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SUPREME COURT OF THE STATE OF FLORIDA

LARRY D. RICHARDSON,)
)
Appellant,)
) Supreme Court No.: 86,011
vs.)
)
STATE OF FLORIDA,)
)
Appellee.)

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF

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County and City Data Book, 1988, United States Department of Commerce............................

Gardner, Executions and Indignities--An Eight Amendment Assessment of Method of Inflictin Capital Punishment, 39 Ohio State L.J. 96, 125 n.21 1978).. 83

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Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, Stetson L.Rev. 47 (1987) 76

Mello, Florida's "heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13

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Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) 73

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SUPREME COURT OF THE STATE OF FLORIDA

LARRY D. RICHARDSON,	)	
	)	
Appellant,	)	
	)	Supreme Court No.: 86,011
vs.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

INITIAL BRIEF

PRELIMINARY STATEMENT

The Appellant, LARRY D. RICHARDSON, will be referred to as Appellant, Defendant or by his proper name. The government will be referred to as the State or the prosecutor.

STATEMENT OF THE CASE

The Appellant, LARRY D. RICHARDSON, (hereinafter referred to as Appellant) was charged by Indictment in three counts, to wit:

a) First degree murder, in violation of F.S. 782.04(1)(a) one and/or two capital felony;

b) Armed robbery with a firearm or a deadly weapon in violation of F.S. 812.13(1) and (2)(a), a first degree felony punishable by life imprisonment;

c) Burglary of a dwelling, in violation of F.S. 810.02(2)(a) and/or (b), a first degree felony not exceeding life. (R-01-02).

A handgun was alleged in said Indictment. The Office of the Public Defender in and for Seventh Judicial Circuit entered its Notice of Appearance and entry of plea of not guilty coupled with an Affidavit of Indigency on or about January 17, 1992. (R-6-7). Previous thereto, said office entered a Notice of Invocation of Right to Counsel and Right to Remain Silent on or about January 13, 1992. (R-5).

The Appellant, through counsel, filed his Notice of Intent to Participate in Discovery on or about January 28, 1992. (R-8). Appellant, through counsel, filed a Motion for a Statement of Particulars, Request for Criminal Background History of Victim on

or about January 28, 1992. (R-8-11). Appellant, through counsel,requested that a mental health expert be appointed pursuant to 3.216(a) Florida Rules of Criminal Procedure on or about February 11, 1992. (R-12-13). Judge Graziano entered her order as presiding judge appointing said expert pursuant to the Appellant's Motion for Appointment. Jockeying occurred between counsel for the State and the Appellant with various motions to each particular expert.[1] (R-34,43). The Appellant was found competent to assist in his defense and was found sane for the time-frame of any of the instant allegations. .

The State filed motions to obtain fingerprint exemplars with said motion being granted by the Honorable Judge Graziano on March 19, 1992. (R-46). Additionally, said Court entered its order on that same date authorizing the taking of samples of blood and hair from the Appellant. (R-61).

On or about April 3, 1992, Assistant State Attorney David Damore filed the State's request for attendance of out-of-state witness. (R-68-70). Said motion requested an order that

[1] The parties ultimately stipulated to Dr. Davis on March 27, 1992. (R-64).

Appellant's father, James Richardson, be ordered to appear before the lower tribunal on the instant cause.[2]

Appellant's Motion to Suppress Statements was filed on or about May 12, 1992. Said Motion to Suppress objected to all statements made to Detective John Ladwig while Appellant was incarcerated and while he was a suspect in the murder case of the instant cause. (R-90). Further, in the said motion, Appellant objected on at least six (6) occasions to Detective John Ladwig visiting him in custody despite the fact that the Appellant had contacted the said Detective on only two (2) occasions. (R-92).

Appellant's aforenoted Motion to Suppress also argued the issue of confidentiality pursuant to plea negotiations. (R-93-94).

The lower court entered its order on or about May 20, 1992, compelling Florida Department of Law Enforcement to analyze unknown fingerprints. (R-168).

The State filed its Notice of Intent to Offer Similar Fact Evidence on or about May 21, 1992. (R-180-183). The defense moved on or about May 21, 1992, for a motion for pretrial ruling regarding admissibility of William's Rule testimony. (R-184-185). The lower court entered its amended order dated July 15, 1992,

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[2] Case bears docket number CRC 92-30089 CFAES, Larry Dean

granting Appellant's Motion to Suppress as to all statements made February 14, 1991, at the Daytona Beach Police Department. Further, said court granted Appellant's Motion to Suppress as to all statements made at the Volusia County jail prior to November 21, 1991. Finally, regarding said challenged statements, the lower tribunal denied Appellant's Motion to Suppress as to statements made before November 21, 1991. (R-209-210).

The State's Motion for Pretrial Ruling Regarding Admissibility of William's Rule Testimony, (R-184-185), was disallowed by the lower court as to all similar fact evidence contained in the State's Notice of Intent. (R-217-218). The State thereafter filed its timely Notice of Appeal, (R-219), and a Motion to Stay Proceedings and Toll Speedy Trial. (R-220). Said Request to Stay Proceedings was granted by the lower tribunal. (R-221). The Fifth District Court of Appeal of the State of Florida issued its opinion on July 2, 1993. (R-247-257). The court therein held specifically that the State had presented issues which may be appealed by the State pursuant to Rule 9.140(c)(1)(B), Florida Rules of Criminal Procedure. (R-250). Said court disallowed introduction of the evidence regarding the possession of a firearm on February 11, 1991, juxtaposed with the

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Richardson. (sic) (*emphasis supplied*)

death of the instant victim on February 14, 1991. (R-253). However, the said court disagreed with the lower tribunal and sanctioned the introduction of evidence regarding the Floyd homicide as a collateral crime relevant to prove Appellant's motive to commit the charged offense. (R-255). The court also considered a phone call Appellant made to his father wherein he allegedly told his father that he needed money to leave town because he had "just killed a man". (R-256). The court concluded also that the State should be allowed to show that the bullets that killed Floyd and the instant victim came from a .22 caliber firearm, were consistent in class characteristics and could have come from the same firearm. (R-257). The State at trial failed to do so over objection of the Appellant. (R-T3-5034-5035). Finally, the court decided that statements made by the Appellant to the police on February 14, 1991, were admissible. (R-257). No such testimony was introduced by the State.

The record is replete with the Appellant's repeated attempts to represent himself.[3] Appellant was eventually successful in his attempt to have self-representation. An attorney was appointed as advisory counsel for the Appellant. (R-261).

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[3] For example, Appellant filed a formal motion that was denied. (R-224-226). Appellant filed again on, (R-234-239), said motion was denied (R-240).

Thereafter, a Motion for Clarification of Status of Counsel was filed. (R-277-278). Four days subsequent to the filing of said motion for clarification, Appellant filed a Motion for Self-Representation. (R-279). Ultimately, Appellant's first attempt at jury selection was incredibly self-destructive, ineffective and combative in nature with members of the venire.[4] Appellant relented and allowed counsel to be appointed as full-time counsel in preparation of anticipated trial. The case was mistried due to a hung jury for trial number one and likewise mistried on trial number two.

Appellant again decided to be his own counsel for his third trial. Appellant conducted his own jury selection after which counsel was then appointed. Upon being convicted of all counts contained in said Indictment, Appellant chose to act as his own counsel for death penalty purposes. Appellant had informed counsel before the court on record on many occasions that he

[4] Appointed counsel had been designated as standby counsel whose sole purpose was to merely advise Appellant as to the law.

would not contest the death penalty phase.[5]

The State filed a Motion in Limine regarding a letter "authored by Christian Taylor" (sic). (R-398-399). The letter essentially was composed by an unknown individual, but was delivered to Henry Christian who in turn tendered the letter to Paul Crow,[6] Chief of Police, Daytona Beach Police Department.

Counsel for the Appellant filed a Motion for DNA Testing. (R-423-425). Said motion was filed subsequent to Appellant's first mistrial, as aforenoted and prior to trial number two. Said motion was founded in the notion that Dr. Botting had testified at trial number one that significant hair particles were retrieved from the victim's hands. Said motion was denied.

Counsel for the Appellant filed a Motion to Dismiss Indictment, (R-445-447), and an Amended Challenge to Panel. (R-

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[5] Appellant thereby waived the Statement of Particulars regarding aggravating circumstances, the reasons the death penalty was sought and the theory of prosecution underlined murder in the first degree, (R-138-141); Motion to Elect and Justify Aggravating Circumstances, (R-142-144); Motion for Disclosure of Impeaching Information, (R-145-148); Motion to Compel Disclosure of Mitigating Circumstances, (R-149-152); Motion for Disclosure of Penalty Phase Evidence, (R-153-157); Motion for Production of Favorable Evidence, (R-158-162); Motion for Recess of Trial Between Guilt Verdict and Penalty Phase, (R-162-166).

[6] Mr. Christian's testimony is contained in trial number one at (R-T1-2067-2084). The trial court thereafter disallowed said testimony in trial number three despite the fact that the letter purportedly stated that the author of the said letter knew and mentioned specifically two names.

448-450). Said motions centered on the fact that the Black registered voters in Volusia County are fixed at approximately 5.8% of the total number of registered voters while the Black population of Volusia County comprises at least 18% of the general population of Volusia County.

The Appellant purportedly had entered into a stipulation[7] on July 13, 1994, while representing himself. (R-321-322). A brief copy of said interview which was the subject of the stipulation occurred on October 6, 1994, may be found on the record.[8] (R-403-405). Appellant filed an application with the trial court to withdraw from said stipulation. (R-495-499).

