IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,134



**TIVAN JOHNSON,**

Appellant,

vs.

**THE STATE OF FLORIDA,**

Appellee.

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

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

This is an automatic direct appeal from judgments of conviction and sentence -- including a death sentence -- entered following a jury trial before the Honorable Arthur I. Snyder of the Eleventh Judicial Circuit of Florida, in and for Dade County.[1]

On July 3, 1991, a Dade County grand jury returned an indictment charging Appellant and his co-defendant, Albert Cooper, with: (1) the first-degree murder of Charles Barker; (2) the armed burglary of a pawnshop owned and operated by Charles Barker; and (3) the armed robbery of Charles Barker; and (4) the commission of one or more felonies while "unlawfully and feloniously display[ing] firearm(s)," in violation of Florida Statutes, § 790.07. (R. 1-3.) Appellant, who was 20 years old at the time of the alleged offenses, pled not guilty to all four counts.

After a joint trial of Appellant and his co-defendant Cooper in 1995, the jury convicted Appellant of all four counts. (R. 263-66; Tr. 2434.)[2] After a joint sentencing hearing in front of the advisory jury, jurors, by votes of 8-4, recommended death sentences for both Appellant and co-defendant Cooper for their respective first-degree murder convictions. (Tr. 3408-09.) The trial court followed the advisory jury's recommendations and sentenced both Appellant and his co-defendant to death. After departing from the sentencing guidelines'

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[1] In this brief, the clerk's record on appeal is cited as "R." and the court reporter's transcription of the proceedings is cited as "Tr."

[2] The jury also convicted co-defendant Cooper of all four counts.

recommended sentences, the trial court additionally sentenced Appellant to two consecutive life sentences for the armed burglary and armed robbery convictions and, pursuant to Florida Statutes, § 775.087(2), imposed two three-year minimum mandatory terms of imprisonment on those two counts. (R. 644-45.) The trial court vacated Appellant's conviction for committing a felony while possessing a firearm. (R. 648.)

The evidence at trial established the following: The State's first witness, Debra Barker, testified that she was married to the decedent, Charles Barker, at the time of his death. (Tr. 1216.) Mr. Barker owned and operated the Outpost Pawnshop in Dade County. (Tr. 1216.) On Saturday, May 25, 1991, Mrs. Barker was expecting her husband to arrive home around 5:30 p.m., as he usually did after closing the pawnshop at 5:00 p.m. (Tr. 1217.) When Mr. Barker did not arrive home by 6:00 p.m., Mrs. Barker became worried and requested that her friend, Marjorie Bower, go to the pawnshop. (Tr. 1219-20.) Bower agreed to drive to the pawnshop and check on Mr. Barker. Thereafter, Bower's husband informed Mrs. Barker that her husband had been killed. (Tr. 1221.) Mrs. Barker further testified that her husband, a former police officer, regularly wore a pistol on his hip when he worked at the pawnshop. (Tr. 1224.) The State's second witness was Marjorie Bower. (Tr. 1231.) Bower testified about being called by Mrs. Barker and being asked to go to the Outpost Pawnshop to see if anything had happened to Mr. Barker. (Tr. 1233.) Sometime after 7:00 p.m., Bower entered the pawnshop, where she heard loud music playing. (Tr. 1236.) Bower looked through a Dutch

door that led to a back room in the pawnshop and saw blood on the floor. (Tr. 1239.) She then exited the pawnshop and located a nearby police officer, who called for back-up officers. (Tr. 1240.)

The State's third witness was Metro-Dade Police Officer Frankie Lee Buckner, Jr. Officer Buckner testified that on May 25, 1991, he was employed as a uniformed patrol officer, but was moonlighting as a security guard in a building located near the Outpost Pawnshop. Shortly after 7:00 p.m., Buckner was approached by Marjorie Bower, who asked him to go to the pawnshop. (Tr. 1258, 1269.) Before entering the pawnshop, Buckner radioed for a police backup. Accompanied by other officers, Buckner went inside the pawnshop, where he found Charles Barker behind the counter "lying on the floor with several gunshot wounds." (1260-61.) Barker's dead body was found inside the pawnshop's office; the office had a Dutch door. (Tr. 1263, 1271.)

The State's fourth witness was Robert Latta. Latta testified that he worked for Charles Barker in May of 1991 at the Outpost Pawnshop. (Tr. 1281.) According to Latta, at the close of an usual business day (shortly after 5:00 p.m.), Barker would count his daily cash receipts on a stool inside the pawnshop's office. (Tr. 1290.) Barker regularly wore an exposed Colt .45 pistol on his hip while working at the pawnshop. (Tr. 1291.) A week after Barker was killed, Latta went into the pawnshop. Latta noticed that a Mossberg shotgun was missing from the gun rack inside the pawnshop. (Tr. 1295.) Latta was then shown a Mossberg shotgun by the prosecutor. Latta stated that "this appears to be like the gun that was on the

rack." (Tr. 1295.) Latta also testified that he noticed that two other guns were missing from the pawnshop, a Cobray nine millimeter pistol and a Mac-10 semi-automatic pistol. (Tr. 1296.) The prosecutor asked Latta to identify a pawn slip with the name Benjamin Brown on it, which was dated 4:42 p.m., May 25, 1991. Latta testified that Brown was a "regular customer" at the Outpost Pawnshop. (Tr. 1313-14.)

On cross-examination, counsel for Appellant asked Latta if Charles Barker had a license to sell firearms at the pawnshop. Latta responded affirmatively, but also stated in response to a question from counsel that Barker did not have a license to sell automatic weapons. (Tr. 1328.) Latta also testified that Benjamin Brown was routinely not asked to show identification when he pawned property because he was a known customer. (Tr. 1345.) Instead, because Barker and Latta were familiar with Brown, they would simply have Brown sign and fingerprint a pawn slip, give him money for a pawn, and then would later fill out the relevant information for Brown's transactions on a pawn slip (*e.g.*, his address) based on information contained in the pawnshop's files. (Tr. 1346.) Latta also testified that when Charles Barker recorded the time of a transaction, it was invariably correct; Barker was meticulous at recording times because of a Dade County ordinance that prohibited pawn transactions after 5:00 p.m. (Tr. 1348.)[3] Latta further testified that no one had ever done a "complete inventory" of the property in the pawnshop

[3] Dade County authorities reviewed the pawn slips on a daily basis. (Tr. 1368.)

after Barker's death and, thus, he could not determine what property, if any, was missing (besides the three guns mentioned previously). (Tr. 1352.) According to Latta, the pawnshop was poorly organized at the time of Barker's death. (Tr. 1354.)

The State's fifth witness was Benjamin Brown. Brown testified that he had been a part-time worker at the Outpost Pawnshop and also a regular customer in 1991 and, thus, knew the pawnshop's proprietor, Charles Barker. (Tr. 1379-80.) Brown testified that he went into the pawnshop around closing time on May 25, 1991. (Tr. 1384.) Brown was shown a pawn slip dated May 25, 1991, with his name on it. He identified it as the slip which memorialized his pawn transaction on that date. (Tr. 1384.) The slip stated that the transaction occurred at 4:42 p.m. (Tr. 1384.) Brown testified that when he entered the pawnshop shortly before closing time on May 25th, he was let in by "a guy" -- an apparent customer -- who was already inside the shop. (Tr. 1386.) According to Brown, two other apparent customers were also inside the shop, along with Barker. (Tr. 1387, 1389.) All three of the apparent customers were black males. (Tr. 1390.) The person who opened the door for Brown told Barker that Brown could do his pawn transaction first since he was carrying a heavy tool. (Tr. 1388.) According to Brown, "when I got up to the front of the desk [Barker] didn't look the same" and acted differently. "We was looking kind of weird like." (Tr. 1392.) In particular, the normal jovial Barker did not joke with Brown, as he *always* did whenever Brown came to pawn something. (Tr. 1392-93.) "This day he didn't open his mouth to me." (Tr.

