IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 85,014

JOSE JIMENEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

CRIMINAL DIVISION

****

REPLY BRIEF OF APPELLANT

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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 THE CASE AND STATEMENT OF THE FACTS

Appellant adopts the Statement of the Case and Statement of the Facts presented in his initial brief. Any additional facts which Appellant seeks to bring to the attention of the Court are contained in the argument portion of this brief.

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. The State maintains that the trial court conducted an adequate inquiry into Defendant's request to discharge court-appointed counsel. The State suggests that the court properly rejected Defendant's request based upon "the lack of any legitimate indication of incompetence or conflict." (Appellee's Brief, p. 29). The State asserts, moreover, that since Defendant made no request for self-representation, there was no error in failing to inform Defendant

of his right to represent himself. Lastly, the State argues that since there is no constitutional right to co-counsel or second chair counsel, there is no showing of prejudice, as the "lead counsel would remain and defendant would not be representing himself." (Appellee's Brief, p. 29).

It cannot be disputed that the trial court conducted an insufficient inquiry into Defendant's request to discharge court-appointed counsel. Defendant talked about his "attorneys," and complained about the fact that "they" were not ready to proceed to trial. (T. 174). He clearly stated that his attorneys were willing to go to trial even though they were not ready to proceed to trial. (T. 174). Defendant made clear that he did not want to be represented by an attorney who was not representing him to the fullest. (T. 178). Mr. Kassier himself pointed out that due to the withdrawal of Ms. Cohen, Defendant's prior counsel, 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).[1] In view of the foregoing, the State's suggestion that the court properly rejected Defendant's request based upon "the

[1] Mr. Kassier declined to inform the judge in <u>open court</u> about the nature of this conflict. (T. 180). The court made no attempt to address the problems <u>in camera.</u> At an earlier occasion, when Mr. Matters, Defendant's guilt phase counsel, requested an opportunity to address the court at sidebar with the court reporter to discuss the problems between Mr. Kassier and Defendant, the court decided not to do in Mr. Kassier's absence. (T. 164-165).

lack of any legitimate indication of incompetence or conflict" (Appellee's Brief, p. 29), is meritless.

The State cites to Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla.), cert. den., 480 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), and Smith v. State, 641 So.2d 1319, 1321 (Fla. 1994), for the proposition that a trial court must conduct an inquiry only if a defendant questions the competency of his attorney, It is apparent, however, that Defendant's assertions that his attorneys were improperly proceeding to trial without being ready and that the attorneys were not representing him to the fullest were direct attacks on their competency. He was clearly "questioning" their competency. Smith, supra.[2] Contrary to the State's argument, Defendant was not simply expressing dissatisfaction with lack of knowledge as to what was happening in his case. More importantly, the court was faced with statements by counsel putting at issue his own competency and the adequacy of his representation and preparation.[3]

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[2] Indeed, the issue of competency was brought to the court's attention by Mr. Kassier himself who informed the court that he believed that he had been relieved of any obligation as court appointed counsel and that he had "walked away" from the case.

[3] Compare Watts v. State, 593 So.2d 198, 202-03 (Fla. 1992) (adequate hearing where accused's sole complaint was that attorneys had not seen him at jail); Ventura v. State, 560 So.2d 217, 218-20 (Fla. 1990)(adequate hearing where accused's sole complaint was number of continuances sought and granted in case and judge had previously written accused about right of self-representation); Valdes v. State, 626 So.2d 1316, 1319-20 (Fla. 1993) (adequate hearing where accused refused to explain his allegations of ineffectiveness of counsel and court had previously informed him that he would have to represent himself should he discharge court-appointed counsel).

The State relies on this Court's decision in Lowe v. State, 650 So.2d 969 (Fla. 1994), in support of its position that the trial court conducted an adequate hearing in Defendant's complaints in this case, However, in Lowe, the accused gave no specific reason for his assertions that appointed counsel was not doing his best and, at one point, stated: "Never mind... Just forget it, man." Id., at 975. **Clearly**, the circumstances in this case are quite different. Defendant explained that his attorneys were improperly proceeding to trial without being ready and that the attorneys were not representing him to the fullest. Defendant never informed the trial court to "forget" his complaints. More importantly, Mr. Kassier himself acknowledged that he had "walked away from the case."

In any event, where the court determines that no legitimate complaint **has** been provided by an accused for replacement of his counsel, the court must advise the accused that should his request for discharge of counsel be granted, the court is not under **any** obligation to appoint substitute counsel and the **accused** would be exercising his right to represent himself. In Matthews v. State, 584 So.2d 1105, 1106-07 (Fla. 2d DCA 1991), the Second District Court of Appeal set forth the steps to be taken at such a hearing, ruling:

> "[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 .**" Id. (citations omitted) (emphasis supplied). See

also Mundy v. State, ___ So.2d ___, 22 F.L.W. D25 (Fla. 1st DCA, December 17, 1996); Smith **v. State, 677** So.2d **370, 371** (Fla. 2d DCA 1996); Davis v. State, 648 So.2d **228,** 229 (Fla. 2d DCA 1994).

In the present case, the judge did not fully advise Defendant as to his options even after finding that there were no legitimate grounds to remove Mr. Kassier. 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.[4]

The State notes that because Defendant made no specific request for self-representation, there was no error in failing to inform Defendant of his right to represent himself. The record in this case clearly shows, however, that Defendant's right of self-representation was implicated. In Hardwick, supra, this Court recognized the principle that when a defendant attempts to dismiss his court-appointed counsel, **it is presumed** that he is exercising his right to self-representation. Id., **521** So.2d at **1074** (citing

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[4] Defendant asked the trial judge if he had to accept "an attorney I don't feel is representing me to the fullest." The trial judge answered by stating that Defendant had not given her "any **good** cause" to believe that Mr. Kassier was not representing him to the fullest. (T. 178). The fact of the matter **was** that Defendant did have a choice. As the Second District Court of Appeal ruled in Smith, supra, 677 So.2d, at 371:

> "In the present case, the trial judge repeatedly informed Smith that he had 'no choice' and had to proceed with his attorney, **Because Smith did have a choice, self-representation, the trial judge erred by telling Smith that he could choose only to remain in the courtroom or to wait in his jail cell." (emphasis** supplied).

A court may not force a lawyer upon a defendant. Bowen v. State, **677** So.2d 863, 865 (Fla. 2d DCA 1996).

Jones v. State, 449 So.2d 253, 258 (Fla.), cert. den., 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984)). In State v. Young, 626 So.2d 655, 656-657 (Fla. 1993), this Court once again reiterated this priniciple, citing Hardwick, supra, with approval. In fact, it is incumbent upon the trial court to determine whether the accused is knowingly and intelligently waiving his right to court-appointed counsel, especially where the accused indicates that his actual desire is to obtain different court-appointed counsel, which is not his constitutional right. Hardwick, supra, at 1074; Young, supra, at 657 (citing Hardwick). As the Second District Court of Appeal explained in Smith, supra, 677 So.2d, at 371, discharge of a court-appointed attorney may result in no substitute appointment at all, which automatically involves the issue of self-representation.

The State's suggestion that there was no prejudice to Defendant in failing to inform Defendant of his right to represent himself because "lead counsel would remain and defendant would not be representing himself" (Appellee's Brief, p. 29), does not, at all, take into consideration the fact that only Mr. Kassier had been preparing for the penalty phase of the case. It is apparent that when considering Defendant's request that Mr. Kassier be removed from the case, the trial court was, in effect, considering Defendant's sole representation on the penalty phase of his capital case. Defendant was under no illusion as to the trial court's thinking on this issue. The trial court made clear that there was no constitutional requirement for a second chair and that if Mr.