Appellant filed a Motion to Proceed "On Pro Se"(sic), on or about April 12, 1995. Concomitantly, Appellant's counsel filed a Motion for Continuance stating that he was not prepared and needed time to review files prior to the trial scheduled April 17, 1995. (R-505-506). Said motion was denied. Appellant's motion was couched solely on the basis that he did not feel as if he was prepared for trial. The Appellant specifically noted that he felt as if he had been forced out of self-representation by the court's ruling. (R-4660). No further inquiry was conducted

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[7] Stipulation to admit Appellant's father's statement.

[8] Said statement was read into the record over objection at all three trials.

before Appellant was disallowed pro se representation and before trial counsel was yet again appointed. (R-4663.) Trial counsel was required to assume position of trial counsel and said attorney attempted to decline representation. (R-4664). Counsel then filed his written Motion to Withdraw on or about April 17, 1995. (R-510-511).

Appellant was adamant about self-representation and noted to the court that he was essentially being forced out of pro se representation. (R-4660). Trial counsel notified the court that he had been previously notified by the Florida Bar Hotline that he must abide by an order entered by the court regarding representation, (R-4665), and moved for a Motion to Continue.[9] Counsel noted that he was not prepared and asked for a mere two days to get ready. (R-4665). Counsel moved for a mistrial based upon the court's ruling and the same was denied. (R-4666). Counsel requested that voir dire be reopened in order to be assured that a fair jury was impaneled. (R-4669). Said motion was denied. (R-4669).

Appellant again affirmed that he repeatedly notified counsel that he was not to investigate or pursue any efforts or present

[9] Counsel noted that the case had been twice litigated by both himself and the prosecutor and both had received transcripts of the second trial "just past Wednesday".

any evidence or testimony regarding the death penalty should the State achieve a conviction. (R-4676-4677). No Court inquiry regarding this issue occurred.

Counsel for the State argued as to Defendant's statements made on November 21, 1991, in opening statement. (R-4701). Counsel for the Appellant reluctantly objected.[10] (R-4701-4702). Said objection was over-ruled. Said objection was founded in the order granting Appellant's Motion to Suppress.[11]

Appellant, through counsel, timely made his Motion for Judgment of Acquittal as to all three counts. Said motion was renewed timely. Appellant was found guilty on or about April 25, 1995, on all three counts contained within the subject Indictment. (R-538-540).

Appellant filed his "Notice of Mitigating Evidence" on or about April 27, 1995. (R-558). The court did not conduct an adequate inquiry when the Appellant announced that he was going to proceed in pro se during his death penalty phase. The jury recommended a sentence of death on or about April 27. 1995. (R-564). Despite that Appellant expressed his wishes to represent himself, an order was entered by the Honorable Kim C. Hammond on

[10] Counsel noted his reluctance to object during opening statements.
[11] Paragraph two (R-207).

or about April 28, 1995, directing trial counsel to submit a memorandum of law to the court. (R-565). Counsel timely filed his memorandum of law. (R-566-69). The Appellant demanded that the memorandum be withdrawn in that he objected to any representation of counsel. The sentencing court noted the same. (R-543).

This timely Notice of Appeal ensued. (R-573).

This court has jurisdiction. Article V, Section 3(b)(1), Florida Constitution.

STATEMENT OF THE FACTS

Carrie Lee was killed February 14, 1991, within the confines of her home. Her neighbor, Henry Christian saw smoke, entered the home and found the bloodied crime scene. Detective John Ladwig, Daytona Beach Police Department was the first officer on the scene. Frank Auman, Daytona Beach Police Department was initially the lead investigator, although, Ladwig assumed that role at a later time.

The coroner testified that the cause of death was from one of several factors, to wit: multiple stab wounds to the body and head; the cracking of the skull with a skillet; a small caliber gunshot wound in the ear; and/or a vicious battering by the claw end of a hammer. The Appellant was a boarder in one of Ms. Lee's rooms in one of her buildings. For unstated reasons Appellant became a suspect of the homicide by Daytona Beach Police Department. Police officers spoke with Appellant on the evening of the homicide within his room. Permission was given by the Appellant for a full and unlimited search of his room. The officers did in fact conduct said search and seized items from Appellant's room, although none introduced into evidence at any of the three trials. Further, the Appellant voluntarily stripped

so that his body could be examined for scratches or marks. Appellant spoke with officers of the Daytona Beach Police Department on the evening of the homicide which the 5th District Court of Appeal found to be permissibly issued statements. None of said statements were introduced at the trial by the State.

There was also a partial shoe imprint, in blood, reflecting a "LA Gear" in the kitchen area. (R-4892). The firearm was never recovered. A hammer, knife and skillet remained at the crime scene.

Dr. Arthur Botting, Medical Examiner in and for Seventh Judicial Circuit testified at the first two trials on the instant cause. Dr. Botting testified as to the hair clutched in both hands of the victim. (R-1888). The State announced that there were nine (9) hairs in the hands of the victim. (R-112).

The crime scene was quite bloodied because the struggle between the victim and her attacker ensued throughout the residence. The crime scene was thoroughly examined by the Florida Department of Law Enforcement and no fingerprints connecting the Appellant to the crime scene were introduced at trial. A safe in Ms. Lee's home was open and blood was spattered on it and the adjacent wall. Said safe was not wiped clean of fingerprints. There was no evidence of any items having been

taken from the home although an insurance claim was filed by the family of the deceased and papyment was made for two fur coats. Counsel for defense provided this information to the government.

A FDLE technician found vague similarities between the bullet fragment recovered from the body of Ms. Lee and compared to another gun that was allegedly used by the Appellant in a separate homicide.

The Appellant was ultimately charged by Indictment and subsequent thereto was, by court order, required to submit to hair samples being plucked from various parts of his body.

The Appellant was visited by John Ladwig while incarcerated at the Volusia County Branch Jail on many occasions. During the visits of November 21, and November 22, 1991, the Appellant purportedly issued statements against interest. On the 22nd of November, 1991, John Ladwig delivered a written plea offer for the Appellant's acceptance.

Prior to the Appellant's arrest on the instant cause, Mr. Henry Christian received a letter from an unidentified source establishing the names of the two individuals who supposedly had committed this brutal homicide. Mr. Christian personally delivered said letter to Chief Paul Crow, Daytona Beach Police Department, and the letter was thereafter misplaced, lost or

destroyed by the Daytona Beach Police Department. Neither the Appellant nor counsel ever saw a copy of said letter.

The Appellant purportedly called his father on February 13, 1991, in Massachusetts and made the admission that he had killed somebody and needed money to get out of town. A "stipulation" was entered into by the Appellant while acting in pro se, and the Office of the State Attorney. The stipulation called for admissibility of the entire statement issued by the father, James Richardson.

SUMMARY OF ARGUMENT

First Issue: The court allowed a non-disclosed witness to testify over timely objection of the Appellant. Essentially, the coroner who testified at trial was not the coroner who conducted the autopsy. The State represented to the court that the witness, Dr. Reeves was listed; said representation was in error. No Richardson inquiry was allowed despite counsel's request.

Second Issue: The State was guilty of prosecutorial misconduct in securing a stipulation from the Appellant which was not of record.

The State committed prosecutorial misconduct by not disclosing that Investigator Ladwig had been noticed by a circuit judge in and for the Seventh Judicial Circuit as an official of the State who had no regard for his obligations to the administered oath.

The State committed prosecutorial misconduct by failing to produce material evidence of independent citizens specifically establishing the known names of the killers of the victim.

The prosecutor committed prosecutorial misconduct by intentionally leading the jury regarding evidence of hairs found in the victims hands. The prosecutor at the third trial was the

same prosecutor for all three trials. It is inconceivable that said Assistant would argue not only matters that were not introduced into evidence, but further would go so far as to fabricate evidence in argument to the jury.

The prosecutor improperly vouched for the credibility of the officers at trial.

The prosecutor attempted to shift the burden of proof to the defendant regarding matters that were not placed into evidence contrary to his obligation to preserve and defend the Constitution.

Third Issue: The Defendant, while representing himself in pro se attempted to negotiate a sentence on the case sub judice. Said negotiations were protracted and ultimately, Appellant was required to give a statement to the State for plea bargaining purposes. The lower tribunal erred in allowing these statements to be introduced into evidence in that said statements were issued pursuant to plea negotiations.

Fourth Issue: Appellant timely challenged the venire and filed a related Motion to Dismiss. The lower court erred in denying said motion. The Black members of the jury pool were pulled from the registered voters list. As such, and by

definition said pool was disproportionate to the general black population.

Fifth Issue: The Fifth District Court of Appeal erred in accepting the appeal from the Office of the State Attorney in that it substituted the trial court's factual findings and, without additional factual assessments determined in error that certain Williams Rule evidence was relevant.

Sixth Issue: The court's instruction regarding reasonable doubt deprived the Appellant of due process and of a fair trial.

Seventh Issue: 921.141 is constitutionally infirm for reasons set forth herein.

Eighth Issue: The lower court tragically erred in disallowing Mr. Richardson's right to self-representation. Richardson made an unequivocal request for self-representation which the lower tribunal illegally denied.

Ninth Issue: The trial court abused its discretion in denying the Appellant's Motion to Continue at his third trial. Said motion was founded in the notion that Mr. Richardson would represent himself at trial. The articulated reasons for the continuance were couched in terms of the Appellant's ability to organize an exhaustive file. The trial court erred in denying the Appellant's Motion to Continue for reasons stated herein.

Tenth Issue: The trial court erred in failing to conduct an adequate Faretta inquiry. The Appellant had been notified on numerous occasions as to his rights to proceed in pro se. Appellant finds fault with the notion that he was not either fully advised or fully inquired of regarding his ability to proceed in pro se at the death penalty phase. The record establishes that the court's inquiry is woefully insufficient and as such, the death sentence must be set aside.