1393.) Brown testified that he put his fingerprint on the pawn slip at 4:42 p.m. (Tr. 1394.) Brown identified Appellant's co-defendant, Albert Cooper, as being one of the three black males who were inside the pawnshop shortly before closing time on May 25, 1991. (Tr. 1400.) Brown was not able to identify Appellant as one of the three black males.

On cross-examination, Brown testified that he did not fill out the pawn slip bearing his name and dated May 25, 1991. Rather, he only signed it and placed a thumbprint on it, and Barker then gave him money for his tool that was pawned. (Tr. 1401.) Brown explained that the home address that was recorded on the pawnslip -- 2166 N.W. 74th St. -- had been his address when he first began to pawn items many years ago. Brown's address on May 25, 1991, was 75 N.W. 68th Terrace. The reason that the former address was on the pawn slip was because, after Brown left the pawnshop, Barker had referred to outdated information in his files when he filled out the pawn slip for Brown. (Tr. 1402-09.) Brown further testified that Barker repaired weapons in the pawnshop. Barker had a friend from the Army who came into the shop and worked on weapons with tools. (Tr. 1426-27.)

The State's sixth witness was Metro-Dade Police Officer Tommy Stokes, who was a crime scene investigator in the instant case. (Tr. 1435.) Stokes was shown pictures and sketches of the crime scene and was asked to identify pictures of bullet projectiles and casings that were under or nearby the dead body of Charles Barker. (Tr. 1441.) According to Stoker, the bullet casings were ejected from a

.380 semi-automatic weapon. (Tr. 1442-50, 1477.) Stoker also testified that he removed certain papers from the pawnshop and submitted them for fingerprint analysis. (Tr. 1460.) On cross-examination, Stoker testified that the police failed to check Charles Barker's hands for residue which would have indicated whether he had fired a weapon. (Tr. 1492.) A .25 caliber pistol was found underneath Barker's dead body. (Tr. 1481).

The State's seventh witness was Metro-Dade Police Detective Pasqual ("Pat") Diaz, a member of the homicide division and the "lead" detective in the instant case. (Tr. 1494, 1512.) Diaz testified that Charles Barker's assistant, Robert Latta, was unable to do a complete inventory of the merchandise in the Outpost Pawnshop at the time of Barker's death. Thus, police were unable to determine what guns, if any, were missing from the pawnshop after Barker's death. (Tr. 1500-01, 1509.) Diaz also testified that he had conducted a pre-trial photographic identification procedure with Benjamin Brown and that Brown had identified Albert Cooper as one of the three black males whom Brown had seen in the pawnshop on the afternoon of May 25, 1991. However, Brown did not identify Appellant. (Tr. 1503, 1515.)

The State's eighth witness was Detective William Saladrigas. Over defense objection, Saladrigas testified that, in mid-June of 1991, he first came in contact with Appellant and his co-defendant Cooper in connection with an "unrelated matter." (Tr. 1524-25.) The police interviewed Appellant and Cooper regarding that other matter for 10-12 hours and then Saladrigas advised Detective Diaz that

he should talk to them about the murder of Charles Barker. (Tr. 1527.)

The State's ninth witness was Timothy Thanos. Thanos testified that in 1991 he lived in the Hidden Garden Apartments in Dade County. (Tr. 1532.)[4] At the apartment complex, Thanos met Appellant and Albert Cooper, who also resided there. (Tr. 1533-34.) Sometime in June of 1991, Appellant and Cooper -- along with Renee Carey, Appellant's then-wife, and her baby -- moved into Thanos' apartment after they were evicted from their own apartment. (Tr. 1536.) Appellant and Cooper put their property into a rented U-Haul truck. (Tr. 1537.) Thanos further testified that, approximately two weeks before Appellant and Cooper were arrested by police at the Hidden Garden Apartments in mid-June of 1991, Appellant told Thanos that "he had robbed a pawnshop, shot a guy a few times, unloaded a pistol on him ...." (Tr. 1539-40.) Thanos also testified that he had seen Appellant and Cooper in the possession of "several" guns. (Tr. 1540-41.) In particular, Thanos saw Appellant with a .38 caliber pistol. (Tr. 1545.)

The State's tenth witness was Metro-Dade Police Officer Salvatore Garafalo. Garafalo testified that he went to the Hidden Gardens Apartments on June 14, 1991, to arrest Appellant and Albert Cooper. (Tr. 1560-61.) Garafalo arrested Albert Cooper in a U-Haul truck. (Tr. 1564.) The U-Haul truck was impounded by the police. (Tr. 1565.) The State's eleventh witness was Metro-Dade Police Sgt.

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[4] Thanos admitted that he had been convicted of a crime fives times and also that he had a "drug problem" (with crack cocaine) on and off for a decade. (Tr. 1532, 1546-49, 1553.)

John Methrin, who testified that he arrested Appellant on June 14, 1991. Appellant was driving a silver Ford Probe automobile. (Tr. 1568-72.) The car was impounded by the police. (Tr. 1571.)

The State's twelfth witness was Admonia Patricia Blount-Coleman. Coleman testified that she was 14 years old in mid-1991 and was romantically involved with Albert Cooper. (Tr. 1574-77.) Coleman stated that she drove around with Cooper and Appellant in a silver Ford automobile. (Tr. 1578.) Coleman further testified that sometime in May of 1991 -- approximately 2-3 weeks before Appellant and Cooper were arrested (Tr. 1583, 1598) -- she overheard a conversation between Appellant and Cooper in which Cooper said that he wanted to rob a pawnshop and "take guns." According to Coleman, Appellant said, "I'm down," which she understood to mean, "[t]hat he's with it." (Tr. 1580.) Appellant then allegedly asked Cooper, "[y]ou want the money from the cash register, too?" (Tr. 1582.) Cooper then stated that "he [*i.e.*, Cooper] will hold him [*i.e.*, the person working inside the pawnshop] because he's stronger than Tivan, and Tivan would shoot him." (Tr. 1584.) (Tr. 1584.) Cooper stated that "[t]hey were going to splat him," *i.e.*, kill the man inside the pawnshop. (Tr. 1584.) When the prosecutor repeatedly asked Coleman how Appellant responded to Cooper's stated intent to kill the unidentified man in the pawnshop, Coleman either gave no response or said that she did not remember. (Tr. 1584-85.) Coleman testified that Cooper later admitted that he "kill[ed] somebody at the pawnshop" and that "it took a lot of shots to get him down because he was very big." Cooper also allegedly admitted

that "they took guns from the pawnshop." (Tr. 1585.)

On cross-examination, Coleman agreed that when Cooper and Appellant talked about robbing and killing the pawnshop owner, it was "as if the man owed [Cooper] money." (Tr. 1595, 1604.) Coleman testified that Cooper said that he had "worked at that pawnshop." (Tr. 1595.) On re-direct examination, the prosecution, over defense objection, introduced Coleman's 1991 statement given to police, in which she stated that Appellant and Cooper had discussed their roles in the robbery and killing of the pawnshop owner in her presence. (Tr. 1613-17.)

The State next re-called Officer Tommy Stoker, a Metro-Dade crime scene technician, as a witness. Stoker testified that he had "processed" the Ford Probe and the U-Haul truck impounded by the police. (Tr. 1629.) Stoker testified that a five-shot .38 caliber pistol and ammunition were recovered from the U-Haul. (Tr. 1644-46.) The State's thirteenth witness was Metro-Dade Police Detective Mike Santos. Santos testified that he participated in the search of the impounded vehicles. Santos identified a U-Haul rental agreement which showed that the truck had been rented to Albert Cooper on June 3, 1991. (Tr. 1669.)

The State's fourteenth witness was Dr. Jay Barnhart, Jr., the State's medical examiner. (Tr. 1678.)[5] Dr. Barnhart opined that the cause of Charles Barker's death was a fatal gunshot wound through the heart. (Tr. 1694.) Barker's body

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[5] Dr. Barnhart did not conduct the autopsy of Charles Barker; rather, his assistant, Dr. Cynthia Beisser, conducted it. However, Dr. Barnhart testified about the autopsy based on Dr. Beisser's records. (Tr. 1685.)

had a total of 12 gunshot wounds. (Tr. 1687, 1712.)