Kassier was forced to withdraw, "I may not appoint a second chair." (T. 160).

The trial court had the authority to appoint two attorneys to represent Defendant in this capital case. See Section 925.035(1), Florida Statutes; Lowe v. State, susra, at 975 n.3; Administrative Order No. 92-38, Eleventh Judicial Circuit of Florida [Appendix A1. Once this dual representation was approved in the instant case, it is apparent from the record that a division of responsibility was made between Defendant's two attorneys.

The record clearly reflects that Mr. Kassier, as "second chair," would be, and was, working on the penalty phase of the capital case:

> THE COURT: "Let's set this case for October 4th. could you perhaps be prepared for the **death phase?**
>
> MR. KASSIER: My gut feeling is no. Other than speaking with my client and getting a very general **idea** what kind of witnesses and investigation is out there, for me to prepare for the **death phase,** I don't want to say that I couldn't be ready..." (T. 82).
>
> * * *
>
> THE COURT: "...So, while I'll give the defense **a** continuance and a January 10th trial date, I'll ask counsel to begin preparing **as** if it could go in October.
>
> MR. KASSIER: Specifically, to prepare for the **penalty phase** I would ask for additional investigative costs. I would ask for **a** $1,000.
>
> THE COURT: Have any monies been granted for investigative **cause** for the **death phase?**
>
> MS. COHEN: Yes. That is what my investigator has been doing, but we were waiting **for the second chair."** (T. 84).
>
> * * *
>
> THE COURT: How much time do you need in order to prepare for **your segment of the trial?**

MR. KASSIER: I talked to my investigator about whether he can have his investigation done by the beginning of February..." (T. 93).

* * *

MR. BAND: "...If this case involves something out of the ordinary such as Mr. Cassier [sic] assiting in the **death phase** I don't see how we can't work around that somehow....

I think we can try this **case** certainly in a week's time if we can pick the jury on the day beforehand we'll finish this **case** in a week. Mr. Cassier [sic] indicated yesterday that he almost completed his **death phase** investigation." (T. 140-41).

* * *

THE COURT: "Let's try for 7/25. You can check with Ms. Georgi, see whether Mr. Cassier [sic] needs to remain on for the **death phase** of this case....

It is the Court's position if Ms. Georgi is not available on 7/25 I'll kepp Mr. Cassier [sic] on to assist **you** in the **death phase**." (T. **143-44).**

* * *

THE COURT: "...Mr. Kassier is familiar with the facts, and has done all of the research on the **death phase. I** don't want to keep substituting counsel...

So, unless there's a major problem, I'm not going to allow it. I'm simply not going to." (T. 159).

* * *

MR. MATTERS: "Let me ask the Court this then, since we are now **at** trial for October 3rd let me readdress the issue of allowing Mr. Peckins to substitute in for Mr. Kassier. Certainly there is going to be ample time for Mr. Peckins to familiarize himself with the **penalty phase** in that instance..." (T. 163).

* * *

THE COURT: "Mr. Kassier, however, has been on the cases all along or at least in terms of preparing it for potentially the **death phase** and he is representing you on both cases at this time on the **death phase,** so that is really what's going on with your case." (T. 177).

Under these circumstances, it is inaccurate to suggest, **as** the State does, that Defendant had representation by lead counsel and that, therefore, there was no prejudice to Defendant in failing to inform Defendant of his right to represent himself, as required under Matthews, supra, and Smith, supra. Mr. Kassier's discharge would have, in effect, left Defendant with no effective

representation on the penalty phase. As such, the State's attempt to distinguish Matthews and Smith is unpersuasive.[5]

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.

(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. No inquiry was made of Defendant by the court on his absence from the sidebars or any waiver of his presence at the sidebars 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 the sidebars or ratified those decisions.

Defendant's absence from, and lack of participation in, the aforementioned sidebar conferences warrants a new trial in this

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[5] The failure of the trial court to tell the accused that he might represent himself is apparently not subject to a harmless error analysis. See Mundy v. State, supra, So.2d ___, 22 F.L.W., at D26. Cf. United States v. Salerno, 61 F.3d 214, 221-222 (3rd Cir. 1995)(trial court's failure to conduct thorough waiver inquiry during sentencing not subject to harmless error analysis),

cause. Rule 3.180(a)(4), Florida Rules of Criminal Procedure. 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). 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, supra, 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) (Grimes, 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").

The State argues that the decision in Coney v. State, 653 So.2d 1009 (Fla.), cert.den., U.S. , 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), is not applicable to the present case. Appellant acknowledges that pursuant to this Court's decision in Bovett v. State, __ So.2d ___, 50 F.L.W. S535 (Fla., December 5, 1996), Coney is inapplicable.

The State maintains, moreover, that under pre-Coney decisions, an accused must make proper objection at the trial level in order to adequately preserve his right to be present. The State cites to Francis, supra and Gibson v. State, 661 So.2d 288, 290-291 (Fla.

1995). In Gibson, this Court found that a defendant had not preserved for appeal his claim that he was denied his right to be present during jury challenges at sidebar. This Court found that the defendant's lawyer did not raise the issue being asserted on appeal. However, preventing a defendant from raising a claim that he was improperly excluded when challenges were made, by requiring a contemporaneous objection to preserve the right, would, in effect, render the right meaningless since a defendant would not feel free to interrupt the proceedings to interject his objections.[6]

Fundamental rights must be personally waived by a defendant. For example, the United States Supreme Court has recognized that the right to counsel must be personally waived and such waiver must appear on the record, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). In addition, those constitutional rights necessarily waived by entry of a guilty plea, including the right to jury trial, must appear on the record. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A waiver of a trial judge's presence cannot be implied because of a defendant's failure to make a timely objection. Brown v. State, 538 So.2d 833 (Fla. 1989).

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[6] Indeed, the First District in Mejia v. State, 675 So.2d 996 (Fla. 1st DCA 1996), has suggested that the language in Gibson on this point was "apparent dicta." Id., at 999.

In Chandler v. State, supra, this Court recognized that **a** defendant has a right to be present during jury selection.[7] In Chandler, the defendant claimed that the trial court erred in hearing and ruling on challenges for cause to three prospective jurors during the defendant's absence. This Court made the following observations:

> "The trial court announced individual voir dire would be conducted of any prospective jurors who had read or heard about Chandler's **case.** Accordingly, Chandler, the attorneys, the trial judge, and court reporter retired to the jury room for the first individual questioning. At that time the judge granted a challenge for cause, in Chandler's presence, at defense counsel's request. **Later, when the three prospective jurors at issue here had to be questioned individually, defense counsel informed the judge that Chandler did not want to attend the individualized voir dire. In response to the judge's questioning him, Chandler waived his right to be present.** Because **a** challenge for cause had been heard and ruled on previously while not in open court, Chandler should have realized that, by not going with the others, he might well miss other challenges for cause. **The record demonstrates that Chandler knowingly and voluntarily absented himself during a portion of the proceedings when it could be expected that challenges for cause would arise and be disposed of.** We find no merit to this point." Id., at 704 (emphasis supplied)

Thus, it clearly appears that this Court prior to Coney has recognized that jury selection is a critical part of a capital case at which the defendant has a right to be present, and that a defendant may waive that right in a "knowing, voluntary, and intelligent" manner. Turner v. State, 530 So.2d 45, 49 (Fla. 1988).