ARGUMENT

FIRST ISSUE

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF THE CORONER, AS A NON-DISCLOSED WITNESS, OVER THE TIMELY OBJECTION OF THE APPELLANT.

Appellant filed a demand for discovery on the case sub judice on or about the 8th day of August, 1994. (R-345-347). The State responded and in fact filed several amended witness lists. Dr. Ronald Reeves was not listed as a witness for the State. Dr. Arthur Botting formerly was employed as the coroner for the Seventh Judicial Circuit. Dr. Botting testified in the Defendant's first two trials as to the cause and manner of death, and more importantly, that "hair. . .(was) clutched in both hands" of the victim. (R-T1-1888). The State had previously argued that there were nine hairs in her hands. (R-112). For reasons not disclosed within the record, Dr. Botting was not called by the State for Appellant's third trial. Rather, the State substituted Dr. Ronald Reeves, the medical examiner for the circuit at the time of his testimony. Dr. Botting had relocated his practice to New Smyrna Beach.

At jury selection, the prosecutor read Dr. Reeves' name and disclosed him as a witness for the first time. (R-3921). Dr.

Botting was likewise listed and Dr. Reeves' name was essentially buried in thirty names. (R-3921-22). The Defendant read his list of witnesses which mirrored all known witnesses available to the State with said reading of the list not reflecting the name of Dr. Reeves. (R-3922-23). Jury selection required that a second panel be addressed for jury selection purposes and no re-reading of any witness list occurred. (R-4070). Trial counsel was re-appointed on the day of trial. (R-T3-4664-4666).

When the State called Dr. Reeves to the stand, counsel for Appellant objected noting that Dr. Reeves had not been listed as a witness. The prosecutor argued as "an officer of the Court" that Dr. Reeves had been listed. Counsel for the Appellant specifically noted that he had not had privy to the file for trial preparation purposes and accepted (as did the court) the prosecutor's representation of fact. (R-T3-5025).

Dr. Reeves testified as to the cause of death, and more importantly, testified that fingernail scrapings of the victim were obtained but that he had no knowledge of the nature of the "material" in the victim's cluthed hands. (R-T3-4778-4788). The Court adjourned after his testimony. On the very next day, Appellant's counsel discovered that contrary to the prosecutor's representation as "an officer of the court", Dr. Reeves had <u>not</u>

been disclosed as a witness. The prosecutor acknowledged this as true, but maintained the curious position that the defense had waived argument regarding the discovery violation. (R-T3-5025-5026).

The State argued to the jury at closing that it could rely upon the testimony of Reeves as an expert. (R-T3-5230). The State further attempted to shift the burden regarding this discovery issue by stating essentially that if Dr. Botting had favorable evidence he would have been produced for the jury's benefit by the defense. (R-T3-5209).

Reeves' testimony reflects that he did not even speak with Dr. Botting regarding the autopsy, (R-T3-4786-87), but rather, he merely reviewed the autopsy report, any available notes, photographs and Dr. Botting's previously issued sworn testimony. (R-T3-4780). Reeves did note that scrapings of the victim's fingernails were obtained and were transferred to the investigating officer for John Ladwig. (R-T3-4789). Reeves did not try to find any scrapings and/or test any of the said scrapings, (R-T3-4807), yet he did admit that the scrapings were taken for testing purposes. (R-T3-4814-15).

Counsel for Appellant moved to strike the testimony of Dr. Reeves and established prejudice. Counsel stated that the defense

was geared to Dr. Botting and his previously issued testimony in the prior two trials on the instant cause. Specifically, counsel argued prejudice in not having Botting testify to the lack of evidence regarding the hair samples examined for forensic comparison purposes and further, the lack of the testimony that numerous unidentified hair were in Carrie Lee's clutched hands at the time of her death. (R-T3-5030). Counsel reminded the court that opening statement had been delivered. It was argued to the court through a bifurcated argument that the defense objected to the non-appearance of Dr. Botting, (R-T3-5032),[12] and further, counsel argued that the testimony of Dr. Reeves was fundamentally unfair. The lower tribunal ruled that the err was harmless but did note that, "...it didn't go the way I would have... preferred". (R-T3-5034). Despite counsel's request for an "after-the-fact Richardson," (R-T3-5025), the Court did not rule that the defense had waived the argument and apparently understood that counsel did not have privity to his own file prior to the trial. The trial court axiomatically noted that the State enticed the actions of counsel by stating his position regarding notice of Reeves as "an officer of the Court". (R-T3-5025).

[12] Counsel for Appellant was given approximately one-half hour to prepare for his opening statement (R-T3- 5032).

Rule 3.220, Florida Rules of Criminal Procedure provides that, upon filing of a "Notice of Discovery" the prosecutor <u>shall</u> disclose to the defense,

> (A) the names and addresses of all persons known the prosecutor to have information that may be relevant to the offense charged and to any defense with respect thereto.

Further, the prosecutor has an obligation to properly and promptly disclose or produce the witness as is required under the rules governing initial discovery, Rule 3.220(j) Fla. Rules of Criminal Procedure. Article I, Section 9, Constitution of the State of Florida, provides inter alia, "no person shall be deprived of life, liberty or property without due process of law. . ." The Due Process Clause is likewise recognized by and through the Fifth Amendment to the United States Constitution and applicable to the States by and through the Fourteenth Amendment to said Constitution.

The courts have historically held post <u>Richardson</u>, *supra*, that the State's discovery violations were per se reversible if the lower court did not conduct an adequate inquiry. However, this court has now sanctioned the application of the harmless error analysis as to the trial court's failure to conduct a <u>Richardson</u> hearing, <u>State v. Schopp</u>, 653 So.2d 1016 (Fla. 1995).

The per se reversal rule was predicated upon the assumption that "no appellate court can be certain that errors of this type are harmless." Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977). Schopp, *supra* perhaps reflects a factual scenario displaying that there should not be form over substance even in the discovery process. The State therein at trial attempted to call a responding officer as a witness with the defense objecting merely because the officer was not on any witness list. It was acknowledged by the State that the officer was not in fact listed, but had been given to the defense on an amended list shortly before trial. The officer purportedly was to testify as to matters contained in a report which had been supplied to the defense through pre-trial discovery.

The Harmless Error Doctrine traditionally established that the test is "not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." State v. DiGullio, 491 So.2d 1139 (Fla. 1986). The question is whether or not there is a reasonable possibility that the error affected the verdict. DiGullio, *Id.*; Schopp *supra*. The burden is on the State to show that the error was harmless and the reviewing court must be able to say beyond a reasonable doubt that

the error did not affect the verdict. Otherwise, the error is by definition harmful, Schopp, *Id.* The established reason for the per se reversible error rule regarding a trial court's failure to conduct a Richardson inquiry is to be founded in that the reviewing court would be in no position to determine from a record whether or not the error was in fact harmless. This legal standard and its application was modified. Schopp, *Id.* This court has recognized that it rarely provides a reviewing court with a basis for the conclusion beyond a reasonable doubt that the defense was not prejudiced by the State's violation of the discovery rules. Schopp, *Id.* (emphasis supplied). This court must consider "every conceivable course of action" available to the defendant in this appellate review. Schopp, *Id.* 1020.

The Defendant has been procedurally prejudiced in his trial preparation and/or strategy in that opening statement certainly would have been materially different had the violation not occurred. Meaningful preparation and timely strategy decisions would have benefited the Appellant had he known about Dr. Reeves in timely fashion prior to opening statement. Defense opening statement was made with knowledge of Dr. Botting's prior testimony at two prior trials on the case sub judice. The Defense was then notified that Botting would not testify and Dr. Reeves would. The

defense was required to "engage in 'back-stepping' the harm that was already done." Brown v. State, 640 So.2d 106, (Fla. App. 4th District 1994). The Brown opinion, *Id.* was issued in 1994 in a pre-Schopp period. However, the court therein was urged by the State that a discovery violation does not require per se reversal. The court noted specifically that the defense case became less credible when his attorney represented certain facts in opening statement which were subsequently contradicted by testimony of witnesses not timely noticed to the Appellant. In the case sub judice, defense counsel argued in opening about Dr. Botting's previous testimony and the hair clutched in the victim's hands in a death grip. The hairs were not introduced into evidence, and it is abhorrent yet true that the prosecutor argued outside the scope of evidence in stating that "no hairs" were recovered from the victim. (R-T3-4713). The State argued again that no white man's hairs were found in her hands. (R-T3-5205). When counsel for the Defendant attempted to negate the damage done, the prosecutor objected to counsel arguing factual matters not in evidence. (R-T3-5249).

In short, not only was the Defendant prejudiced by the failure to timely notify him of Dr. Reeves' potential as a witness, but the State attempted to argue outside the evidence

regarding the most critical and prejudicial argument presented that the hairs were not those of a white man. The trial court refused to grant a full and meaningful inquiry as to the discovery violation despite the timely objection by counsel. The court simply issued its statement that the court did not find the statement to be prejudicial. The court did not address whether or not the omission was willful or inadvertent, did not conduct an adequate inquiry as to whether or not the violation was trivial or substantial, and lastly, did not inquire or consider the affect it would have had on the party's ability to properly prepare for trial, Richardson *supra*. The court allowed the prosecutor to be the architect of the proceedings and the factual record, and it cannot be said with a clear conscious that the prosecutor's and the court's activities did not deny the Defendant his fundamental right to a fair trial and to due process.

SECOND ISSUE

THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT, AND IF SO, SAID ACTS INDIVIDUALLY OR COLLECTIVELY CONSTITUTE REVERSIBLE ERROR.[13]

[13] The acts of misconduct will be designated alphabetically under this one title.