The State's fifteenth witness was Metro-Dade Police Detective Michael Jones. Jones testified that he took a sworn statement from Albert Cooper at 3:35 a.m. on June 15, 1991. In that statement, Cooper confessed to participating in the robbery and fatal shooting of Charles Barker. (Tr. 1765 *et seq.*) According to Cooper's confession, he was armed with a .380 semi-automatic pistol and Appellant was armed with a five-shot .38 caliber pistol when they went into the Outpost Pawnshop at approximately 4:50 p.m. on May 25, 1991. (Tr. 1771-73, 1777.) Cooper admitted that he fired the first shot into the victim's chest. (Tr. 1775.) After Cooper fired a second time, "then Tivan pulled his weapon and began firing, also." (Tr. 1776.) According to Cooper, the two shot the victim a total of 13 times -- Cooper shooting seven times, and Appellant shooting six times. (Tr. 1776-77.)[6] Cooper stated that the pawnshop's "owner tr[ied] to draw his weapon." (Tr. 1776.) After they shot the pawnshop owner, Appellant and Cooper took money and guns from the pawnshop. (Tr. 1778.)

The prosecution then re-called Detective Pasqual Diaz, who testified about Appellant's custodial statement given to police. During the early morning hours of June 15, 1991, Diaz interviewed Appellant about the pawnshop robbery and

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[6] According to Cooper, Appellant fired five shots at Barker and then re-loaded and fired a sixth shot at Barker's jaw, which "came out the top of [Barker's] head." (Tr. 1777.) The State's medical examiner testified that one of the bullets in Barker's body entered his cheek and exited "just beside the right eye." (Tr. 1692.) As discussed infra, in Appellant's confession, he stated that he did not shoot Barker in the head.

shooting of Charles Barker. (Tr. 1800-02.) Before a formal confession was taken in front of a court reporter, Diaz conducted a 30-minute "pre-interview," which was not recorded. (Tr. 1811.) Over objection, Appellant's sworn confession, which had been transcribed by a court reporter, was read to the jury. (Tr. 1815 *et seq.*) Appellant stated that Cooper planned the robbery on May 20, 1991, and that he, Cooper, and another person named Eric were going to participate. (Tr. 1820.)[7] Appellant was armed with a .38 pistol and Cooper was armed with a .380 semi-automatic pistol. (Tr. 1822-22.) The two arrived at the pawnshop at 4:45 p.m. on May 25, 1991. (Tr. 1823.) Once the shop had no remaining customers, Appellant and Cooper pulled out their weapons and said, "freeze." (Tr. 1826.) According to Appellant, Cooper then opened fire at the pawnshop owner and shot him seven times. (Tr. 1826.) Appellant proceeded to fire five shots at the owner. After placing the spent shell casings in his pocket, Appellant reloaded his pistol with one more bullet and fired a sixth shot at the owner's head. Appellant stated that he missed the owner's head and instead hit a nearby toolbox. (Tr. 1826-27.)[8] Appellant then "jumped accross the counter and began to [taking] guns and money." (Tr. 1827.) Appellant's confession stated that Cooper "just freaked out" when he shot the pawnshop owner, implying that the shooting was not planned. (Tr. 1831.)

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[7] Appellant's confession made no further reference to Eric.

[8] As noted, Cooper's confession stated that Appellant's sixth shot hit Barker in the head.

In his confession, Appellant also stated that, after the shooting, he and Cooper pawned a Mossberg 12-gauge shotgun that they took from the Outpost Pawnshop. Appellant stated that the other pawnshop was located around U.S. 1 near Culter Ridge Road in Dade County. (Tr. 1830-31.) After Appellant confessed, the police recovered a Mossberg .12 gauge shotgun from South Dade Gun and Pawnshop, a pawnshop that was near the location described by Appellant in his confession. (Tr. 1834.) The police also seized a pawn slip which memorialized the pawn transaction involving the shotgun. Detective Diaz sent that pawn slip to the Metro-Dade Police Department's fingerprint identification section. (Tr. 1836.) On cross-examination, Diaz admitted that the police were unable to locate any reference to the Mossberg shotgun in the Outpost Pawnshop's records. (Tr. 1861.) Diaz also acknowledged that a licensed firearms dealer such as Charles Barker was required to keep a record of all firearms in his possession. (Tr. 1862.) Diaz stated that he was unable to locate records of many of the firearms found inside the Outpost Pawnshop. (Tr. 1862.)

The State's sixteenth witness was Fred Troike, an employee of South Dade Gun and Pawnshop. (Tr. 1875.) Troike identified the pawn slip with the name Albert Cooper on it. (Tr. 1879-80.) The slip was dated May 30, 1991, and recorded the pawning of a Mossberg 12-gauge shotgun, serial number K-558459. (Tr. 1882-84.) The State's seventeenth witness was Metro-Dade Police Sgt. Gary Smith. Smith testified that he went to South Dade Gun and Pawnshop and recovered the Mossberg shotgun. (Tr. 1894-95.)

The State's eighteenth witness was Metro-Dade Police Technician Gilbert Tamez, a fingerprint expert. Tamez testified that the fingerprints of Appellant and Albert Cooper were lifted from both the Ford Probe and the U-Haul truck impounded by police on June 14, 1991. (Tr. 1913-14.) The State's nineteenth witness was Metro-Dade Police Technician James Hinds, another fingerprint expert. Hinds testified that the above-mentioned pawn slip from the South Dade Gun and Pawnshop contained Albert Cooper's thumbprint. (Tr. 1922.) Hinds further testified that Appellant's palmprints and fingerprints were found on papers recovered from the Outpost Pawnshop. (Tr. 1933-34.)

The State's twentieth witness was Metro-Dade Police Criminologist Thomas Quirk, a firearms examiner. Quirk testified that he examined the projectiles recovered from the corpse of Charles Barker. (Tr. 1992.) Quirk opined that some of the projectiles were fired from a .38 caliber pistol and others were fired from a .380 pistol. (Tr. 1994-97, 2021.) Quirk also examined the shirt worn by Charles Barker when he was fatally shot. Based both on the lack of any gunpowder residue found on Barker's body and also the particular content of lead residue found on Barker's body, Quirk opined that the bullets that hit Barker's chest were fired by a .380 pistol from a distance of four to six feet. (Tr. 2016-17.) On cross-examination, Quirk was confronted with his pre-trial deposition, in which he had opined that the .380 bullets recovered from Barker's body came from *two* different .380 pistols, as well as from a .38 pistol. (Tr. 2023-25.) At trial, Quirk acknowledged that there could have been two different .380 pistols, as well as the

.38, fired at Barker -- a total of three guns. (Tr. 2028.) Quirk further testified that he had never examined Charles Barker's hands to see if he had fired a weapon. (Tr. 2030.)

The State's twenty-first witness was Metro-Dade Police Criminologist Robert Kennington, another firearms examiner. Kennington testified that he examined the .38 caliber bullets recovered from Barker's corpse and compared them to bullets fired from the .38 pistol found by police in the U-Haul truck. Kennington opined that five of the .38 projectiles recovered from Barker's body were fired by the .38 pistol seized by police. (Tr. 2036, 2051.) At the conclusion of Kennington's testimony, the prosecution rested its case-in-chief. (Tr. 2055.)

Appellant then testified in his own behalf. Appellant stated that on May 25, 1991, he, Albert Cooper, and a third individual named Eric -- a former schoolmate -- went to the Outpost Pawnshop. (Tr. 2064.) Appellant testified that "we went there to help Eric pick up some guns. ... [H]e told us that he dealt with the man [*i.e.*, Charles Barker] person-to-person, but we weren't going to receive any money from him. We would receive the money through [Eric] for helping sell the guns and taking the guns where we had to take them." (Tr. 2064.) At least some of the guns were illegal automatic weapons. (Tr. 2076.) Appellant and Cooper accompanied Eric in order to "watch his back...." (Tr. 2089.)