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[7] In Francis v. State, supra, this Court recognized that a defendant has a "constitutional right to be present at the stages of his trial where **fundamental** fairness might be thwarted by his absence." Id., at 1177. The Court noted that under Florida law the challenging of jurors is one of the essential stages of a criminal trial where a defendant's presence is mandated. Id.

See also DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983); Francis v. State, supra, at 1178. Such a waiver by a defendant could be established by waiver on the record by the defendant prior to absenting himself from the courtroom,' or by a defendant's ratification or acquiescence in counsel's waiver on behalf of the defendant,' or by some form of misconduct amounting to constructive waiver.[10] In the present case, there was no such waiver."

The State does not address any of these arguments in its answer brief. Rather, the State maintains that since the exercise of challenges related solely to preliminary cause challenges, any error was harmless beyond a reasonable doubt. (Appellee's Brief, pp. 47-48). First, 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 of defendant's right to presence is "structural defect" not amenable to harmless error analysis). Second, the fact that cause challenges were exercised

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[8] Chandler v. State, supra.

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

[10] Capuzzo v. State, 596 So.2d 438, 440 (Fla. 1992); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

[11] It should be noted that 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).

in this case does not in any way minimize a defendant's right to be present during such challenges. See Chandler, supra (no error when cause challenges exercised in defendant's absence when defendant voluntarily absented himself). Third, it remains the State's burden to show that any 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)). 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, supra, at 49.

Here, the State simply argues that Defendant could not have assisted counsel in the presentation of legal arguments supporting or rejecting the requested challenges for cause. But the State does not address, at all, the importance of client input on the prosecution's challenges. Juror Comellas had stated at one point that "I don't think my English is good." (T. 244). The defense counsel simply stated later that this juror had "a little language problem." (T. 263). Juror Darna understood the judge when he asked if she did not understand English. (T. 244). Mr. Espinel answered all of the court's questions properly and merely indicated his English was "poor." (T. 313-314). Mr. Moux was asked just two questions by the court. He stated that he understood "a little" of what the court had asked so far. (T. 327). This record does not amply demonstrate the jurors' total inability to understand or comprehend the proceedings. At a very minimum, Defendant should

have had an input in the excusal for cause of these Hispanic jurors, especially in light of his Hispanic background.

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.

(III)

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

The State argues that the trial court properly prohibited defense counsel from cross-examining Detective Ronald Pearce and Detective Anthony Ojeda about the search of Defendant's apartment as outside the scope of direct examination. The State also maintains that the trial court properly prohibited Defendant from asking Ojeda about the particulars of Defendant's arrest warrant, on grounds that the questions would elicit hearsay responses.

The State asserts that **no** proffer was made by defense counsel **as** to the areas of examination and that, therefore, the issue was not preserved for appellate review. (Appellee's Brief, p. 51). The State reads the prerequisites for preservation too narrowly. This Court in Finney v. State, 660 So.2d 674, 684 (Fla. 1995), noted that the defendant's claim on curtailment of cross-examination was not properly before the Court because the defendant "never proffered the testimony he sought to elicit from the witness and **the substance of the testimony is not apparent from the record..."**

(emphasis supplied).[12] In Lucas v. State, 568 So.2d 18, 22 (Fla. 1990), this Court noted that a proffer is necessary "because an appellate court will not otherwise speculate about the **admissibility of such evidence**."(emphasis supplied)

The appellate courts in Salamv v. State, 509 So.2d 1201 (Fla. 1st DCA 1987), Phillips v. State, 351 So.2d 738 (Fla. 3d DCA 1977), Parnell v. State, 627 So.2d 1246 (Fla. 3d DCA 1994), Ketrow v. State, 414 So.2d 298 (Fla. 2d DCA 1982), and Bennett v. State, 405 So.2d 265 (Fla. 4th DCA 1981), all agree that **a** proffer should be made to preserve as error the exclusion of evidence. In Salamv, supra, the court found that the prosecutor had failed to indicate by proffer "or otherwise" what he wished to elicit from the witness. In Phillips, supra, the court found that the proffer given was insufficient to show that the trial court erred in excluding the proposed testimony. In Parnell, supra, the court found that the defense counsel failed to proffer a foundation that would have established the relevance of the excluded evidence. In Ketrow, supra, the court found that no proffer was made to demonstrate that proposed evidence was improperly excluded. In

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[12] Section 90.104(1)(b), Florida Statutes, provides as follows:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when **a** substantial right of the party is adversely affected and:
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof **or was apparent from the context within which the questions were asked.** (emphasis supplied)

Bennett, supra, the court found that no proffer was made to show how the excluded evidence was admissible as a state of mind exception to the hearsay rule.

In the present case, the defense adequately preserved the trial court's error curtailing cross-examination for this Court's consideration. When the prosecution objected to the questioning of Detective Pearce as to the search of Defendant's apartment, defense counsel noted that he believed he could question the detective, as the lead crime scene investigator, as to "what he did search and didn't search." (T. 559). The trial court initially agreed, noting:

> "...He is the lead investigator and also searching the defendant's apartment pursuant to this case. I think it's admissible." (T. 559).

Subsequently, however, the court ruled that the subject matter was beyond the scope of direct examination. Similarly, the defense adequately preserved the trial court's error curtailing cross-examination of Detective Ojeda for this Court's consideration. When the prosecution objected to the questioning of Detective Ojeda as to the search of Defendant's apartment, defense counsel noted that he believed he could question the detective, as the lead investigator. (T. 756). The prosecution did not quarrel with the admissibility of the subject matter. Indeed, the prosecutor stated:

> "...If he wants to discuss this area, let him call him as the witness." (T. 756).

The record is abundantly clear that the subject matter addressed by the proposed questioning was apparent from the record.

More importantly, the admissibility of the subject matter was not questioned by either the court or the State. Rather, the sole ground of the court's ruling was the fact that the testimony would touch on matters outside the scope of direct examination. As such there was no danger that an appellate court will not otherwise speculate about the admissibility of such evidence. The authorities cited by the State in its brief are, therefore, inapposite to the facts and circumstances of this case.

The State, moreover, asserts that even if preserved for appellate review the trial court's ruling prohibiting cross-examination of Pearce and Ojeda was proper in that the subject matter was beyond the scope of direct examination. The State, however, does not address the proper scope of cross-examination, especially when it involves the State's key witnesses. 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. 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, 895 (Fla. 1953). 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). This Court in Coco, supra, observed that cross-

examination extends to all matters germane to the direct examination and may go into any phase developed by the direct examination. Moreover, cross-examination may not be 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. Id. at 895.

The State relies on this Court's decision in Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982), where it was recognized that cross-examination must relate to credibility or be germane to the matters brought out on direct examination. In Steinhorst, this Court ruled that questions aimed at impeaching credibility are proper, but engaging in a general attack on a witness' character is not appropriate. Id., at 338. The State also cites to Hunter v. State, 660 So.2d 244 (Fla. 1995), where this Court upheld the trial court's curtailment of cross-examination of a detective, who was called as a chain-of-custody witness and whose testimony was "limited." Id., at 251.

In the present case, neither Steinhorst nor Hunter lend support to the State's argument. Neither Pearce nor Ojeda were called as "limited" witnesses. Both were called as the lead investigators in the case. Pearce discussed visiting the crime scene; searching the scene and taking photographs; dusting for fingerprints; walking the scene, including going from one balcony to another; noting blood evidence; visiting the home of Defendant's parents and collecting evidence therein; collecting evidence for

serological examination; and being present when blood and saliva samples were taken from Defendant. (T. 493-568). Ojeda discussed visiting the crime scene; speaking with the witnesses; obtaining an arrest warrant for Defendant; visiting the home of Defendant's parents; speaking with Defendantbytelephone; arresting Defendant; speaking with the witness with whom Defendant was speaking when he was arrested. (T. 744-772).