A) The State committed prosecutorial misconduct in engaging in critical communications with the Appellant which were not of record. Specifically, the Office of the State Attorney in and for the Seventh Judicial Circuit engaged in a stipulation with the Appellant on or about July 12, 1994, while he was represented in pro se. (R-321-22). The stipulation centered on a statement purportedly issued by the Appellant's father to law enforcement officials in the State of Massachusetts. The statement from the father is very damning in nature and essentially the father accuses the son of being the devil incarnate. The said statement is, by and large, irrelevant and highly prejudicial. Presumably the State would have known that a vast majority of the evidence contained therein would be inadmissible in any court of law.

Rule 3.171 Fla. Rules of Criminal Procedure provides inter alia:

> "if the Defendant represents himself or herself, all discussions between the Defendant and the prosecuting attorney shall be of record."

In the case sub judice, the State engaged in negotiations for an agreement for the admissibility of a horribly damaging statement by the Appellant's father. Counsel for the Defendant argued that the communications with the Office of the State Attorney and the Defendant regarding said stipulation were not of record. (R-T1-

1022-23). This factual allegation by counsel was not contested by the prosecutor in any fashion. The Appellant noticed the court of the State's harassment of his father, (R-30), and noted that his father was arrested previously at the State's insistence and required to post bond for purposes of attendance at trial on an unrelated case. (R-T1-1709). The Defendant was given a standing objection to the document. (R-T1-1723; R-T3-5002). The thrust of the allegations of prosecutorial misconduct is the communications with the Defendant in pro se which were not of record. This case points out the classic example as to why all communications by an un-represented Defendant with the prosecutor <u>must</u> be of record. The Defendant noted that his father would die from the strain of travel, (R-T1-1016-22), and the prosecutor admitted he had talked to the father's physician. The Defendant inquired of the prosecutor as to whether or not the travel would kill the father, and the Assistant State Attorney stated "That's right". (R-T1-1019). There is a clear conflict of the testimony which is without record. The Appellant's statements which were of record show his state of mind at the time of engaging in this stipulation. The Appellant also was told that he could withdraw from the stipulation by the initial trial judge. (R-1017).

The Appellant claims prejudice as to the statements being unrecorded in that he was unable to show to the court the full extent of the representations made to him by the State, coupled with the State's general attitude that the Defendant's father would be arrested yet again, would be shackled and transported down to the State of Florida to testify against his son. Said record would also show the undue, unethical and illegal coercion directed at the Defendant.

The prosecutor has special responsibilities within the State of Florida. Rule 4-3.8. Specifically, it is provided by the Florida Bar that, "The prosecutor in a criminal case shall:...

> (b) not seek to obtain from an unrepresented accused, a waiver of important pre-trial rights such as a right to a preliminary hearing;"

In the case sub judice the state has committed prosecutorial misconduct by engaging in critical communications with the Appellant which were not of record.

B) John Ladwig was the primary witness on the case sub judice. Detective Ladwig testified that Appellant confessed to him November 21 and November 22, 1991. John Ladwig had previously been found essentially to be unbelievable by a circuit judge in and for the Seventh Judicial Circuit. <u>This</u> court's opinion on that same case reflects that Ladwig has no regard for his

obligations to the oath.[14] This factual matter was known or should have been known to the instant prosecutor, and surely was known to the Office of the State Attorney in and for the Seventh Judicial Circuit. However, this specific finding was not disclosed to the Defendant. It is much to the Defendant's prejudice in that the credibility of John Ladwig was the fulcrum of the State's case.

C) Henry Christian was called by the State as a material witness in Appellant's first trial (R-T1-2067). Mr. Christian was apparently somewhat confused upon his initial testimony in that he stated that he had received no letter regarding the identification of the murderers of Carrie Lee (R-T1-69-70). Mr. Christian stated at that time, upon direct examination, that his recollection was the first letter which he tendered to Chief Paul Crow, Daytona Beach Police Department was essentially a complaint of police investigation and contained a suggestion that said Department "hurry up and catch the killers of Carrie Lee" (R-T1-69-70).

Mr. Christian, within the same proceedings recalled that <u>he had received</u> a letter from his wife which said letter contained two names identifying the murderers of Ms. Carrie Lee (R-T1-2083-84; R-T1-2076). The Appellant's name was not contained within the

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[14] <u>Terry v. State</u>, Fla. Law Weekly, Vol. 21 No. 2, January 12.

four corners of the letter (R-T1-2083-84). Mr. Christian stated at Appellant's first trial that he recalled the author of said letter kept the information "inside" because she did want to get involved (R-T1-2084). The letter was apparently left with Mr. Christian's wife and not delivered via the U. S. Mail (R-T1-2076). Appellant was incarcerated February 14, 1991 and has so remained. Mr. Christian has testified that he gave the letter to Chief Paul Crow at a line-up. Christian said he "carried it and showed it to him" (R-T1-2082). Mr. Henry Christian raised the ultimate question when he stated in his answer to a question by counsel, "The Chief have (sic) the letter, couldn't you get it from the Chief and find out what's on it?" (R-T1-2084).

Mr. Christian stated that he gave it to a "Jimmy Huges" (sic) and was notified that the letter should be taken down and given to the Chief of Police of Daytona Beach (R-T1-2083). Apparently Mr. Huger received the letter, reviewed the same and Mr. Huger made an appointment with Chief Crow of behalf of Christian. (R-T3-5137). Mr. Christian testified at the Appellant's third trial that he had held the letter for two days because the police, even upon notification of reception of the same, failed to respond to his notification of said letter. It is readily apparent that Mr. Christian was adamant that the Chief of Police receive this letter

and solve the mystery of the murder of Carrie Lee. The letter was given directly to Chief Paul Crow by Mr. Christian (R-T3-5138); however, Mr. Christian at Mr. Richardson's third trial did not recall what the letter said (R-T3-5138). Mr. Christian stated that he was 89 years old at the time of his testimony (R-T3-5141), and did not recall at the time of his testimony the names which were contained in the letter.

Counsel for the Appellant called Chief Paul Crow, Daytona Beach Police Department in a proffer regarding the missing letter (R-T3-5131). Counsel further notified the Court that the proffer was regarding a Brady violation.[15] A Notice of intent to participate in discovery was filed by trial counsel as aforenoted. Chief Crow testified at the proffer that he gave the letter to Lieutenant Evans and personally directed Mr. Christian to said lieutenant (R-T3-5133). However, Chief Crow denied that the letter had anything to do with the Carrie Lee homicide, but rather, said letter had raised issues regarding other robberies and burglaries in the area (R-T3-5133).

The defense noted that there was really no ruling regarding the argument of counsel, (R-T3-2159-61) and the Court disallowed

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[15] Brady vs. Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed2d 215 (1963).

any argument regarding the subject matter. The Court did hold that the defense could "paint" the government's performance (R-T3-2160), and counsel was not allowed to reference the specifics of said letter.

The Fifth District Court of Appeal has addressed the issue of deliberate destruction of favorable evidence by the government. State v. Milo, 596 So.2d 722 (Fla. App. 5 Dist. 1992) Therein, an officer from Daytona Beach Police Department deliberately re-approached a witness and had specific statements which were derogatory in fashion of said officer deleted from the initial statement. The officer destroyed the first statement after obtaining the second statement. The Court therein held that "willful, intentional destruction of evidence requires sanctions". Bad faith destruction of evidence requires dismissal of the charges. Louissant v. State, 576 So.2d 316 (Fla. 5th DCA 1990). The Court held that "the ultimate sanction" was warranted. Milo, *Id.* at 723.

In order to prove a Brady violation, a defendant must show:

> (1) that the government possessed evidence favorable to the Defendant (including impeachment evidence); (2) that the Defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991); United States v. Meros, 866 F.2d 1304, 1308 (11 Cir.) *cert. denied*, 493 U. S. 932, 110 S.Ct 322, 107 L.Ed2 312 (1989).

The defense has not alleged that the prosecutor did not personally suppress the evidence. However, it is continuously alleged that the State may not withhold favorable evidence in the hands of the police who do, by definition, work closely with the prosecutor. Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969).

In the instant cause there is a very specific demand for discovery regarding the said letter. The letter coincidentally and mysteriously has been missing since all meaningful efforts were exercised to defend the Appellant on the instant charges. The good faith or bad faith of the prosecution is irrelevant for this Court's inquiry, Brady, *supra*. 373 U.S. 87, 83 S.Ct 1196-97. Mr. Richardson could not possibly have delivered the letter in that he has been incarcerated since February 14, 1991 on an unrelated case. It is therefore more than a perplexing academic pursuit that Daytona Beach Police Department would not only fail to disclose the content of said letter, but further would either destroy or fail to adequately explain the reasons why the letter is not now available for the Appellant. Surely this Court need not stretch its imagination to perceive the distinct impact that

said letter would have had upon the defense in terms of trial preparation, the establishment of trial strategy and even, in a remote fashion, plea bargaining by the Defendant while he was represented in pro se. The appalling nature of the prosecution and of the missing letter is belied by the notion that John Ladwig, a former Daytona Beach Police Department officer, was the critical nexus of the Defendant to the subject homicide. This Court cannot give countenance to the actions of Daytona Beach Police Department and it is unforgivable that the Office of the State Attorney in and for the Seventh Judicial Circuit had such a cavalier attitude regarding the missing letter. This issue is complicated only by Mr. Christian's infirmity of age. He was exceptionally clear at Mr. Richardson's first trial and specifically testified as to the content of the said letter. Appellant did not enjoy the clarity of recollection of Mr. Christian at his third trial. The Appellant was in a position where he could not possibly obtain the evidence which was readily delivered to Daytona Beach Police Department and was clearly favorable to his cause (and at least included impeachment evidence). The prosecutors (and/or the police) suppressed the anticipated favorable evidence. The record sub judice reflects that, had this evidence been affirmatively provided to the

Defendant in a timely fashion, then a reasonable probability does exist that the outcome of the proceedings would have been different. Hegwood, *supra*.