Appellant testified that when he and Cooper went into the Outpost Pawnshop, Charles Barker and Eric were discussing which guns that Barker would give to Eric to sell. (Tr. 2066.) Cooper and Appellant then assisted Eric in carrying guns out to

their cars. (Tr. 2066.) Appellant stated that, at that point, Benjamin Brown came into the pawnshop, and the young men temporarily discontinued loading the guns into their cars. After Brown left, they continued loading guns. (Tr. 2067.) When Appellant and Cooper came back into the shop after loading certain weapons, they saw that Eric and Barker were "cussing loud ... [T]hey were talking about the difference in what was being paid out for the selling of the first batch of guns, that [Eric] never received his right amount of money." (Tr. 2069.) "Eric said all he wanted was what he was supposed to pay him because [Barker] didn't pay the full amount the first time he did business with him ...." (Tr. 2069.) Eric then stated, "[f]uck you" and told Barker that "he was out of there and he was gone." (Tr. 2070.) Barker then became angry because Eric said he was taking the guns that were already loaded in the cars for payment of the debt that Barker owed him. (Tr. 2070.) Barker then pulled out a pistol and fired one or two shots. (Tr. 2071, 2075.) Appellant then pulled out his own weapon, a .38 pistol, and fired five shots at Barker. (Tr. 2071-72.) Cooper and Eric also shot their .380 pistols at Barker. (Tr. 2072, 2134.) Appellant, Cooper, and Eric then fled. (Tr. 2073.) Eric later gave Cooper a shotgun for repayment of a debt owed by Eric to Cooper. (Tr. 2074.)

Appellant further testified that Eric told Appellant and Cooper that "he wasn't working by himself" and that if they informed anyone about what had happened at the Outpost Pawnshop "[Eric] was going to fuck my mama up." (Tr. 2075.) Appellant stated that his 1991 confession to police was false and that he had not

told the truth in order to protect his mother from Eric's threat. (Tr. 2075.) Appellant testified that he was willing to tell what really happened at his 1995 trial because Eric had been killed in 1993. (Tr. 2075.) Appellant testified that he did not go to the Outpost Pawnshop on May 21, 1991, with the intention of robbing or killing Charles Barker or burglarizing his store. (Tr. 2076, 2156.)

On cross-examination by the prosecutor, Appellant testified that Timothy Thanos and Admonia Blount-Coleman both had lied when they testified about Appellant's alleged incriminating statements. (Tr. 2078-84.) Appellant further testified that he had given the police a false confession "[b]ecause I was pressured and I was protecting somebody." (Tr. 2095.) According to Appellant, the police were "feeding" him what to say from a yellow pad. (Tr. 2095, 2098, 2107.) "What they were telling me and what I was going along with was a lie." (Tr. 2102.) Appellant admitted shooting Barker five times -- in self-defense -- but denied reloading and firing a sixth shot, as his 1991 confession stated. (Tr. 2100-01.) At the conclusion of Appellant's testimony, the defense rested its case. (Tr. 2160.) Co-defendant Cooper presented no witnesses in his own defense.

The prosecution then presented two rebuttal witnesses. The first witness, Detective Pasqual Diaz, testified that he did not "feed" Appellant any information to include in his 1991 confession. (Tr. 2177-84, 2192.) Diaz admitted that the police had already interviewed Timothy Thanos, Renee Johnson, Admonia Blount-Coleman, and Albert Cooper at the time that Diaz interrogated Appellant. (Tr. 2188.) Diaz also admitted that he had a yellow notepad when he interviewed

Appellant. (Tr. 2189.)

Over objection by the defense, the State next called Renee Carey, Appellant's former wife. (Tr. 2216.) Carey married Appellant in 1991. (Tr. 2216.) Carey testified that, on the evening of May 25, 1991, she saw Albert Cooper counting "a bunch of money" in the apartment that Carey, Appellant, and Cooper shared at the Hidden Gardens apartment complex. (Tr. 2223.) Carey also saw "[s]everal guns" on the floor. (Tr. 2224.) Carey said that she asked Cooper -- outside of Appellant's presence -- where the guns and money came from. Cooper allegedly responded that it "came from a pawnshop." (Tr. 2230-31.) Carey was confronted with a statement that she gave to police in 1991, in which she stated that Albert Cooper discussed shooting a man in the chest during a robbery of a pawnshop. (Tr. 2235-37.) On cross-examination, Carey stated that she had heard Appellant use the name Eric. (Tr. 2241.) Eric possibly was a friend from Overtown. (Tr. 2242.) At the conclusion of Carey's testimony, the prosecution rested its case. (Tr. 2245.)

During Appellant's closing argument, defense counsel contended that, at most, Appellant was guilty of third-degree felony-murder -- murder in the course of a non-enumerated felony (*i.e.*, dealing in illegal firearms). (Tr. 2258.) Defense counsel noted weaknesses in the prosecution's case which supported Appellant's trial testimony, including: (1) Police Technician Quirk's opinion that there were three guns (two .380 pistols and one .38 pistol) used to shoot Charles Barker; and (2) Benjamin Brown's testimony that three black males were in the Outpost Pawnshop

shortly before 5:00 p.m. (Tr. 2262-63.)[9] Defense counsel also pointed out that the police failed to swab Barker's hands, which would have established whether or not he had fired his gun in defense, as Appellant claimed. (Tr. 2265.) Defense counsel contended that the evidence that Barker had not recorded numerous guns in his store records -- as required by law -- supported Appellant's defensive theory that Barker was engaged in an illegal weapons trade. (Tr. 2271.) Finally, counsel noted that Appellant's 1991 confession contained information that suggested it was fabricated. For instance, Appellant's confession stated that he fired a sixth shot at Barker's head, which missed and instead hit a nearby toolbox. Defense counsel asked jurors why, if this tool box in fact had been hit, did the prosecution fail to introduce the tool box into evidence. (Tr. 2339-40.)

The jury deliberated for approximately eight hours before finding Appellant and Cooper guilty of the charges contained in the indictment. (R. 255-56.)

After Appellant and Cooper were found guilty of first-degree murder, the trial court conducted a capital sentencing hearing in front of the advisory jury. The jury

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[9] Defense counsel also correctly noted that Brown's testimony about Barker's supposedly unusual demeanor when Brown was in the store -- suggesting that he was being robbed at that point -- made no sense. Brown admitted that he fingerprinted and signed the pawn slip and left it for Barker to fill in the relevant information (*e.g.*, Barker's driver's license number, address). Defense counsel correctly observed that, if in fact Barker was being robbed when Brown came into the store, Barker would not have had the opportunity to fill the pawn slip out for Brown after he left the store. Counsel argued that, "[i]t got filled out because Charles Barker had the time to fill this out, because Charles Barker was watching [Appellant, Cooper, and Eric] take firearms that he had made arrangements for them to take in and out of his shop ...." (Tr. 2337-39.)

first heard aggravating evidence relevant to both Cooper and Appellant. (Tr. 2523-2666.) Central to the State's case in aggravation was proof of the circumstances of another first-degree murder of which Appellant and Cooper had previously been convicted as co-defendants.[10] That prior criminal conduct involved a robbery, burglary, and kidnapping -- and ultimate murder -- of a manager of a Rudy's Steakburger Restaurant in Dade County. Both Appellant and Cooper confessed in that case, and both confessions were introduced by the prosecution during the punishment phase in the instant case. Cooper's confession admitted that he was the triggerman who fatally shot the manager, but claimed that Appellant instructed Cooper to kill the manager. (Tr. 2555.) Conversely, Appellant's confession did not state that he instructed Cooper to kill the manager and instead indicated that Appellant did not wish for the manager to be killed. (Tr. 2600-35.)[11]

After the prosecution concluded its case in aggravation, Cooper presented his

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[10] Appellant and Cooper were each given life sentences for that first-degree murder conviction. They also received consecutive guidelines-departure life sentences for concurrent robbery, burglary, and kidnapping convictions. Those convictions and sentences were upheld on direct appeal. Cooper & Johnson v. State, 638 So.2d 200 (Fla. 3rd DCA June 21,1994). At the time that this brief is being filed, Appellant's federal habeas corpus petition challenging those convictions is pending in the U.S. District Court for the Southern District of Florida.