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.** Defendant should have been permitted to explore the entire context and surrounding circumstances of the subject matter testified to by the witnesses. Moreover, the particulars of the search of Defendant's premises directly related to the thoroughness of the investigation and the credibility of the investigating witnesses who testified.

In particular, the defense should have been permitted to question Ojeda about Officer Cardona's identification of Defendant at the scene. The subject matter of the arrest warrant **had been addressed** during direct examination. (T. **746).** The trial court based its ruling below on the fact that Cardona's statements of

identification to Ojeda were inadmissible hearsay and improper impeachment. (T. 767-768).

The court's ruling below did not take into consideration the fact that Cardona's observations partially formed the basis of the arrest warrant against Defendant. (T. 765). The line of questioning by defense counsel was clearly aimed at demonstrating that despite differences in descriptions, an arrest warrant for Defendant **was** nonetheless obtained. Consequently, defense counsel was not seeking to prove the truth of Cardona's observations, but rather, to show that irrespective of inconsistencies of descriptions, the detectives working the case obtained an arrest warrant for Defendant. As such, Cardona's observations were not inadmissible hearsay. Section 90.801(1) (c), Florida Statutes.[13]

Moreover, the statement was admissible as impeachment of other statements of identification. Contrary to the State's argument, Detective Ojeda did testify that the arrest warrant for Defendant was based upon identification by other witnesses:

> MR. MATTERS: " Now, part of the basis of the arrest warrant which you suggested that you had gotten, but in right Diecidue was the affiant for, was not only the fingerprints but also testimony or knowledge that you had gathered from Officer Cardona about her observations of the defendant being on the scene that night, correct?
>
> DET. OJEDA: That's correct. **Along with identification of the defendant himself in a photo line-up.**
>
> MR. MATTERS: That's correct. So there was basically three things?

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[13] The prosecution conceded that Cardona's description was in fact different from the description given by the female witnesses. (T. 767).

DET. OJEDA: Correct." (T. 765).[14]

The State suggests that Cardona's description of the suspect's appearance did not refer to any matter of substance which could demonstrate harmful error. However, it is clear that the entire case against Defendant was based upon circumstantial evidence. Identification of the supposed assailant in and around the apartment complex on the day of the stabbing was central to the prosecution's case. Any evidence which contradicted or placed into doubt the descriptions given by other witnesses clearly referred to a matter of substance. As such, the trial court's decision to prevent cross-examination on this point was harmful error.

(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

The State argues that the trial court did not err in failing to obtain a personal waiver from Defendant on an instruction for the lesser included offense of third degree murder in this case. Primarily, the State avers that there is no requirement to obtain a personal waiver as to offenses which are not necessarily lesser included offenses. Lastly, the State claims that any error was harmless as Defendant was convicted of an offense two steps removed from the crime on which Defendant was convicted. (Appellee's Brief, p. 59).

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[14] Merriweather had testified about his identification of Defendant from the photo line-up. (T. 710-711).

Third-degree felony-murder is not a necessarily included offense of first-degree murder. However, it is, under certain circumstances and evidence, a proper permissive lesser included offense of first-degree murder, requiring a jury instruction thereon if there is evidence to support it. Green v. State, 475 So.2d 235, 236-237 (Fla. 1985). Failure to give a requested instruction is per se reversible error where the evidence supports the giving of the instruction. Herrington v. State, 538 So.2d 850, 851 (Fla. 1989)("[I]n the case of degree crimes, requested instructions on all lesser degrees that are supported by the evidence must be given regardless of the allegations of the charging document.") In the present case, the evidence supported the giving of a third-degree felony-murder instruction, which is a permissible lesser included offense of first-degree murder.[15]

The State maintains that 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), which requires a personal waiver by a defendant of lesser included instructions in capital cases, is limited to necessarily lesser included offenses. (Appellee's Brief, p. 60). However, in Mack v. State, 537 So.2d 109 (Fla. 1989), decided five years later, this Court reversed a defendant's conviction where defense counsel waived all lesser included offense instructions without the

[15] In the present case, an instruction on third-degree murder would have been appropriate as the underlying felony at issue could have been construed by the jury armed trespass rather than burglary.

defendant's personal waiver. In Mack, supra, this Court made the following determination:

> "Because the record reflects no personal waiver of appellant's right to have the jury instructed on lesser included offenses, the conviction and sentence are hereby reversed and the case is remanded for a new trial." Id., at 110. (emphasis supplied).

The Court in Mack did not distinguish between necessarily included and permissive lesser included offenses. Indeed, such a distinction would not appear reasonable since the rule announced in Harris and re-affirmed in Mack is grounded on the uniqueness of a capital case, not on the "category" of lesser-included offenses. In fact, the personal waiver rule is inapplicable in non-capital offenses. Jones v. State, 484 So.2d 577 (Fla. 1986).[16]

(V)

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

Appellant relies on the arguments presented in his initial brief on this issue.

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[16] The State argues that the failure to give a lesser-included offense instruction on an offense two steps removed from the offense on which the accused is convicted is subject to harmless error analysis. Abreu v. State, 363 So.2d 1063 (Fla. 1978). As such, the failure of the trial court to instruct on third-degree murder in this case was harmless. In Abreu, this Court simply held that only the failure to instruct on the next immediate lesser-included offense constitutes error that is reversible per se. Id., at 1064. More importantly, the State's argument does not address the issue involved here, which is the lack of personal waiver by Defendant as to the lesser included offenses.

(VI)

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

The State argues that Defendant's claim of prosecutorial impropriety during the penalty phase closing argument are unpreserved and without merit. As an initial matter, the State asserts that Defendant's claims were not preserved by objection or motion. It should be noted that this Court may properly review the prosecutor's statements under the concept of fundamental error. Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996). This Court may review the record and take into consideration the context of the closing argument. Crump v. State, 622 So.2d 963, 972 (Fla. 1993). The doctrine of fundamental error is available to review prosecutorial statements made during the penalty phase of a capital case. Street v. State, 636 So.2d 1297, 1303 (Fla. 1994).[17]

The appellate courts in this state have reversed numerous cases based upon a fundamental error arising from improper prosecutorial arguments. See Porterfield v. State, 522 So.2d 483, 487 (Fla. 1st DCA 1988) (prosecutor's allusions to defendant's failure to testify subject to review even without contemporaneous

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[17] It has been recognized that the sentencing phase of a death penalty trial is one of the most critical proceedings in criminal jurisprudence, and is certainly the most critical legal proceeding from the standpoint of the defendant whose life is at stake. Because of the surpassing importance of the jury's penalty determination, a prosecutor has a "heightened duty" to refrain from conduct designed to inflame the sentencing jury's passions and prejudices. Lesko v. Lehman, 925 F.2d 1527, 1541 (3rd Cir. 1991). See also Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985) (" [A] rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury.").