The Appellant's fundamental right to due process was denied by the lower tribunal. The prosecutor engaged in gross prosecutorial misconduct which said conduct was attributed by and in large to the Daytona Beach Police Department. That the police department would "lose" a letter of such extreme importance establishes, at best, inconceivable incompetence. Dare this Court say that this was an intentional act by the Daytona Beach Police Department? The facts surely support this position in view of the articulated, unbiased and somewhat cantankerous testimony of Mr. Henry Christian. This Court should also juxtapose the realistic notion that John Ladwig, investigator for the Office of the State Attorney, has essentially been called a liar by a Circuit Court; said opinion was endorsed by this Court, Terry, *supra*. The officers apparently made a decision early on that Appellant was guilty of the charge and, through their goal-oriented agenda, pursued avenues of conviction and threw up police roadblocks to all due process avenues.

D) A previous prosecutor indicated that the victim had nine hairs in her hand. (R-112). The doctor conducting the

autopsy stated that hair was "clutched in both hands". (R-T1-1887-1888). Appellant had hairs plucked from his body pursuant to State's Motion and court order. The Assistant State Attorney remained the same on all three cases. However, said Assistant misrepresented to the jury that no hairs of evidentiary value were found on Ms. Lee, (R-T3-4713), and further stated that it was a white man's hair (R-T3-5205). Said statements were immediately objected to as being outside the scope of evidence produced; however, the prosecutor, undaunted, objected to defense counsel's rebuttal of said statement by alleging that counsel was arguing matters outside the scope of evidence. (R-T3-5249). Counsel then attempted to bootstrap his argument by stating that if a white man had killed Ms. Carrie Lee he would have been noticed in the neighborhood, etc. ad nauseam (R-T3-5206-07). Further, in a Janus-face fashion, the State again argued that the hairs were from a white male, (R-T3-5204-05). The prosecutor impermissibly speculated that the victim was dragged down a hallway and that was the source of the "white hairs". (R-T3-5206). No hairs were introduced into evidence and no testimony was elicited regarding any comparison tests conducted.

E) That the prosecutor improperly vouched for the credibility of the officers that testified in the proceedings

below. The prosecutor effectively established that the officers would not ruin their careers over this case with said statement being issued on at least two separate occasions. (R-T3-5240). Further, the prosecutor personally vouched that the officers would not disregard their professional obligations. (R-T3-5240).

The government's attorney committed prosecutorial misconduct by vouching for the credibility of the officers and making an inquiry of the jury as to what the testifying officers had to gain by jeopardizing their career and perjuring themselves, Davis v. State, 663 So.2d 1379 (Fla. App. 4 Dist 1995). It has been firmly established that the Assistant State Attorney cannot attempt to establish that the law enforcement officers must be telling the truth or they would lose their job. In the case sub judice, there was a contemporaneous objection in line with Davis, *Id.* See also Garrette v. State, 501 So.2d 1376 (Fla. 1st DCA 1987). This argument is not subject to the harmless error doctrine, Davis, *Id.*; Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993); DiGullio, *supra*. Impermissible bolstering of the testimony of the officers has been traditionally treated by the Florida courts as a

death bell to any conviction predicated upon prosecutorial misconduct.[16]

Essentially, the case sub judice was reduced to a swearing contest between the Appellant and the officers. It is through the impermissible, unethical and illegal argument of counsel for the government, that the State obtained a conviction of guilty.

F) The Assistant State Attorney repeatedly noted to the members of the venire in the jury that he would not be wasting their time and did not want the jury to sit for "days ... and days..." unnecessarily. (R-T3-5200-02). A timely objection was noted regarding government's argument on this issue.

Further, the State attempted to shift the burden of proof numerous times to the Defendant. The State specifically told the jury that it would be "cherry picking" the evidence and, should a videotape of the crime have been favorable, then the Defendant would have introduce the same. (R-T3-5200-02)(R-T3-5245). .The prosecutor said he "sat by himself and pooled all the evidence" to cherry-pick it for their presentation. The deplorable tactic of the State not wasting the time of the jury has been previously held as an untenable position by the government. Further, the

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[16] Clark v. State, 632 So.2d 88 (Fla. 4th DCA 1994); Robinson v. State, 637 So.2d 998 (Fla. App. 1 Dist 1994).

government attempted to shift the burden of proof by argument that Dr. Botting would have testified for the defense had he had something favorable to say. (R-T3-5209). This argument is improper Messec v. State, 635 So.2d 89 (Fla. App. 4 Dist 1994). The prosecutor cannot state what witnesses might have said but, rather, must confine himself/herself in closing to the evidence that was introduced, Tillman v. State, 647 So.2d 1015 (Fla. App. 4 Dist 1994).

The State can argue any theory that is supported by the facts, however, the State may not "subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts", Garcia v. State, 622 So.2d 1325 (Fla. 1993) at 1331. Of course, there is a special need for propriety in the State presentation, preparation and argument of the case when the death penalty is involved, Garcia, *Id.*

The timely objections have been aforenoted. However, a great degree of prosecutorial misconduct in argument occurred without objection. This Court must ascertain whether or not the error goes to the foundation of the case and the merits of the cause of action, Clark v. State, 363 So.2d 331 (Fla. 1978). The prosecutor, as a holder of great public trust is charged with

preserving and defending the Constitution and as such, the primary goal is not to procure a conviction, but rather to insure that justice is accomplished, Newton v. State, 178 So.2d 341 (Fla. 2nd DCA 1965). The cumulative effect of the instant prosecutor's over-reaching was so overwhelming as to deny the Defendant a fair trial, Nowitzke v. State, 572 So.2d 1346 (Fla. 1990); Article I, Section 9, Constitution of the State of Florida; Fifth and Fourteenth Amendments to the United States Constitution.

The prosecutor argued matters that were not introduced into evidence, distorted evidence that was introduced and effectively procured an embarrassing conviction. Judge Minor stated in a concurring opinion "I trust and fully expect that Florida's prosecutors are too intelligent and disciplined a lot to require a lick between their collective eyes by such a two by four to get their attention as did the proverbial mule of jokelore", Killings v. State, 583 So.2d 732 (Fla. App. 1 Dist. 1991) at 733. It is respectfully suggested that this Court must, yet again, pick up the said proverbial two by four and thrash the government for the bold, unethical and illegal conduct that secured the conviction sub judice.

THIRD ISSUE

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF PURPORTED CONFESSIONS BY THE APPELLANT WHEN SAID STATEMENTS WERE ISSUED PURSUANT TO PLEA NEGOTIATIONS.

The defense filed a Motion to Suppress statements purportedly made by the Defendant. (R-90-131). The Honorable Gayle Graziano, Circuit Judge in and for the Seventh Judicial Circuit, granted the motion but for the statements purportedly issued by the Defendant November 21 and November 22, 1991. The Fifth District Court of Appeal reversed Judge Graziano.[17] (R-247-257). Trial counsel at each of the three separate trials attempted to have the statements suppressed because they were obtained pursuant to plea negotiations (R-T1-1921, R-T3-4673-75). Plea negotiations with the Defendant being represented in pro se and Investigator John Ladwig began on about July 1, 1991 (R-195). Appellant was also negotiating for an active robbery charge (R-256), but the Appellant's primary concern at the initial plea bargaining phase was that he be transferred back to Massachusetts to serve time and that there be no death penalty (R-196). The government apparently notified Appellant that the State of Florida could not guarantee a

[17] The Appellant did not cross-appeal the denial of the request for suppression of said statements.

prisoner transfer (R-198). Appellant spoke with Investigator Ladwig between ten to fifteen times, (R-4932), November 22, 1991, inclusive. Appellant and Ladwig met on November 5, 1991, and Ladwig brought up the plea bargaining option by telling Appellant that "We can always broach that subject again". (R-209). Ladwig was obviously attempting to resurrect the negotiations. Appellant was not so much interested in a guarantee of a transfer to Massachusetts, but at that time he was more concerned with the State guaranteeing that they would _try_ to get him transferred. Ladwig's report of his visit with Richardson on November 5, 1991 was that the Appellant required a written contract with Ladwig responding, "I told Richardson that the State would probably do that under the following terms. That, 1: Prior to any signed agreement between him and the State, Richardson would have to provide a full confession to the Carrie Lee case; 2: Richardson would then have to appear in court to have sentence passed on that case, at which time I am sure the State would sign an agreement stating that they would petition on his behalf wherein transferred to the State of Massachusetts offering no guarantees that the transfer would actually take place; and 3: The Defendant would be sentenced as a habitual violent offender (R-T1-1930). Richardson agreed. (R-123). Ladwig did note in his report he would relay the

"new plea offer from Richardson" to the prosecutor assigned to the case (R-124). Ladwig denied that he was making a plea offer despite the clear meaning of the words (R-258). The offer by the State was very clear. Ladwig's report reflects that the State was still agreeable to his conditions and again established the written contract would include the attempt to have the Appellant transferred to the State of Massachusetts and the State would not seek the death penalty after receiving a confession to the murder of Carrie Lee. The Defendant was also bargaining that charges against his father would be dropped (R-113).

Ladwig and Appellant next met November 15, 1991 and the Appellant purportedly indicated he was ready to confess to the Carrie Lee murder if all the conditions precedent were established; Ladwig tried to get a confession immediately (R-211). Appellant declined to do so.