[11] In Cooper's confession, he alleged that Appellant instructed Cooper to "off him [i.e., kill the manager]." (Tr. 2555.) In Appellant's confession, he stated that he instructed Cooper to lock the manager inside the restaurant's walk-in freezer and that Appellant then stated, "I am fixin' to kill the electric." (Tr. 2627.) According to his confession, the very fact that Appellant wished to lock the manager inside the freezer and turn off the electricity demonstrated that he did not wish for the manager to be killed. (Tr. 2660.)

case in mitigation. (Tr. 2667-3016.) Cooper's primary theory of mitigation during the punishment phase was that Appellant dominated Cooper and that Appellant was, thus, more culpable than Cooper. Cooper's mitigation suggested that Appellant deserved a harsher punishment than Cooper. (Tr. 2679-80, 2683, 2722, 2724, 2755-56, 2762, 2769-70). During closing arguments, Cooper's counsel contended that Appellant was responsible for Cooper's actions during the 19-day period in the late spring of 1991 when the two first-degree murders were committed. (Tr. 3134-35.)

After jurors made their recommendation regarding Cooper's punishment in a sealed verdict, Appellant presented his case in mitigation. (Tr. 3162 *et seq.*) Appellant's first witness was his biological father, Clayton Harrel, who testified that he and Appellant's mother were never married. Harrel saw Appellant only occasionally -- once a week when Appellant was young and once a month as Appellant grew older. (Tr. 3164.) Harrel testified that Appellant had a life-threatening case of meningitis when he was an infant, which was responsible for Appellant's "slow development" as a child. (Tr. 3167.) Harrel also described his son's positive qualities, noting that he was a sensitive, loving, and caring person. (Tr. 3172-73.)

Appellant's second witness was Jodie Bueden, who was Appellant's special education teacher when he was in elementary school. (Tr. 3176.) She also had "regular contact" with Appellant even after she finished being his special-ed teacher, up until Appellant's mid-teenage years. (Tr. 3183-84.) Bueden testified

that Appellant had a "classic learning disability" that required him to enroll in special education classes. (Tr. 3177-78.) She described Appellant as "very well behaved" and as an extremely hard worker who always had to make extra efforts to overcome his learning disability. (Tr. 3178-79.) Appellant was shy and a "mama's boy" who was devoted to his mother. (Tr. 3179, 3187.) Contrary to Cooper's counsel's characterization of Appellant, Bueden testified that Appellant was not a "leader." (Tr. 3182.)

Appellant's third witness was Ellen Johnson, a cemetery manager who supervised Appellant when he worked at a cemetery as part of Appellant's participation in the Boy Scouts. (Tr. 3197.) Appellant worked at the cemetery for over a year and was, according to Johnson, an excellent worker. (Tr. 3198-90.)

Appellant's fourth witness was Willie Bell Toomer, Appellant's mother.[12] Toomer testified that Appellant was the youngest of her seven children and was born on November 9, 1970. (Tr. 3206-07.) Toomer further testified that Appellant's biological father, Clayton Harrel, was not very involved with his son as he grew up in Miami. (Tr. 3207.) Toomer recounted Appellant's near-death experience with meningitis as a baby. (Tr. 3208.) According to Toomer, Appellant was intellectually slow as a child and had to repeat first-grade. (Tr. 3209.) Thereafter, Appellant was in learning-disabled classes. (Tr. 3210-11.) Despite his learning disability, Appellant became actively involved in the Boy Scouts

[12] Toomer was Appellant's mother's maiden name. Johnson was the name of the father of one of Appellant's siblings. (Tr. 3207.)

and became an Eagle Scout, the highest rank attainable. (Tr. 3211-12.) He was also the first African-American Ranger in the history of the Boy Scouts. (Tr. 3212.) Toomer testified that Appellant had always been hard-working and was regularly employed during his youth. (Tr. 3214.) Appellant was also a devoted son, a "mama's boy." (Tr. 3216.)

Appellant dropped out of school after the 10th grade. (Tr. 3215.) Thereafter, in 1990, Appellant's life took a dramatic turn for the worse. Appellant's involvement in Boy Scouts ended in mid-1990. Appellant moved out of his mother's home in December 1990 and later married Renee Carey after she falsely reported that she was pregnant. (Tr. 3218-19, 3242.)[13] Toomer stated that Appellant, who was barely 20, was too immature to handle the responsibilities of marriage. (Tr. 3220.) Appellant's involvement in the two murders occurred in May and June of 1991.

Appellant's fifth witness was Dr. Merry Haber, a licensed psychologist who interviewed and tested Appellant in 1995, and also reviewed Appellant's medical, school, and jail records, in preparation for her testimony. (Tr. 3253-54.) Haber testified about Appellant's social history. Appellant was the only child of the seven siblings in his family who had a different father from any of the other siblings. His siblings treated him like an "outcast" for that reason and referred to him as a "scum." (Tr. 3256-57.) Appellant's relationship with his biological father during his youth was "[v]irtually non[-]existent." (Tr. 3256.) As a child, Appellant

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[13] Appellant married Carey in the spring of 1991.

attended learning-disabled classes. (Tr. 3269.) Dr. Haber testified that, around the time of the two murders in the spring of 1990, Appellant was working both a day job and night job as a cook, which caused sleep deprivation. (Tr. 3258.) During that time, Appellant's unhappy marriage "added a great deal of stress ...." (Tr. 3296.)

Dr. Haber also described Appellant's successes in life. Foremost among them, Appellant was active in the Boy Scouts and even became the first African-American Eagle Scout in Miami. (Tr. 3270.) According to Dr. Haber, Appellant's life disintegrated in mid-1990, when he was unable to obtain permanent employment in the Boy Scouts organization. (Tr. 3270-71.) In early 1991, when Appellant was 20, hospital records show that he attempted to commit suicide. He has hospitalized as a result. (Tr. 3271-72.) Thereafter, he failed to obtain necessary psychiatric counseling. (Tr. 3275.)

Dr. Haber opined that, since mid-1990, Appellant had a "dysthymic disorder," which she defined as a "long standing depressive disorder." (Tr. 3276.) Such a condition impairs a person's judgment, according to Dr. Haber. (Tr. 3276.) Dr. Haber also stated that Appellant has various personality disorders, including a mixed personality disorder. (Tr. 3277-78.) Dr. Haber concluded that, at the time of the offense, Appellant "was under the influence of [an] extreme mental or emotional disturbance." (Tr. 3280.)[14]

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[14] Haber testified that, while in jail awaiting trial, Appellant required treatment for his depression and suicidal tendencies. (Tr. 3259-62, 3267-68.) Jail doctors

Appellant's sixth witness was Dr. Christian Del Rio, licensed psychologist with a speciality in neuropsychology. (Tr. 3309.) Dr. Del Rio conducted extensive testing and interviews of Appellant in 1995, and also reviewed Appellant's medical and school records. (Tr. 3311.) Dr. Del Rio testified that Appellant's problems began when he was a baby, when he suffered from meningitis, "which is a brain infection." (Tr. 3314.) In his teenage years, according to Dr. Del Rio, Appellant began to develop depression, suicidal tendencies, and a personality disorder. (Tr. 3314-15.) Appellant's learning disability "contribute[d] to [his] depression." (Tr. 3315.) Appellant's various problems impaired his judgment and caused him to have "[p]oor impulse control." (Tr. 3326-27, 3332.) Dr. Del Rio opined that, at the time of the crime, Appellant's ability to conform his behavior to the requirements of the law was impaired as a result of "severe depression" and "a severe personality disorder." (Tr. 3316.) Dr. Del Rio also opined that, at the time of the offense, Appellant was under the influence of an "extreme emotional or mental disturbance." (Tr. 3316.)

In rebuttal, the prosecution presented the testimony of two psychologists, Dr. Jay Weinstein and Dr. Lazaro Garcia. Dr. Weinstein conducted neurological tests of Appellant, and concluded that Appellant did not have any brain damage. (Tr. 3340.) Dr. Garcia examined Appellant and testified that, while he was "depressed," Appellant did not suffer from any major mental or emotional disorder

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prescribed Sinequan, an anti-depressant, antianxiety medication "used for people [who] are very depressed, for major mental illness." (Tr. 3262.)

and was fully able to conform his conduct to the requirements of the law. (Tr. 3355, 3356-57.) Dr. Garcia also opined that, at the time of the offense, Appellant was not acting under the domination of Albert Cooper. (Tr. 3356.) At the conclusion of Dr. Garcia's testimony, the prosecution rested its case.