objection); Rosso v. State, 505 So.2d 611, 612-613 (Fla. 3d DCA 1987) (prosecutor's statements regarding defendant's failure to testify and derogatory comments concerning defendant's insanity defense subject to review even without contemporaneous objection); Aia v. State, 658 So.2d 1168 (Fla. 5th DCA 1995) (prosecutor's comments on matters not introduced as evidence at trial subject to review even without contemporaneous objection); Fuller v. State, 540 So.2d 182, 184-185 (Fla. 5th DCA 1989) (prosecutor's comments derogatory of defendant as "shrewd" and "diabolical" and attacking defense counsel subject to review even without contemporaneous objection); Pacifico v. State, 642 So.2d 1178, 1182-1184 (Fla. 1st DCA 1994) (prosecutor's comments regarding jury's duty to convict, pejorative terms characterizing defendant, expressing personal beliefs as to credibility or veracity of witnesses, and referring to matters not in evidence, subject to review even without contemporaneous objection) .[18]

The State claims that the prosecutor's comments during the penalty phase of the present capital case were not preserved for review, and were not, in any event, improper statements.[19] In

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[18] It is submitted that as a result of the series of improper prosecutorial comments during the penalty phase in this case, Defendant ought to be accorded a new sentencing hearing. Nonetheless, it has been recognized that a "single misstep" on the part of a prosecutor may be so destructive of a fair trial that reversal is mandated. See United States v. Johnson, 968 F.2d 768, 771 (8th Cir. 1992) (quoting United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)) .

[19] It ought, of course, to be noted that all of the prosecutorial comments at issue in this appeal were not made in response to any prior comments by defense counsel. As such, they were not "invited" by the defense.

particular, the State avers that the assistant state attorney's remarks comparing defendant with others, requesting the jury to consider what defendant has done with his life, referring to defendant's record or character, alluding to his conduct as a son, jokingly asking whether defendant was a boy scout, questioning any academic achievements, placing into doubt defendant's work ethic and questioning Defendant's status as a productive member of society, were fair comments on the evidence." The State cites to Johnson v. State, 660 So.2d 637, 646 (Fla. 1995), and Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992), in support of its argument.

Neither of these cases support the **State's** position. In Johnson, this Court properly upheld the prosecution's elicitation of testimony undermining Defendant's character evidence when presented strictly for rebuttal purposes. In Johnson, this Court reviewed the presentation of evidence by the State to rebut a defendant's character evidence. Here, the prosecution presented no evidence **rebutting** character evidence. Rather, the prosecutor's argument pointing out Defendant's questionable background as a son, worker, student and member of society **was** clearly in support of aggravation. In Mann, a prosecutor's arguments negating **a** psychologist's conclusions that the statutory mental mitigators applied to defendant were upheld. Here, the prosecutor turned

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[20] There is little question that the prosecutor "pinpointed" various factors as improper aggravating circumstances. Compare Sochor v. State, **619** So.2d 285, 291 (Fla. 1993) (prosecutor's comments did not rise to such a level as to "pinpoint" lack of remorse or warrant a new sentencing trial).

Defendant's father's testimony about Defendant's background into an improper nonstatutory aggravator. The assistant state attorney was not simply "summarizing the evidence presented," or "pointing out that nothing concerning Defendant's life, during or after childhood, reduced his moral culpability." (Appellee's Brief, p. 71). The prosecutor was actively employing matters about Defendant's background into a cause for aggravation of the penalty. This was improper.[21]

The State argues that the prosecutor's comments to the jury about "an adversary [sic] board to this Court," and "what society's reaction is to this crime," and that "[O]ur legislature made a decision for you, like it or not," and "to do the right thing," and that "[I]f you find the aggravating circumstances outweigh the mitigating circumstances **there's only one recormnendation you can come back with,** " and "[A] victim not given an opportunity to plead her case or present to you mitigating factors," and "as our representatives **as** to what should happen when someone does this, when someone commits this crime," were perfectly appropriate comments.

In particular, the State contends that the prosecutor's comments concerning the death penalty as a legislative decision not

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[21] The State suggests that there **was** no possibility that the prosecutor's comments in this matter could have affected the sentence of death in this case. (Appellee's Brief, p. 73). In fact, the trial court did ultimately consider the subject matter of the prosecutor's comments in its sentencing order. The court referred to the fact that Defendant was "a willful and stubborn child, teen and adult," that Defendant failed at private, military and high school, and that there was no basis to believe that Defendant would change his "life style." (R. 540-541).

to be questioned was appropriate because the propriety of capital punishment **was** within the legislative domain and "not the jury's." (Appellee's Brief, p. 74). Curiously, the State relies on this Court's decision in Johnson v. State, supra, where this Court rejected **a** defense position that argument on the wisdom of the death penalty was an appropriate mitigating circumstance to be presented to a jury. This Court stated:

> " they are not legal arsuments but rather wolitical debate that in essence attack the propriety of the death penalty itself. Once the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or anv other court to permit counsel to question the wolitical, sociological, or economic wisdom of the enactment... Rather, political questions -- as opposed to legal questions-- fall within the exclusive domain of the legislative and executive branches... Accordingly, the trial court did not err in refusing Johnson's request here, which would have illegally interjected the iudiciarv into political questions." Id., at 646 (emphasis supplied).

Certainly, the corollary of the above-mentioned rule of exclusion applies in capital litigation: A prosecutor may not inject political questions **in support of the death penalty** during penalty phase arguments, as such exhortations are not legal arguments but "political debate" into which the judiciary should not be "interjected." Ruling otherwise would be to permit one-sided, uncontested political tirades in a courtroom amounting to an unstated aggravating circumstance: "the Government has spoken."

The State contends that exhorting the jurors that there was only "one recommendation" was **a** proper statement of law because "a jury does not have unfettered discretion." (Appellee's Brief, p.

75).[22] In this argument, the State has disregarded prior precedent of this Court condemning a prosecutor's statements telling jurors that it was their "sworn duty" to come back with "a determination that the defendant should die for his actions." Garron v. State, 528 So.2d 353, 359 (Fla. 1988). This Court stated plainly that such a comment was a "misstatement of law." Id., at n.10. See also Redish v. State, 525 So.2d 928, 930 (Fla. 1st DCA 1988) (citing United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 1047-48, 84 L.Ed.2d 1 (1985), and United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986)); and United States v. Manning, 23 F.3d 570, 573 (1st Cir. 1994). The prosecutor's argument was not an attempt to curtail unfettered discretion but a clear command to reach a specific determination.[23]

Moreover, the State asserts that the prosecutor's foregoing remarks did not constitute an impermissible "message to the community" argument. Specifically, the State maintains that there was no mention of any "message" to the community. (Appellee's Brief, p. 77). It is clear, however, that although the prosecutor did not mention the dreaded word "message," his exhortations to the

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[22] Although a jury is never instructed on its power of "pardon," Florida law has always recognized that a jury, in fact, has a pardon power. This concept, although intellectually dissatisfying to legal purists, allows juries to do substantial justice in extenuating circumstances, "something which our law has always prized." Nurse v. State, 658 So.2d 1074, 1078 n.2 (Fla. 3d DCA 1995), rev. den., 667 So.2d 775 (Fla. 1996).

[23] The State confuses the concept of guiding jury discretion (see Dougan v. State, 595 So.2d 1, 4 (Fla. 1992)(Florida law sets out a clear and objective standard for "channeling" the jury's discretion), with the altogether different notion of exhorting an outcome mandated by law.

jury were not-so-subtle solicitations for such a message. The prosecutor reminded the jurors that those who break the "rules" of society by killing "should face the death penalty", and he asked the jurors to express "society's reaction" and to speak as "members of society" and "representatives" as to what should happen "when someone does this..."