The Appellant's confession allegedly issued on November 21, 1991 contained, at best, the Appellant saying "I did it, I confess" (R-127). Ladwig spoke with Appellant twice on November 22, 1991. He received plea negotiations terms from Richardson, (R-280) and thereafter went to talk to the Assistant State Attorney. An agreement was reduced to writing and Ladwig delivered the same to the Appellant. The Assistant State Attorney

had signed the document prior to Ladwig's return on that same date. (R-281-82). Ladwig attributes to his recantation that the Appellant must confess in order to attempt to negotiate any plea by stating that he had "got words out of order" (R-282). Ladwig does finally acknowledge that his mission on his second trip to see the Defendant on November 22 was to secure a plea with the full knowledge of the Assistant State Attorney (R-284). November 22, 1991, is the only date that the Appellant purportedly gave a detailed confession. No further negotiations between the Appellant, in pro se and State occurred subsequent to November 22, 1991.

The State was first notified of the trial counsel's objections to the statement issued on November 21 and 22, 1991, in Mr. Richardson's first trial (R-T1-1731). The Court took the issue under advisement.

Ladwig's explanation of his confusing statements was simply that "I think I meant that I wanted him to confess to me if he did it before we went any further in any negotiations" (R-246). However, and speaking out of the other side of his face, the following testimony occurred: "And that plea offer again was represented to Mr. Richardson on the 5th. A: I told him that it still stood; if he had given it any thought" (R-249) Again Ladwig

iterates that the meeting on the 15th of November a plea offer was made to the Defendant from the State (R-251). Ladwig was the relay man bringing the State's plea offer to the Defendant on behalf of the Office of the State Attorney (R-252).

The Appellant was sentenced on an unrelated homicide November 21, 1991 (R-259). Detective Ladwig learned, at that time, that the Appellant had successfully negotiated a charge of armed robbery and that Ladwig would no longer be able to use that as a plea bargaining factor. Ladwig was "upset" about this and expressed his concern, "to anybody that would listen" (R-259). Ladwick notified the Defendant that "Any plea negotiations we had prior to that date were off" (R-264). Ladwig made it clear that the revocation of all plea bargaining offers included "the counter-offer" that the State had issued (R-264).

The issues, facts and argument regarding the plea negotiations was fully articulated in Appellant's first trial (R-T1-1920-49; R-T1-1952-61). The trial judge denied the defense Motion and allowed the statements to be introduced.

The defense resurrected this same issue in trial number three (R-T3-4673-75; R-T3-4846-55). The State also sought to preclude any plea bargaining despite that the statements of November 21 and November 22, 1991 were going to be admitted, (R-T3-4932-35; R-T3-

5073). The trial court sustained the prosecutor's objection (R-T3-5076). The Defendant did establish that plea bargaining was ongoing as of November 22, 1991 (R-T3-5072). Appellant was unable to testify as to the benefit of the bargain which he would have received solely as a result of the judge sustaining the State's objections (R-T3-5073).

The incriminating statements of the Defendant were issued as a direct result of ongoing plea negotiations while the Defendant was representing himself on the instant cause in pro se. Section 90.410 Fla. Statute provides:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under Chapter 837.

It is an inescapable conclusion that Daytona Beach and the Office of the State Attorney required a confession prior to the acceptance of any of the Defendant's negotiated terms. The confession of the Appellant was the predicate act. Ladwig at various times admitted or denied that plea negotiations were ongoing, however, the aforenoted record shows how easily this particular officer/investigator can disregard the truth with utter

abandon. This Court has addressed that the same witness has been found to be "at least recklessly false" in his statements in affidavits issued for the execution of arrest/search warrants. Terry vs. State, Fla. Law Weekly, Vol. 21 No. 2, January 12, 1996.

The negotiations were not only ongoing, but were subject to modifications. The Appellant relented on a guarantee that he be transferred to a prison in Massachusetts, and the deal did not coagulate as a result of additional factors which the State had included in its signed, written plea bargain offer. However, and at all material times regarding the Defendant's statements against interest, he had the expectation that a plea bargain would be secured. This is not a situation where the Defendant is ttempting to void a statement made subsequent to the consummation of any plea bargain.

This court has addressed this very issue in Groover v. State, 458 So.2d 226 (Fla. 1984). The court therein considered whether a sworn statement made in fulfillment of a negotiated plea bargain is a statement made in connection with a plea for purposes of the rule[18] or of the Statute. The statements of the Appellant as alleged by Ladwig quite obviously were made to induce, enhance

[18] Rule 3.171 Fla. Rules of Criminal Procedure.

negotiations and were issued as a direct and critical factor of said negotiations.

The Appellant was bargaining for a plea with the investigator for the Office of the State Attorney in and for the Seventh Judicial Circuit. Ladwig admitted on many occasions he was the relay man with messages being sent back and forth between the Assistant State Attorney and in fact, the said Assistant State Attorney signed a written contract which was delivered to Appellant by Ladwig. This Court has addressed this issue in a case factually remarkably similar. Anderson v. State, 420 So.2d 574. This Court therein adopted the characterization of the conversations between the Office of the State Attorney and the Appellant as set out in United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978). The court in Anderson, *supra*, noted that the facts therein did not involve unilateral offers by individual defendants and found the negotiations identical to instant cause as distinguishable and inadmissible.

The court has recognized that Rule 3.172(h) was adopted to promote plea bargaining in such a fashion which would allow the Defendant to negotiate without waiving his fundamental right to remain silent as guaranteed to him by and through the Fifth Amendment and the Fourteenth Amendment in the United States

Constitution. "The most significant factor in the Rule's adoption was the need for free and open discussion between the prosecution and the defense during attempts to reach a compromise." Groover , *Id.* at 228 citing United States vs. Davis, 617 F.2d 677, 683 (D.C. Cir. 1979) *emphasis added.* By definition, the first tier of the analysis is, "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion." Robertson, *supra* at 1366. The court emphasized that once an agreement has been achieved, subsequent statements cannot be made with any expectation of protection. It is parenthetically noted that the plea agreement had not been breached by Appellant.

It has been subsequently recognized that "guilty pleas are an essential part of our criminal justice system, and candor in plea discussions aids greatly in the reaching of agreements between the defendant and the State." Landrum v. State, 430 So.2d 549, 559 (Fla. 2 DCA 1983); quoting State v. Trujillo, 93 N.M. 724, 727, 605 P.2d 232, 235 (1980).

The purpose of Section 90.410 has been considered to be of such importance that a violation of the Section cannot be deemed harmless. Landrum, supra; Dawson v. State, 585 So.2d 443 (Fla. App. 4 Dist 1991).

The record is overwhelming in the facts which establish that Appellant, in pro se, was negotiating a proposed resolution of the case sub judice. He had every reason to believe that the negotiations would remain inadmissible and has expressed his subjective expectation that negotiations were ongoing. The State in fact solicited these statements in question from the Appellant and as such should have been held inadmissible, Stevens v. State, 419 So.2d 1058 (1982), *cert. denied 103* S.Ct. 1236, 459 U.S. 1228, 75 L.Ed.2d 469, - conviction relief granted in part 552 So.2d 1082.

FOURTH ISSUE

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S CHALLENGE TO THE VENIRE AND RELATED MOTIONS TO DISMISS.

The timely amended Challenge to Panel finds fault with the fashion with which Florida fixes the jury pool with said fault fixed in both the Florida Statute and the United States Constitution. (R-448-450). Further, in a related motion the Appellant sought to have the Motion to Dismiss under a similar argument with the distinction being that said Motion to Dismiss challenged the composition of the grand jury. (R-445-447).

For all material times to the cause sub judice, members of the venire were selected from a pool comprised only of registered electors of the County of Volusia.[19] No alternate method of selecting the names of perspective jurors was provided for and made available to the Appellant by the majority of the judges of the circuit.[20] The method of compiling the data base has been amended by section 40.011.[21] However, the department data base provided by the Department of Highway Safety and Motor Vehicles will not be utilized by the Clerk of Court in each respective county until January 1, 1998.

Appellant finds fault in the manner with which the pool of the venire and the grand jury was established. Volusia County has approximately 18% total Black population, however, a mere 5.9% of said Black population are registered voters. Appellant expressed his concerns regarding the disproportionate non-representation of Blacks on the jury early in the proceedings. (R-548-552). Appellant personally issued his challenge to the panel with an assessment that it was a "suburbanized white panel". (R-T3-4007-

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[19] Section 40.01 provides "jurors shall be taken from the male and female persons of at least 18 years of age who are citizens of this State and who are registered electors of their respective counties."

[20] Section 40.225.

[21] Added by laws 1991, c. 91-235, Section 2, eff. Jan. 1, 1992.

4010). The objection was renewed at Appellant's third trial. (R-T3-4050). The trial court had been presented with the same issue prior to each trial and finally stated "...once and for all you made your point... I'll stand by my ruling." (R-T3-4052). The court officially announced that the instant motion was denied. (R-T3-4051). The court did not exercise its discretion by issuing an order that would summon jurors in addition to the regular panel as provided for by Section 913.15, Florida Statutes.

This court has previously held that it will not tolerate any unconstitutional jury districting system. Craig v. State, 583 So.2d 1018 (Fla. 1991). The court therein held that equal protection of the laws is guaranteed to the Appellant by article I, Section 2, of the Florida Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. The court noted therein held that there was an unconstitutional systematic exclusion of a significant portion of the Black population from the jury pool. Likewise, the list of registered voters in the case sub judice from which the Clerk's office exclusively drew the names of the potential members of the venire is constitutionally infirm. African-Americans are grossly disproportionate in the actual composition of the members of the venire and the grand jury in the mathematical possibilities of

being represented by members of the venire. As aforenoted, Volusia County has merely 5.9% Black registered voters as opposed to a total of 18% of the Black population. This is intolerable and the legislative branch has seen fit to correct this perceived error. Appellant has repeatedly raised this issue despite that the issue need not be preserved.[22] The Appellant's protests repeatedly fell upon the deaf ears of the lower court.