After closing arguments regarding Appellant's punishment case, the advisory jury was sent to deliberate, and returned a recommendation -- by a vote of 8-4 -- that Appellant be sentenced to death. (Tr. 3408.) By an identical 8-4 vote, the same jury (in a sealed verdict) had previously recommended that Albert Cooper be sentenced to death. (Tr. 3410.) Following a brief sentencing hearing in front of the trial judge, the trial court followed the jury's recommendations and sentenced both Appellant and Cooper to death. (Tr. 3451, 3469.)

The trial court's written sentencing order found the existence of three statutory aggravating circumstances: (1) Appellant was previously convicted of another capital felony and felonies involving the use of violence to the person; (2) the murder was committed during the course of robbery and burglary;[15] and (3) the murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification." (R. 628-33.) The trial court found the existence of one statutory mitigating factor: the murder was committed while Appellant "under the influence of extreme emotional or mental disturbance." (R.

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[15] The trial court also found that the murder was committed for "pecuniary gain," although the court merged this factor with the felony-murder aggravator, since it involved the "same aspect of the offense." (Tr. 3459.)

634-35.) The court also found the existence of numerous non-statutory mitigators, including: Appellant's troubled childhood; the absence of a meaningful relationship with his father; a life-long learning disability; Appellant's devotion to his mother; and various positive character traits, including being "the first black youngster in Dade County to become an Eagle Scout." (R. 637-39). Although the trial court found Appellant's mitigation to be "significant," the court found it to be outweighed by aggravating factors. (R. 640.)

## SUMMARY OF ARGUMENT

(1) The trial court erred by failing to suppress Appellant's two custodial confessions in this case. The Miranda warning form read to Appellant was constitutionally deficient in that it failed to inform Appellant that he had the right to consult with counsel prior to any interrogation outside of the presence of the police (as opposed to the right to have counsel present during the interrogation).

(2) The trial court erred by disallowing one of Appellant's peremptory challenges in response to an objection by the prosecution. Defensel counsel's explanations for the strike were race- and gender-neutral.

(3) The trial court erred by permitting the prosecution to introduce evidence that Appellant was in custody on an "unrelated matter" at the time of the his confessions. The prejudice to Appellant was especially great since one or more jurors likely inferred that the "unrelated matter" was a homicide or at least a serious felony.

(4) Appellant's convictions must be reversed because the trial court repeatedly

permitted jurors to see Appellant in handcuffs and shackles.

(5) The trial court committed fundamental error by failing to submit special verdict forms which would have permitted the jury to acquit Appellant of one of the two alternate types of first-degree murder. A note from the jury strongly suggests that jurors would have acquitted Appellant of premeditated murder, which would have precluded the prosecution from relying on the CCP aggravator during the sentencing phase under the collateral estoppel doctrine.

(6) Appellant's death sentence must be reversed because his two court-appointed lawyers were absent during a "critical stage" of the capital sentencing hearing. In particular, counsel were absent during the testimony of co-defendant Cooper's punishment phase witnesses, who attempted to shift the blame to Appellant.

(7) The trial court erred by refusing to sever Appellant from his co-defendant Cooper during the capital sentencing phase. To different grounds for severance arose during the punishment phasew: (a) the prosecution sought to introduce Cooper's confession to the Thomas Walker murder (that claimed that Appellant instructed Cooper to kill Walker), which contradicted Appellant's confession (which merely made Appellant liable under the felony-murder doctrine); and (b) Cooper's theory of mitigation was antagonistic to Appellant's theory of mitigation.

(8) Appellant's death sentence must be reversed because Appellant was absent from a "critical stage" of the capital sentencing hearing, *i.e.*, the testimony of Cooper's punishment phase witnesses.

(9) Appellant's death sentence is disproportionate.

(10) This Court must reverse Appellant's death sentence in view of the trial court's bias, as evinced by extemporaneous comments made by the trial judge immediately after the advisory jury returned its recommendation for the death penalty.

(11) Capital punishment, at least as presently administered, is cruel and unusual punishment.

## ARGUMENT

### I.

### APPELLANT'S CONFESSIONS TO THE BARKER MURDER AND WALKER MURDER, WHICH WERE INTRODUCED DURING BOTH THE GUILT AND PUNISHMENT PHASES, WERE ADMITTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. I, § 9 OF THE FLORIDA CONSTITUTION.

### A. Relevant Facts

After he was taken into custody on June 14, 1991, the police interrogated Appellant and elicited confessions about his involvement in both the robbery and fatal shooting of Charles Barker and the robbery and fatal shooting of Thomas Walker, the manager of Rudy's Restaurant. The Walker murder confession and Barker murder confession were given during one continuous period of interrogation. Metro-Dade Police Detective Thomas Romangi obtained the Walker murder confession during the late evening hours of June 14, 1991, and early morning hours of June 15th, between 8:00 p.m. and 3:35 a.m. (Tr. 204-07.) Metro-Dade Police Detective Pasqual Diaz subsequently obtained the Barker murder confession

during the early morning hours of June 15, 1991, immediately after Romangi had elicited the Walker murder confession. (Tr. 271-73).

During the interrogations, the two officers read Appellant his constitutional rights from the standard Metro-Dade Police Department warning form. (Tr. 202-04; 271-73; R. 219.) At issue in this case is warning number three contained in the standard form: **"3. If you want a lawyer to be present during questioning, at this time or at anytime hereafter, you are entitled to have the lawyer present."** (R. 219.)

In a pre-trial suppression hearing,[16] Appellant contended that warning number three of the standard warning form was constitutionally insufficient because it failed reasonably to inform Appellant that he had a right to *consult* with a court-appointed attorney *before* being interrogated (outside the presence of police) -- which is distinct from the right to have a lawyer *present* during questioning by police. Appellant thus moved to suppress both confessions on that ground. The trial court denied the suppression motion -- holding that the warnings read to Appellant were constitutionally sufficient -- and, thus, permitted the prosecution to introduce Appellant's two confessions into evidence at trial. (Tr. 354). At the Barker murder trial, Appellant re-urged his objection during the guilt phase when the

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[16] The suppression hearing was conducted in 1992, when Appellant and Cooper had not yet gone to trial on the Walker murder. At that point, Appellant was being represented by Miami attorney Steven Potolsky in connection with both the Walker murder charge and the Barker murder charge. The suppression hearing covered the confessions in both cases.

prosecution admitted the Barker murder confession; the trial court overruled the objection. (Tr. 1802.) Likewise, during the capital sentencing phase, the trial court permitted the prosecution to introduce the Walker murder confession over Appellant's objection. (Tr. 2592.)[17]

At the suppression hearing, Appellant's trial counsel questioned the police officers who interrogated Appellant and elicited the following information: Appellant was arrested by Metro-Dade police officers during the late afternoon of June 14, 1991. After being taken into custody, Appellant was taken to the police station for questioning. Metro-Dade Detective Thomas Romagni testified that he first encountered Appellant at the police station shortly before 8:00 p.m. on June 14th. Before Appellant had been read any Miranda rights, Detective Romagni asked him various questions seeking to elicit "background information." (Tr. 199-200.) Romagni also informed Appellant that he had been "implicated" in the murder of Thomas Walker by his co-defendant, Albert Cooper, as well as by "other people" (who were unnamed). (Tr. 213-15). The detective then told Appellant that "I wanted to hear his side of the story." (Tr. 215-16.). Romangi "got an agreement from Mr. Johnson to talk about details of the murder." (Tr. 216.). All of this

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[17] During the 1993 Walker murder trial, Appellant objected to the admission of the Walker murder confession, but the trial court permitted the prosecution to introduce it into evidence. On direct appeal to the Third District Court of Appeal, the court held that the standard Metro-Dade warning form was constitutional. See Cooper & Johnson, 638 So.2d 200, 201 (Fla. 3rd DCA 1994). At the time that this brief is being filed, Appellant's federal habeas corpus appeal challenging the constitutionality of the Walker confession is pending in the U.S. District Court for the Southern District of Florida.

discussion occurred before Miranda rights were read to Petitioner. (Tr. 216.) After Romagni read Appellant his rights from the standard Metro-Dade Police Department warning form, Appellant confessed, first to Detective Romangi alone in a "pre-interview" and then in front of a stenographer in a sworn statement.