A jury's decision in capital cases has been accorded great weight as the conscience of the community where they are persuaded that death was the appropriate penalty based on the permissible evidence. Grossman v. State, 525 So.2d 833, 846 (Fla. 1988). However, requests to juries for messages to the community are forbidden. In Campbell v. State, 679 So.2d 720, 724 (Fla. 1996), this Court condemned similar remarks concerning following the rules of society, as an impermissible, obvious appeal to the emotions and fears of the jurors.[24]

The State recognizes that the prosecutor's argument that jurors should impose the death penalty because the victim was unable to present a case on her own was "not ideal," but that it was not made a feature of the case. (Appellee's Brief, p. 78). However, coupled with the prosecutor's other egregious comments, this remark clearly formed part of the improper cumulative effect on the jury. See Redish v. State, supra, at 931.

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[24] The prosecutor repeatedly emphasized the jury's advisory role, telling them "to help the Judge determine what appropriate punishment should be," (T. 1087-1088), and "you're not asked to pass sentence. That burden is the Court's, alone." (T. 1088). The trial court reminded the jurors that the "final decision" on a penalty rested with the court and that the jurors would give an advisory sentence. (T. 1106).

Finally, the State contends that the comments by the assistant state **attorney** concerning the role of the jury did not mislead the jury as to its role in the sentencing process. The remarks, however, clearly misled the jury to feel "less responsible" than it should for the sentencing decision. Darden v. Wainwright, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 2473 n.15, 91 L.Ed.2d 144 (1986). Moreover, the prosecutor's remarks in this respect coupled with the other comments at issue, worked cumulatively to deprive Defendant of a fair sentencing determination.[25]

(VII)

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

Appellant relies on the arguments presented in his initial brief on this issue.

(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 State contends that the trial court properly found that the crime was heinous, atrocious, or cruel. In particular, the State notes that the trial court's findings and conclusions were

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[25] The prosecution bears the burden of establishing that any error below was harmless. This Court has ruled that if the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. State v. Lowry, 498 So.2d 427 (Fla. 1986) (quoting State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)). See also Rosso v. State, supra, at 613 (state's attempt to fulfill its burden on harmless error through reliance on "overwhelming" evidence against defendant "misconstrues" proper standard under DiGuilio).

supported in the record and justified a determination that this aggravating circumstance. (Appellee's Brief, pp. 84-86).[26]

Contrary to the State's argument, however, there was no justification for the aggravating circumstance of heinous, atrocious or cruel. For example, 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. Most of the wounds were superficial. (T. 581-584) . There was no indication in what order the wounds to the victim occurred. (T. 586). There was no evidence of defensive wounds. (T. 589) . The wounds were inflicted in a matter of minutes. (T. 588). The medical examiner concluded that the lack of defensive wounds indicated that the victim was possibly unconscious. (T. 590). In discussing blood transfer evidence, Dr. Wetli stated that he could not determine whether the victim was conscious during the entire stabbing incident. (T. 600).

The State relies on Allen v. State, 662 So.2d 323 (Fla. 1995), where this Court upheld the heinous, atrocious or cruel aggravating circumstance. However, in Allen, the medical examiner found that the victim was alive when her ankles and wrist were bound and specifically testified that the victim "would have remained conscious" after her artery was severed. Id., at 331. The State also cited to Davis v. State, 604 So.2d 794 (Fla. 1992). However, in Davis, the medical examiner testified that it was "unlikely that

[26] Defense counsel adequately objected to the heinous, atrocious or cruel instruction to the jury. (T. 1075-1076; T. 1111-1112).

the victim was rendered unconscious by the blow she sustained to her head," and other evidence tended to show that the victim struggled with her assailant and that she was likely standing up when stabbed. Id., at 797. See also Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982) (testimonythatvictim suffered "considerable pain" and attacked while asleep in his bed justified finding the crime was heinous, atrocious and cruel). Compare Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993), cert. den., ___ U.S. ___, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994)(heinous, atrocious or cruel properly found where victim stabbed 23 times, suffered 21 other lacerations, received several blows to her head and was alive when strangled).

Appellant relies on the arguments presented in his initial brief on the sub-issue concerning failure to give Defendant's mitigating circumstances sufficient weight.

(IX)

CAPITAL PUNISHMENT AS PRESENTLYADMINISTEREDVIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Appellant relies on the arguments presented in his initial brief on this issue.

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 should vacate Defendant's death sentence and remand for resentencing.

Respectfully submitted,

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By: _____
J. RAFAEL RODRIGUEZ
FLA. BAR NO. 302007

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, Department of Legal Affairs, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida, 33131, on this 14th day of February, 1997.

_____
J. RAFAEL RODRIGUEZ

APPENDIX A

THE ELEVENTH JUDICIAL CIRCUIT DADE COUNTY, FLORIDA

CASE NO. 92-1
[Court Administration)

IN RE: SPECIAL ASSISTANT PUBLIC DEFENDERS, METHOD OF APPOINTMENT, COMPENSATION

ADMINISTRATIVE ORDER NO. 92-38

WHEREAS, Article V of the **Florida** Constitution places **responsibility** for **administration** and supervision of the Circuit and County Courts in the Chief **Judge; and**

WHEREAS, the Judges in **this** circuit handling criminal **and** juvenile delinquency **matters have concluded** that **justice** would **best be** served by a blind **selection** process **when** tbe appointment of a **Special Assistant** Public **Defender (SAPD)** is warranted; and

WHEREAS, by Administrative Order No. **92-34,** a Circuit **Conflict** Committee was established to select qualified **attorneys** to **serve as SAPDs;** and

WHEREAS, **it** is appropriate that the method of **compensation** of **SAPDs be modified to allow adequate payment for services rendered by SAPDs while establishing** methods to promote simplicity in **billing, with** procedural **safequards** to avoid **abuses;**

NOW, THEREFORE, 1, LEONARD RIVKIND, pursuant to the authority **vested in me as Chief Judge of the Eleventh Judicial Circuit of Florida, do hereby establish the following procedure** for **the appointment** and **payment** of **SAPDs, effective August 3, 1992:**

1. **Except as hereinafter noted, all SAPDs shall be appointed in** blind **selection process from the** Master List of **qualified attorneys, established** pursuant to **Administrative Order** No. 92-34.

2. The **Master List** initially **will be** maintained and **operated by** the **Public Defender on a conditional basis until** further Administrative **Order.**

3. **The** Master **List** will consist of three separate lists (wheels) **- *juvenile* (delinquency), appellate, all** other **felony and misdemeanor cases. An attorney may qualify for more than one wheel** and an **appointment** from one **wheel will not affect that attorney's position** on another **wheel. Within** each **wheel there may be** different **levels** of **cases** as **established** by the **Circuit** Conflict Committee. **An** attorney may **receive** only those appointments within **a wheel as are consistent with that lawyer's qualifications.**

4. **Upon certification of conflict by** the Public **Defender,** the Court will appoint **a SAPD as selected from the appropriate** wheel. **The system will** be operated so as to ensure **that** the **position** of **any** attorney **on** the **wheel cannot** be **disclosed.** Once **selected,** the **attorney's name will** go to the bottom of **the wheel,** whether or not **the appointment** is **accepted.**

5. **Only one SAPD may represent a defendant at any given time (this shall not be deemed *to*** limit **successive** appointments, if **warranted), except** for **a capital** murder **case,** and **then** only If **the lead SAPD files** a **written** motion made **not sooner than 60** days **following the appointment of the lead SAPD, which motion must state that** a **good faith basis exists** to **believe** the **State will not waive** the **death penalty, that** the **case** will be **proceeding** to trial, and that **the assistance of an additional *(second* seat)** SAPD is **necessary.**

6. The following exceptions apply to the blind selection procedure described above:

a. When a SAPD has been appointed, upon re-arrest of a defendant after an alias capias, or upon filing of a probation violation affidavit, or upon the filing of new charges while there is another pending case, or upon transfer from juvenile to criminal division, the same SAPD will be appointed, but only if the attorney is on the Master List and appropriately qualified, and only if the Public Defender again certifies a conflict.

b. The second seat in a capital murder case will be selected from the Master List by the lead counsel. When so appointed, the name of that SAPD will go to the bottom of the wheel.

c. Certain members of the Florida Association of Criminal Defense Lawyers (FACDL) have volunteered to accept one felony case each year, assigning their fee to the FACDL Pro Bono "Put Something Back" Fund. Annually, felony SAPD appointments will be made from a separate list of those FACDL attorneys until the list is exhausted before utilizing the wheels, and an appointment from such list will not affect the lawyer's position on any wheel.