The manner of establishing the list for the venire, as implemented in the case sub judice, has been previously approved by the Supreme Court. State v. Silva, Sup.Ct.Fla.1972, 259 So.2d 153. Appellant recognizes that his proposition that "a system to either exclude or include a certain fixed percentage of qualified black citizens of Dade who were registered voters was violative of due process and equal protections." However, Florida, as a progressive State, has refined constitutional protections of the accused since the 1972 decision contained in Silva. For example, this court has held that challenges for cause cannot be based solely upon racial factors. State v. Neal, 457 So.2d 481 (Fla. 1984). This court has extended that notion to include gender discrimination when either party exercises preemptory challenges based on gender alone, Laidler v. State, 627 So.2d 1263 (Fla. App.

[22] See Craig v. State, *Id.*, at 1020.

4 Dist. 1993). Therein, this court noted that, "Florida has had a long history of invidious discrimination against women serving on juries ." Laidler, *Id.* at 1264. The court further noted the history of discrimination against women for purposes of service on a jury. Likewise, it is urged upon this court that the Silva case, *supra*, should be revisited and over-ruled pending the effective date of the statutory modification of section 40.011,

FIFTH ISSUE

THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA ERRED IN ACCEPTING THE APPEAL FROM THE OFFICE OF THE STATE ATTORNEY IN AND FOR THE SEVENTH JUDICIAL CIRCUIT; IF so, THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT REGARDING ITS SUPPRESSION OF EVIDENCE OF A TWENTY-TWO CALIBER BULLET AND WILLIAMS RULE EVIDENCE.

The Fifth District Court of Appeal erred in accepting the appeal by the State on the instant cause. The Honorable Gayle S. Graziano entered her order as trial court suppressing Williams Rule Evidence.[23] (R-217-218). The State filed its timely Notice of Appeal regarding said order. (R-219). All proceedings were stayed upon petition by the State. (R-221).

23 Williams v. State, 110 So.2d 654 (Fla.), *cert. denied, 361* U.S. 847, S.Ct. 102, 4 L.Ed.2d 86 (1959)

The record below reflects an extensive argument regarding Williams Rule evidence. The trial court found specifically, upon considering arguments of counsel, case law submitted by counsel and a review of the Notice of Similar Fact Evidence that such evidence regarding the Floyd homicide "is irrelevant to prove any material issue and fact." (R-217).

The State impermissibly sought appeal with the Fifth District Court of Appeal. The State's right of appeal in criminal cases is strictly limited. R.L.B. v. State, 486 So.2d 588 (Fla. 1986); State v. C.C., 476 So.2d 144 (Fla. 1985). The State apparently relied upon Rule 9.140(c)(1), Florida Rules of Appellate Procedure as the predicate for said appeal. That rule sets forth the sole situations whereby the State has its right of appeal. Subsection (B), upon which the State relied for authority provides that the State may appeal an order, "suppressing before trial confessions, admissions or evidence obtained by search and seizure." See *also* Article V, Section 4(b)(1), Florida Constitution; State v. Smith, 260 So.2d 489 (Fla. 1972). The trial court's ruling in the case sub judice concerned only the inadmissibility of irrelevant evidence. It is then, by definition, not an order suppressing a confession or admission or suppressing "evidence obtained by search and seizure." The court's order made a very specific

factual finding that the said evidence was irrelevant. (R-217-218). Cases have been cited by the government regarding its attempt to substantiate the initial appeal by the State of Florida. State v. Palmore, 495 So.2d 1170 (Fla. 1986), dealt with an order suppressing a signed confession. Other cases cited by the State dealt with a seizure and the taping of telephone conversations that the court held was a search and seizure.[24] State v. Everette, 532 So.2d 1124 (Fla. 3rd DCA 1988)[25] does not address the issue of the appealability of any lower tribunal. The question was only referenced in a footnote, and as such, are not applicable on the instant cause.

The Fifth District Court of Appeal disagreed with argument made on behalf of the Appellant. (R-247-257).

The Fifth District Court of Appeal opined that the trial court erred in limiting the State's ability to present evidence of the totally distinct murder of Kevin Floyd. Bullets relating to that murder could not be linked to the gun used in the instant killing. The Fifth District Court of Appeal substituted its judgment on factual matters and merely disagreed with the weight

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[24] State v. Ono, 552 So.2d 234 (Fla. 5th DCA 1989); State v. Katiba, 502 So.2d 1274 (Fla. 5th DCA 1987).

[25] Previously cited by the State.

of the evidence presented to the trial court. The trial court is the sole trier of fact on this matter and said court chose to weigh the evidence in favor of the Appellant. Judge Graziano observed that the evidence of other crimes sought to be presented by the State was not conclusive enough to make it relevant in the instant cause. Further, the trial court, after weighing all the evidence, determined that even if it was relevant, the prejudicial impact of said evidence would outweigh its probative value. The Fifth District Court of Appeal overlooked the fact that the process of weighing the evidence is the sole province of the trial court and the resultant finding of fact by the trial court cannot be overturned by said Fifth District Court of Appeal by independent review of a cold record. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This principal is equally applicable to the State. Thus, the trial court's factual finding came to the Fifth District Court of Appeal with a presumption of correctness. McNamara v. State, 357 So.2d 410 (Fla. 1978); State v. Cardosa, 609 So.2d 152 (Fla. 5th DCA 1992) . The obligation of the Fifth District Court of Appeal while operating as a reviewing court was simply to "interpret the evidence and reasonable inferences and

deductions derived therefrom in a manner most favorable to sustain the trial court's ruling." McNamara, *supra* at 412. The Fifth District Court of Appeal ignored this obligation.

The trial court carefully and cautiously considered the weight to be given the evidence that the State sought to present in its Williams Rule motion and argument and ruled the evidence was not relevant. The trial court heard, weighed and evaluated the proposed evidence and correctly ruled that the evidence was inadmissible. (R-217-218). The suggested evidence was irrelevant, was not probative and was not sufficiently connected to the Appellant and/or to the instant crime. In Williams v. State, 110 So.2d 654, 662 (Fla. 1959), this court specifically stated that: 'the matter of relevancy should be carefully and cautiously considered by the trial judge". (emphasis supplied).

The State claimed relevance to show identity yet there was not the unique similarity that must be present to prove what is essentially recognized as a signature. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). General similarity was insufficient and was not so unusual as to point the proverbial finger at the Appellant. The only similarity that occurred between the two killings was the potential of a .22 caliber bullet. However, no

expert from FDLE expert was unable to state that the same gun was used in either homicide.

Likewise, and concerning the alleged relevancy to show motive, the evidence of motive, in order to be admitted must have some relevant or material bearing on some essential aspect of the offense being tried. Evidence of other crimes to show motive, plan or intent can be admitted only when the crime charged is one of a system of criminal acts occurring so near together and so nearly similar in means as to lead to inference that they are all mutually dependent and committed in pursuance of the same deliberate criminal purpose. See Smith v. State, 365 So.2d 704 (Fla. 1978); Ashley v. State, 265 So.2d 685 (Fla. 1972); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948); Suarez V. State, 95 Fla. 42, 115 So. 519 (1928).

The cases cited by the Fifth District Court of Appeal rely primarily upon motive or plan for the admission of evidence of the other crimes that tended to show relevance for some other material issue, or dealt with other situations where the crimes were intertwined or where the evidence proved the defendant's specific intent to commit the subsequent crime. (R-255-257). It has been noted that it should be crystal clear that the crime

being tried was committed solely because of the prior crimes. (R-247-257). Heiney v. State, 447 So.2d 210 (Fla. 1984).

In Craig v. State, 510 So.2d 857 (Fla. 1987), the evidence of cattle theft from the same victim was relevant to show the Appellant's plan and intention to eliminate that witness to the thefts in order to avoid apprehension. In Heinev, *supra*, the court held that the prior aggravated battery and the Appellant's statements after the shooting that he was going to hitchhike to Florida were relevant to show a specific motive that was inextricably intertwined with a crime for which the defendant was being tried. Hypothetical issues posed were that since the police were searching for the Appellant for the shooting in Texas and since the Appellant had no money and no car, he was desperate to escape the police and had, in fact, hitchhiked to Florida where he killed the driver of the car. In Heinev, *supra*, the evidence was held to be relevant to show identity and was inseparable from the later crime because of the entire context of the events wherein the defendant was driving the victim's car all over the southern United States and using the victim's credit cards to obtain money in order to avoid imminent apprehension.

Here, as factually determined by the trial court, the crimes are separable and not necessary to show the entire context of the

Lee killing. Factually speaking, there is no showing that the Lee killing was motivated by sudden need to escape town, as was established in the Heiney, *Id.*, case. The State attempted to show that the Appellant did need money prior to the Lee killing by the introduction of statements purportedly issued to Appellant's father.

The trial court considered all facts and weighed them in the Appellant's favor; the trial court's finding was simply ignored by the Fifth District Court of Appeal. The trial court's ruling, therefore, should not have been disturbed by the Fifth District Court of Appeal. Said ruling was based upon a proper weighing of the facts of the case and a careful, considerate and articulated decision regarding the law of the case that is within the sole province of the trial court. The Fifth District Court of Appeal effectively substituted its judgment on the weighing of the evidence for the judgment of the trial court. Said substitution is totally inappropriate.