Detective Pasqual Diaz also testified during the pre-trial suppression hearing. Diaz stated that he went in the interrogation room to take Appellant's confession regarding the Barker murder immediately after Detective Romangi had finished obtaining Appellant's confession to the Walker murder. (Tr. 272.) Like Romangi, Diaz first obtained "background" information from Appellant and then read exactly the same standard Metro-Dade warning form to Appellant. (Tr. 272, 274-75.)

Those warnings generally tracked the warnings contained in the U.S. Supreme Court's decision in Miranda, save the third warning: **"If you want a lawyer to be present during questioning at this time or any time hereafter, you're entitled to have a lawyer present."** (R. 219; Tr. 203.) Neither Warning #3, nor any other portion of the standard warning form, informed Appellant that he had a right to *consult* with a lawyer *prior* to any interrogation outside of the presence of the authorities. (Tr. 217-19.)

Appellant also testified during the suppression hearing. Appellant stated that, when he was read the warnings, he did not understand that he "had the right to talk to a lawyer for advice before any questions were asked." That is, Appellant did not know that he had a right "to talk to a lawyer for advi[c]e as [opposed] to just having the lawyer present" during the questioning. (Tr. 311.) Appellant also

agreed with Detective Romangi's testimony that, before Appellant was read any Miranda warnings, the two had entered into an "agreement" that Appellant would "tell his side of the story." (Tr. 310-11.)

**B. Argument & Authorities**

The warnings read to Appellant by Detective Romagni and Detective Diaz during their "tag-team" interrogation were constitutionally inadequate under the Fifth and Fourteenth Amendments to the U.S. Constitution and under Art. I, § 9 of the Florida Constitution. In particular, the failure to warn Appellant that he had the right to consult with an attorney outside of the presence of the authorities before being interrogated -- in addition to having an attorney present during questioning by police -- rendered Appellant's confessions constitutionally inadmissible under Miranda and its progeny. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); California v. Prysock, 453 U.S. 355, 101 S. Ct. 2806, 69 L.Ed.2d 696 (1981); Duckworth v. Eagan, 492 U.S. 195, 109 S. Ct. 2875, 106 L.Ed.2d 166 (1989).

As explained further below, Petitioner contends that the Metro-Dade warning form that was used in this case is facially unconstitutional. Even assuming *arguendo* that the Metro-Dade form is not facially unconstitutional, the totality of circumstances in this case -- in particular, the fact that Detective Romagni had already started questioning Petitioner and had elicited an "agreement" from him to "tell his side of the story" before any warnings were read to Petitioner -- rendered

the standard warnings form unconstitutional *as applied* in the instant case.[18]

***(1) The Facial Unconstitutionality of the Metro-Dade Warnings Form***

It is, of course, well-settled that the Fifth Amendment requires police interrogators to warn criminal suspects in custody of a variety of specific constitutional rights, including general and specific aspects of the right to silence and the right to court-appointed counsel, before eliciting incriminating statements. See Miranda v. Arizona, supra. Failure to warn a suspect of *any* one of these rights requires a reviewing court to hold that a confession given after such incomplete warnings is constitutionally inadmissible. See United States v. Stewart, 576 F.2d 50, 54-55 (5th Cir. 1978) (citing "long line of cases" in which confessions were suppressed "in the absence of any one or all of the Miranda warnings"); see also Sanchez v. Beto, 467 F.3d 513, 515 (5th Cir. 1972) (courts must "carefully follow[] the Miranda command."). "While it is true that it is the substance of [Miranda] warnings, not the form, that is important ..., the warnings given must be complete and meaningful to the accused." South Dakota v. Long, 465 F.2d 65, 70 (8th Cir. 1972).

For purposes of this appeal, the only specific Miranda warning at issue is the right to consult with counsel outside of the presence of the authorities prior to an

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[18] The taint from Romangi's interrogation carried over to Detective Diaz's interrogation regarding the Barker murder, which occurred immediately after Romangi completed his interrogation regarding the Walker murder. Because Diaz immediately came into the interrogation room and read Appellant the same standard Metro-Dade warnings form, Appellant had no reason to believe that he had any additional rights under the state or federal constitutions.

interrogation. Countless courts, including the U.S. Supreme Court, have recognized that this right to consult is distinct from the right to have an attorney present during interrogation.[19] Courts have carefully scrutinized warnings to assure that the

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[19] See, e.g., Duckworth v. Eagan, 492 U.S. 195, 204 (1989) (Miranda requires "that the suspect be informed, as here, that he has the right to an attorney ***before and during*** questioning"); Patterson v. Illinois, 487 U.S. 285, 288 n.1, 108 S. Ct. 2389, 101 L.Ed.2d 261 (1988) (separately noting "the right to consult with an attorney" and "the right to have an attorney present during interrogation" in discussing whether warnings given to particular defendant were sufficient "to the extent required by our decision in Miranda ..."); California v. Prysock, 453 U.S. 355, 361 (1981) ("It is clear that police in this case fully conveyed to [the defendant] his rights as required by Miranda. He was told of his right to have a lawyer present ***prior to and during*** interrogation ...."); United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982) ("a Miranda warning is adequate if it fully informs the accused of his right to consult with a lawyer prior to questioning"; holding that warnings that informed defendant "of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed" were sufficient); Smith v. Zant, 887 F.2d 1407, 1410 n.4 (11th Cir. 1989) (*en banc*) (Tjoflat, J., concurring, joined by Fay, J.) ("[Miranda] requires that before a person in police custody can be interrogated, he must be informed of his Fifth Amendment right to remain silent and also, for the purpose of protecting his Fifth Amendment right, of his rights to consult with counsel and have counsel present during interrogation."); Montoya v. United States, 392 F.2d 731, 735 (5th Cir. 1968) ("[W]e hold that an express statement that a person 'has the right to consult with a lawyer ***and*** to have the lawyer with him during interrogation' is an `absolute prerequisite to interrogation'.") (emphasis added); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968) (same); Chambers v. United States, 391 F.2d 455, 456 (5th Cir. 1968) (same); United States v. Caldwell, 954 F.2d 496, 502 n.9 (8th Cir. 1992) ("Several decisions from other circuits have ... held or implied that a defendant must be specifically warned of his right to an attorney before and during police questioning.") (citing numerous cases); id. at 505-10 (Lay, C.J. dissenting) (citing numerous cases); Butzin v. Wood, 886 F.2d 1016, 1019-23 (8th Cir. 1989) (Lay, C.J., dissenting on grounds not addressed by the majority) (citing numerous cases) (same); United States v. Noti, 731 F.2d 610, 614 (9th Cir. 1984) ("[W]e note that Miranda itself certainly suggests that the right to counsel during questioning is significant, independent of the right to counsel before questioning."); United States v. Reynolds, 496 F.2d 158, 163 (6th Cir. 1974) (same); United States v. Fox, 403 F.2d 97, 100 (2nd Cir. 1968) (same); United States v. Moore, 40 C.M.R. 511, 513

accused was effectively informed that he had a right to consult with a lawyer prior to an interrogation *and* also had the right to have the attorney present during questioning. Courts have upheld convictions only where Miranda warnings effectively conveyed the substance of both of these distinct rights.[20]

The standard Metro-Dade Miranda warning form used in this case was constitutionally inadequate in that it did not, explicitly or implicitly, inform Appellant

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(U.S.Army Rev. Bd. 1969) ("[W]e cannot ignore that [Miranda] encompasses the right to both consultation and presence, as separate elements."); Wright v. State, 703 S.W.2d 850, 851 (Ark. 1986) ("Miranda rights include the right to remain silent, the right to consult with an attorney, ***and*** the right to have an attorney present during questioning.") (emphasis added); Giacomazzi v. State, 633 P.2d 218, 221 (Alaska 1981) ("an individual subjected to custodial questioning has both the right to consult with counsel prior to questioning and the right to have counsel present during questioning"); Franklin v. State, 314 N.E.2d 742, 744 (Ind. 1974) ("Appellant argues that this warning failed to adequately convey to him that he had the right to consult with a lawyer prior to interrogation and to have a lawyer with him during interrogation. Appellant is correct that Miranda requires that the precautionary warning clearly express that an individual has the right to consult with a lawyer and to have the lawyer with him during interrogation."); State v. Creach, 461 P.2d 329, 332 (Wash. 1969) (same).