7. Compensation to SAPDs shall be in compliance with the procedures and in-the amounts as set forth in the Special Assistant Public Defender's Official Billing Manual, a copy of which is attached as Addendum A, and made a part hereof.

8. Administrative Order No. 92-10, entered in case No. 92-1 (Court Administration) is hereby rescinded and held for naught.

DONE AND ORDERED in Chambers at Miami. Dade County, Florida, this 17th day of August 1592, nunc pro tunc August 3. 1992.

LEONARD RIVKIND, CHIEF JUDGE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

ADDENDUM A
SPECIAL ASSISTANT PUBLIC DEFENDERS
OFFICIAL BILLING MANUAL

Section I

1. General Provisions:

A. Accountability to Client:

Each Special Assistant Public Defender (SAPD) is responsible for the representation of his or her client. Other counsel may not be used other than for minor, incidental efforts, matters, or proceedings. In the event other counsel is utilized, the name and the role of and the expended time by the other counsel will be identified in the Long Form, and kept on record for the Short Form.

B. When to Use the Summary Fee Schedule.

(See Attachment I). The SAPD must use the Summary Fee Schedule if the time reasonably expended and allowable in these guidelines does not exceed the maximum defined in the Summary Fee Schedule for the degree of the felony ,or which the defendant is charged. For example, use the Summary Fee Schedule in a first degree felony if the total amount of allowable and billable hours is fifty (50) hours or less.

C. When to Use the Long Form Procedure:

Use the Long Form Procedure only if the total hours allowable per this Official Billing Manual (OBM) exceeds the maximum hours listed in the appropriate category on the Summary Fee Schedule.: For example, use the Long Form Procedure in a first degree felony if the total amount of allowable and billable hours is over fifty (50) hours (See Attachment III).

D. How To Bill for Multiple [redacted] With One Defendant:

If the SAPD has multiple cases with one defendant, follow this process to determine if you arc to use the Summary Fee Schedule or the Long Form Procedure.

1. Total all allowable hours expended on all cases.
2. Based upon the highest level charge against the defendant, use the short form if the total hours do not exceed the maximum hours for that level, as specified in the Summary Fee Schedule, or the Long Form if the total number of hours exceeds the maximum number of hours for the level of the highest degree felony for which the defendant is charged.
3. If you determine that the short form should be used, complete one short form using the highest level charge and listing all case numbers.
4. The sum of all of the cases will be considered in determining if the statutory maximum fee has been exceeded.

E. How to Bill for Probation Violation Hearings:

Fur Probation Violation Hearings (PVH), use the misdemeanor classification on the Short Form Fee Schedule, irrespective of the degree of the underlying crime.

F. Procedure to be Followed When Alias Capias Is Issued:

If an Alias Capias (AC') is issued on a defendant before the case is otherwise concluded, the SAPD will be paid then for the time spent up to the issuance of the AC. if the defendant is later arrested, and the Public Defenders office again conflicts, the same SAPD should be appointed, but the fee, paid to the SAPD after the issuance of the AC, will be credited against the total fee which will be calculated as though the AC had not occurred.

G. Successive SAPD:

Successive SAPDs will submit fee affidavits separately at the conclusion of the individual representation. as though different cases.

2. Non-Billable and Billable Items Applicable to Either Form:

A, Non-billabk items include but are not limited to:

1. Services performed by:
   a. Support staff
   b. Paralegal
   c. Law Clerks
   d. Secretaries
   e. Other attorneys (except as noted in 1.A above)
2. The related to bii, or time related to defending a disputed bill (See Dade County v. Strauss, 248 So.2d 241 (Fl 3d DCA 1971))
3. Preparation of standard forms, including but not limited to:
   a. Form written pleas
   b. Notion of Appearance
   c. Demands for discovery
4. Waiting time over thirty (30) minutes for depositions
5. Travel time

B. Billable categories arc listed below, Examples of billable items include but are not limited to:

I. Conferences. For example:
   - Conference with Client
   - Conference with Client's spouse

2. Court Appearances. For example:
   - Arraignment Hearing
   - Motion Hearing

3. Depositions. For example:
   - Deposition of witnesses
   - Deposition of victim

4. Preparing Documents (other than those not authorized in Section 2.A.3 above). For example:
   - Preparation of motion

5. Research. For example:
   - Legal research of specific case issue%

6. Review/Analysis. For example:
   - Review and analysis of crime scene report

4. Maintenance of Records

A. Records must be kept by the SAPD for three Years, regardless of which method is used for filing the application. The SAPD must maintain a copy of the Order of Appointment, a copy of the case docket (obtainable from the clerk), a copy of the Motion and Affidavit for Attorneys Fees filed with the Clerk and all support records. At anytime during this three year period, a SAPD may be called upon by the Circuit Conflict Committee, the County Attorney, the Administrative office of the courts (AOC), the County Auditor or by court order to produce these records to verify present or past representations.

B. The support records must contain at a minimum the following:
1. Case number and style
2. Date bii activity occurred
3. Nature of service provided or description of the activity by the following categories:
   - Conferences
   - Court Appearances
   - Depositions
   - Preparing Documents
   - Research
   - Review/Analysis

4. Location activity took place or if by phone, specify
5. Name of person/persons interviewed or conversed with and relationship to case
6. Beginning time of the activity and the total time spent (to the nearest one tenth (.10) of an hour)

ASSIGNED COUNSEL PLAN
OFFICIAL BILLING MANUAL

Section 11

1. Form Procedures:
   A. How to Complete the SHORT FORM SUMMARY BREAKDOWN OF HOURS and Summary Fee Schedule form:
      1. Short Form Breakdown of Hours (see Attachment II):
         a. Enter complete case number
         b. Total the allowable hours by category. (Conferences, Court Appearances, etc.)
         c. List total hours, and total listed hours, to the nearest one tenth (.10) of an hour, as allowable in these guidelines, by each of the appropriate categories. For example:
            - Conferences..... 2.4
            - Court Appearances..... 3.5
            - Depositions.....
            - Preparing Documents..... 2.5
            - [illegible].....
            - Review/Analysis.....
            - Total..... 14.6
         d. Complete the form and check the appropriate box far time indicated in the total section of the Motion and Affidavit for Attorneys Fees (See Attachment I). For example:
            2nd Degree Felonies:
            [X] above 10 hours to 20 hours..... $750
   B. How to Complete the Long Form: (See attachment III)
      1. The Long Form must be filed in affidavit form, and contain, at a minimum, the following information:
         a. Case number and style
         b. Date billed activity occurred
         c. Nature of service provided or description of the activity by the following categories:
            - Conferences
            - Court Appearances
            - Depositions
            - Preparing Documents
            - Research
            - Review/Analysis