That, and in the event that this court does not agree with the aforenoted argument, Appellant states that the government's appeal cannot be reviewed by common law certiorari. Certiorari is an extraordinary writ available only where any order of court is sought to be reviewed and would effectively negate the State's

ability to prosecute the accused and would result in a miscarriage of justice. R.L.B. v. State, *supra*; State v. Pettis, 520 So.2d 250 (Fla. 1988) (plurality opinion). There is no showing that in the pretrial ruling that the evidence was irrelevant and as such, inadmissible and further in any way negates the State's ability to prosecute the defendant. There is no additional showing that the ruling departs from the essential requirements of the law in causing a miscarriage of justice. The Fifth District Court of Appeal was in error in entertaining the extraordinary writ of certiorari.

SIXTH ISSUE

THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

The trial court instructed the jury that, "A reasonable doubt in not a possible doubt, a speculative, imaginary or forced doubt." (R-T3-5291). *Emphasis added.* The instruction is constitutionally infirm. The instruction improperly tells the jury that reasonable doubt cannot be a "possible doubt." and as such, this instruction is improper. United States v. Shaffner,

524 F.2d 1021 (7th Cir. 1975)[26]

Finally, the language stating that a reasonable doubt is not a speculative, imaginary, or forced doubt, is also improper. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative" a court is "playing with fire" when it goes beyond that. United States v. Cruz, 603 S.Ct. 2078 (1993). The improper instruction regarding reasonable doubt denied Richardson Due Process and a fair trial. Amends. V and XIV, U.S. Const.: Art. I Section 9, Fla. Const. Richardson's conviction and sentence must be reversed and this cause remanded for a new trial.

SEVENTH ISSUE

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury

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[26] In Shaffner the jury was instructed: 'It is not necessary for the government to prove the guilt of the defendant beyond all possible doubt." The reviewing court held that, 'It is quite clear that this part of the instruction favors the government on the issue of reasonable doubt."

instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

Burch, *Id.*, decided that a verdict by a jury of six must be unanimous. The Court looked to the practice in the various states in determining whether the statute was constitutional aspect of the conviction and the court indicated that a similar practice violates Due Process. The court also expressed an opinion that cruel and unusual punishment claims will require the court to look to the precise nature of the various states legal position regarding death penalty. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allow an Element of the Crime to be found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Constitution of the State of Florida and the Fifth, Sixth Eighth and Fourteenth Amendments to the United State Constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g. Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the

penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

3. <u>**The Florida Judicial System**</u>

The sentencer **was** selected by a system designed to exclude African-Americans from participation **as** circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against **slavery,** and the prohibition against cruel and unusual **punishment.**[27] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and **vacate** the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See <u>State v. Neil,</u> 457 So.2d 481 **(Fla.** 1984); <u>Batson v. Kentucky,</u> 476 U.S. 79 (1986); <u>Swain v. Alabama,</u> 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the 15th Amendment a **well.**[28]

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[27] These rights are guaranteed by the 5th, 6th, 8th, 13th, 14th and 15th Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17 and 21 of the Florida Constitution.

[28] The 15th Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[29] Prior to that time, judges were selected by the governor and confirmed by the Senate. 26 Fla. Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, *638* F.2d 1239, 1245-47 (5th Cir. 1981), *modified 688* F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, *on remand 748* F.2d 1037 (5th Cir. 1984).[30]

The history of elections of African-American circuit judges in Florida shows the system had purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, *2.8%* of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District).

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[29] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

[30] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeal so held.

Florida's population is 14.95% black. County and Citv Data Book, 1988, United States Department of Commerce. In St. Lucie and Indian River Counties, there are circuit judgeships, none of whom are black. Sinqle Member Districts, *supra*. The Appellant raised the issue regarding the selection of potential members of the jury and the disproportionate representation of the black community.

Florida's history of racially polarized voting, discrimination[31] and disenfranchisement,[32] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Roqers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in

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[31] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[32] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

election of the decision-makers in a criminal trial.[33] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channeled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida encourages the especially unreliable decision making process by death recommended sentencers in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

[33] In choosing judges in the Ninth Circuit (only three circuit judges since Reconstruction) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

4. Appellate Review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Mavnard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), and is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United states, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987)(overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring),

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978)(finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[34]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the 'hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[35] it has been broadly

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[34] For extensive discussion of the problems with these circumstances, See Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, Stetson L.Rev. 47 (1987), and Mello, Florida's "heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[35] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate re-weighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ('the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[36] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossmand v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use

[36] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a non-statutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the

of victim impact information in violation of 8th Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated 8th Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United Sates Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[37] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven

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special scope of review violates the Eighth Amendment under Proffitt.

[37] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the 8th Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible.

Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). *But see* Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar 6th Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates A Presumption OF Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[38] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[39] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the 8th Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also crates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened due

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[38] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[39] The presumption for death appears in Section 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not to Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), *reversed on procedural grounds sub nom.* Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[40] principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The instruction given violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

[40] Lockett v. Ohio, 438 U.S. 586 (1978)

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amount to excruciating torture. See Gardner, Executions and Indignities--An Eight Amendment Assessment of Method of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner") . Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

EIGHTH ISSUE

THE LOWER COURT ERRED IN EFFECTIVELY DENYING THE APPELLANT HIS FUNDAMENTAL RIGHT TO MEANINGFULLY REPRESENT HIMSELF.

The Appellant demanded that he be given the opportunity of representing himself. (R-T3-4653-4657). His demand was unequivocal[41] in nature. Appellant noted that he had made this decision intelligently. (R-T3-4653-4657). Appellant moved for a continuance citing the extensive record of the case and noting to the court that he was not prepared for trial. Appellant requested a continuance in order to reacquaint himself with the extensive file that had been accumulated.

The trial court declined to grant the Appellant a continuance. (R-T3-4658). Specific inquiry was made of the Appellant as to whether or not he wished to have counsel appointed for representation to which the Appellant repeatedly responded in the negative. (R-T3-4658). It was established that the Appellant had had possession of the file for a short duration and "stand-by counsel" was not prepared for trial because of the interim lack of possession of said file. (R-T3-4664).

[41] Chapman v. U.S., 553 F.2d 886 (5th Cir. 1977).

The Appellant's unequivocal demand for self-representation was violated by the lower tribunal. Faretta v. California, 422 U.S. *806, 807,* 95 **S.Ct** 2525, *2527, 45* **L.Ed.2d** 562 (1975). Faretta provides that Mr. Richardson has a constitutional right to proceed without counsel. Of course, his choice must be made voluntarily and intelligently, and it is maintained that Mr. Richarson's choice was so exercised; Mr. Richardson's request was not fully appreciated by the lower tribunal and as such, Appellant was required to go forward represented by counsel. The lower tribunal did not go forward with a full Faretta Inquiry, *Id.* Appellant does raise this as an issue even in view of the recent opionion of this court. See State v. Roberts, 21 Fla. Law Weekly, S221, Vol. 21 May 24, 1996.[42]

NINTH ISSUE

THE LOWER TRIBUNAL ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO CONTINUE.

Appellant incorporates by reference all previously issued arguments regarding his demands for self-representation. Certainly, and under Faretta, *Id.,* Appellant was entitled to not

[42] Defendant had repeatedly requested self-representation and, reluctantly accepted counsel. The record is repleat with said action, however, it is readily apparent that Mr. Richardson's desires to represent himself were offered in a sincere fashion.

only self-representation but further, was entitled to meaningful self-representation. While the Appellant might be perceived as manipulating the proceedings 'by willy-nilly leaping back and forth between the choices of having appointed counsel or proceeding pro se"[43] this simply is not the case at hand.

The Appellant had a meaningful request of the court that he be allowed to intelligently review his case prior to proceeding at trial on a capital murder case. (R-T3-4659). The lower tribunal abused its discretion in denying Appellant's request for continuance at trial.

TENTH ISSUE

THE LOWER TRIBUNAL ERRED IN FAILING TO CONDUCT AN ADEQUATE FARETTA[44] INQUIRY PRIOR TO APPELLANT PROCEEDED IN PRO SE ON THE DEATH PENALTY.

Essentially put, the lower court's inquiry of the Appellant subsequent to the rendering of a verdict of guilty was wholly inadequate and did not meaningfully inquire of the accused as to his ability to proceed on the death phase. (R-T3-5372-5506).

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[43] Jones v. State, 449 So.2d 253 (Fla. 1984) at 259.

[44] The lower court made minimal inquiry regarding Appellant's ability to present himself meaningfully before the jury at the death phase of the instant cause.

Jones, *supra,* stands in part for the proposition that the failure to renew offer of counsel at sentencing stage to the defendant was not reversible err. However, the instant cause is materially different in that Appellant had never been assessed by the court as to his ability to proceed in pro se on this life-threatening proceeding. The United States Constitution provides to the Appellant his fundamental right to Due Process. The Appellant's due process rights were violated when the lower tribunal failed to inquire meaningfully of the Appellant as to his ability to proceed with the death phase. Fifth, Sixth and Fourteenth Amendments to the United States Constitution. It is understood that both the State and the accused are entitled to orderly and timely proceedings. Jones v. State, 449 So.2d 253 (Fla. 1984). However, it must be underscored that this was not the first or second trial for the Appellant. Timeliness and proceeding in an orderly fashion should not be considered as an issue at the death phase in that the Appellant had not been faced with these complex issues that typically would be presented at death phase with competent counsel.

CONCLUSION

For reasons prayed for herein this Court should grant this, the Appellant's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand-Delivery to Mark Dunn, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118 and Larry D. Richardson #B-618999-442167, Union Correctional Institution-Al, Post Office Box 221, Raiford, Florida 32083; this 17th day of June, 1996.

PAUL J. DUBBELD, Esquire
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