            (Refer to sample descriptions - Section 2.8)
         d. Name of person/persons interviewed or conversed with and relationship to case
         e. Total time spent (to the nearest one tenth (.10) of an hour)
         f. Indicate the total fee requested.
      2. Fees for the Long Form Procedure are determined by adding to the dollar amount allowed fur the maximum hours on the Summary Fee Schedule, the total additional amount gained by using the rate of $40.00 per hour for out of court time and $50.00 per hour far in court time. For example, for a first degree felony, add to $1,500.00, the additional money claimed f" those hours over 50 hours, figured at the rate of S40-00 for out of court time and $50.00 for in court time,

C. Where to Submit Summary Fee Schedule form and SummarY of Hours or Long Form:

1. Either the Summary Fee Schedule and the Breakdown of Hours or the Long Form, along with proof of appointment, must be submitted to the Clerk of Courts within thirty (30) days after the representation is concluded. The address for criminal and misdemeanor cases is as follows:

   Criminal Division - Post Hearing Unit
   Metro Justice Building. Room 702
   1351 Northwest 12th Street
   Miami, FL., 33125

   The address for juvenile cases is:

   Juvenile Justice Center
   3300 NW 27 Ave, Room 203
   Miami, FL 33142

2. The Clerk of Courts will clock in the form and forward certified copies of these forms co the AOC.
3. The AOC will be responsible for the initial review and may require that the SAPD submit support documentation prior to further consideration of payment.
4. When approved for payment, the AOC will process the Summary Fee Schedule forms and forward them to the Dade County Finance office for payment to the attorney.
5. If the AOC determines that the Long Form Affidavit, the Order of Appointment and the docket are in proper form, they will forward the Long Form Affidavit to the Fee Review Committee (FRC).
6. The FRC, utilizing this Official Billing Manual, will determine if the fee sought is reasonable and justified. If deemed justified, the form will be approved for payment and forwarded to the AOC for processing for payment. If not, the FRC will contact the SAPD and attempt to reach a compromise. If a compromise is reached between the FRC and the SAPD, the committee will submit an appropriate notice as to the amount agreed upon to the AOC. The AOC will then process the Affidavit for payment by Dade County Finance.
7. The FRC will report its recommendations within 45 days after receipt of the fee application from the AOC.

D. Billing Disputes-z-

1. If the FRC does not reach a recommendation within 45 days, the SAPD may apply to the Circuit Conflict Committee (CCC) for a rule to show that the application is in compliance with tbe Official Billing Manual and should be approved as submitted.
2. If the SAPD and the CCC cannot agree on a compromise fee, the attorney may seek final determination through appropriate legal means.

ATTACHMENT I

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

DIVISION: CRIMINAL TRAFFIC OTHER	MOTION AND AFFIDAVIT FOR ATTORNEY'S FEES FOR SPECIAL ASSISTANCE PUBLIC DEFENDER AND COSTS	CASE NUMBER
THE STATE OF FLORIDA VS. PLAINTIFF DEFENDANT		CLOCK IN

Defendant's counsel,_____having been duly appointed in this cause as a Special Assistant Public Defender pursuant to a Certification of Conflict by the Public Defender and being a member of the Florida Bar, moves this Court pursuant to Section 27.53, 925.036, and 925.036, Florida Statutes, to certify attorney's fees and costs as follows:

A. Death Cases (including penalty phase)
[ ] to 60 hours $1,500.00

B. 1st Degree Felonies and above:
[ ] 5 hours or less 250.00
[ ] above 5 hours to 10 hours 3w.w
[ ] above 10 hours to 20 hours 750.00
[ ] above 20 hours to 30 hours 1,000.00
[ ] above 30 hours to 40 hours 1,250.00
[ ] above 40 hours to 50 hours 1,500.00

C. 2nd Degree Felonies:
[ ] 5 hours or less 250.00
[ ] above 5 hours to 10 hours 500.00
[ ] above 10 hours to 20 hours 750.00
[ ] above 20 hours to 33 hours 1,000.00

D. 3rd Degree Felonies:
[ ] 5 hours or less 250.00
[ ] above 5 hours to 10 hours 500.00
[ ] above 10 hours to 25 hours 750.00

E. Misdemeanors/FTB:
[ ] 5 hours or less 250.00
[ ] above 5 hours to 20 hours 500.00

F. Juvenile - Delinquency:
[ ] 5 hours or less 250.00
[ ] above 5 hours to 20 hours 500.00

G. Appeals:
[ ] Death penalty 2,000.00
[ ] Others - up to 25 hours 750.00
[ ] Others - above 25 hours to 40 hours 1,000.00

[ ] Partial payment of $_____has already been received or applied for (alias capias was issued).
[ ] I am no longer the attorney of record although this case is still open.
[ ] I am the succeeding attorney. Case is now closed.

Accordingly the undersigned hereby moves this Court to certify attorney's fees in the amount of $_____ and costs in the amount of $_____.

STATE OF FLORIDA
COUNTY OF DADE

Before me the undersigned authority personally appeared_____, who after being duly sworn, deposes and says that he/she has personal knowledge of and represents that the information contained within the foregoing Motion for Attorney's fees is true and correct.

Notary Public, State of Florida at Large
My Commission Expires:

CERTIFICATE OF SERVICE AND MAINTENANCE OF RECORDS
I HEREBY CERTIFY that I will maintain for three years from this date the records in support of the time indicated in this affidavit, and that a true and correct copy, of the foregoing Motion, and Affidavit for Attorney's Fees for the Special Assistant Public Defender was served by hand/mail upon Janet Reno, State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125, on this_____day of _____, 19__.

Attachment II

Attachment supporting Summary Fee Schedule

SHORT FORM
SUMMARY BREAKDOWN OF HOURS

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA.	
MOTION AND AFFIDAVIT FOR ATTORNEY'S FEES FOR SPECIAL ASSISTANT PUBLIC DEFENDER, AND COSTS	CASE NUMBER

CATEGORY OF SERVICES RENDERED:	HOURS
CONFERENCES	
COURT APPEARANCES	
DEPOSITIONS	
PREPARING DOCUMENTS	
RESEARCH	
REVIEW/ANALYSIS	
OTHER	
TOTAL (*)	

(*) - Check the appropriate box on the Summary Fee Schedule

Attachment III

[ ] IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. [ ] IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA.		
DIVISION: [ ] CRIMINAL [ ] TRAFFIC [ ] OTHER	MOTION AND AFFIDAVIT FOR ATTORNEY'S FEES FOR SPECIAL ASSISTANCE PUBLIC DEFENDER AND COSTS	CASE NUMBER
THE STATE OF FLORIDA vs. PLAINTIFF DEFENDANT		CLOCK IN

Defendant's counsel,_____ having been duly appointed in this cause as a Special Assistant Public Defender pursuant to a Certification of Conflict filed by the Public Defender and being a member of this Florida Bar, moves this Court pursuant to Section 27.53, 925.036, and 925.036, Florida Statutes, to certify attorney's fees and costs as follows:

SECTION A.

Date	Nature of Services	Time Spent

(ATTACH ADDITIONAL SHEET IF NECESSARY)

TOTAL TIME SPENT

Out-of-Court_____hrs. @$40.00 = $_____

In-Court_____hrs. @$50.00 = $_____

Total: $_____