[20] See, e.g., People v. Kelly, 800 P.2d 516, 526 (Cal. 1990) (court holds that written warning that omitted right to consult, as opposed to right to an attorney's presence, did not require suppression of confession, but only because interrogating officer orally added that a lawyer "will be appointed to represent you before any questioning if you wish"); People v. Snaer, 758 F.2d 1341, 1343 (9th Cir. 1985) (in addressing defendant's claim that the warnings read to him failed to convey the right to consult before questioning as well as the right to the presence of an attorney, court affirms conviction only because the defendant was told "[y]ou have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned"; court holds that this two-pronged warning "meets the minimum requirements of the Constitution" but advises that right to consult with counsel prior to interrogation should be made clearer in written warning); State v. Croucher, 326 N.W.2d 98, 99 (S.D. 1982) (admissibility of confession saved by similar "consult" language contained in otherwise invalid warning).

that he had a right to consult with an attorney prior to the interrogation as well as the right to have an attorney present during the interrogation. Warning #3 on the form only advised Appellant that he could request an attorney to be present during questioning.

At trial, the prosecution argued that the warnings form was constitutional because a reasonable person in Appellant's position would comprehend that the right to have an attorney "present" embraced the right to speak or consult with that attorney before questioning. According to the prosecution, under California v. Prysock, 453 U.S. 355 (1981), the warning was sufficient because the Metro-Dade form "reasonably convey[ed] to [Petitioner] his rights required by Miranda." See also Duckworth v. Eagan, 492 U.S. 195, 204 (quoting Prysock). In Prysock and Duckworth, the Supreme Court held that, in determining whether Miranda warnings are constitutionally inadequate, reviewing courts should take a common-sense approach and ask how a suspect would "reasonably" understand the warnings given. If the warnings conveyed the "substance" of all of the various discrete Miranda rights, then there was no constitutional violation. Duckworth, 492 U.S. at 202-03.

Notably, the Eleventh Circuit has interpreted Prysock "[to] stand[ ]for the proposition that a Miranda warning is adequate *if it fully informs the accused of his right to consult with an attorney prior to questioning.*" United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982) (emphasis added). In that case, the Eleventh Circuit held that a Miranda warning was adequate, but only because it informed the

defendant of *both* his right to consult with an attorney before an interrogation occurred *and* his right to have that attorney present during questioning by police. Id. At 979 ("Both the customs and the DEA warnings informed appellant of his right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed.").

At trial, the prosecution also contended that Warning #3 given to Appellant explicitly encompassed both the right to consult and the right to presence in view of the language that informed Appellant that he could have a lawyer "at any time." This argument is untenable for three reasons. First, a reasonable person would read the phrase "at this time" to modify "present during questioning," not as providing a separate right to have a lawyer available to consult *prior* to questioning. That is, "at this time" clearly referred to the questioning that was about to begin. Thus, the phrase did not effectively convey the right to consult with an attorney outside of the presence of police prior to the interrogation. Second, the State's construction of Warning #3 ignores the fact that the same sentence containing the "at any time" language ended with the phase "[then] you are entitled to have a lawyer present." Warning #3 thus informed Appellant that, if he wanted a lawyer "at this time," then counsel would be provided -- but only for the purpose of being "present," *i.e.*, present *during questioning*. Finally, the last sentence of the Metro-Dade form stated that, "[k]nowing these rights, are you willing to answer my questions *without having a lawyer present?*" Even assuming *arguendo* that a reasonable person would interpret Warning #3 as the State has contended, this

final sentence -- which again focuses on the right to "hav[e] a lawyer *present*" during the interrogation -- would have led a reasonable person to believe that the right to counsel was limited to the right to have a lawyer present during questioning.

The mere right to have a lawyer by a criminal defendant's side during the interrogation is not constitutionally sufficient under Miranda and its progeny. "The right to consult with an attorney before questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them. Thus, it is extremely important that a Defendant be adequately warned of this right." People v. Snaer, 758 F.2d 1341, 1343 (9th Cir. 1985).[21]

Accordingly, because the standard Metro-Dade warning form used in this case failed to pass muster under Miranda and its progeny, the trial court erred by failing to suppress Appellant's two confessions. Appellant's Barker murder confession was an integral part of the prosecution's evidence offered to convict Appellant of first-degree murder, robbery and burglary in the instant case. Thus, its admission was clearly not harmless beyond a reasonable doubt. Likewise, the prosecution's introduction of the Walker murder confession during the capital sentencing phase harmed Appellant since the advisory jury clearly relied on it in returning a

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[21] In a similar vein, numerous courts have recognized that the constitutional right to counsel "embodies the right to private consultation with counsel." Barber v. Municipal Court, 598 P.2d 818, 823 (Cal. 1979) ; see also Smith v. Peyton, 276 F. Supp. 275, 277 (W.D. Va. 1967) (citation omitted).

recommendation for the death penalty. (Tr. 3407) (jury sent note to judge requesting copy of Walker murder confession).[22] It cannot be said beyond a reasonable doubt that the admission of either confession was harmless.

### *B. The As-Applied Challenge to the Warnings in this Case*

Assuming *arguendo* that this Court were to believe that the standard Metro-Dade warnings form used in this case was not facially invalid, this Court must nevertheless reverse Appellant's convictions and sentences based on the particular circumstances of the instant case. At the very least, the specific language contained in the Metro-Dade form -- *in conjunction with the manner in which it was read to Appellant* -- violated his Fifth Amendment rights.

As discussed above, Appellant was confronted by Detective Romagni at the police station shortly after Appellant's arrest. Before reading Appellant any of his Miranda rights, Romagni questioned him about certain "background" information and informed him that Albert Cooper and unnamed "others" had "implicated" him in the Walker murder and that Appellant should "tell his side of the story." Only after Romagni had secured an "agreement" from Appellant to give a statement did the detective read Appellant the warnings contained in the Metro-Dade form. Thus, although Appellant may not have said anything incriminating prior to being warned by Romagni, the interrogation process had effectively begun at the time that the

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[22] The prosecution introduced the Walker murder confession during the punishment phase in the instant case in order to establish the circumstances of Appellant's prior convictions for murder, robbery, burglary, and kidnapping.

warning were read to Appellant. Because warning #3 literally stated that a suspect *only* has the right to have a lawyer "present" during the interrogation, a reasonable person in Appellant's shoes would likely understand that a lawyer's *only* function was to be "present" during the interrogation -- which was already effectively under way when the warnings were read -- and not to provide consultation outside of the presence of the police. That is, because the interrogation process began before warning #3 was read to Appellant, Appellant had no reason to believe that the right to have a lawyer "present" meant that the interrogation would be stopped so that Appellant could first consult with an attorney.

Also noteworthy in this regard is the fact that the Metro-Dade warning form read to Appellant did not contain a separate statement that Appellant could terminate the interrogation at any time that he wished, even if it had already started. Although not dispositive by itself, the absence of this specific statement is relevant in this Court's overall analysis about whether the Miranda warnings were sufficient in this case.[23] Because Appellant was not so warned, he had reason to believe that the interrogation could not be stopped so that he could consult with a lawyer.

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[23] See, e.g., United States v. DiGiacomo, 579 F.2d 1211, 1214 (10th Cir. 1978) ("Although there may be no express requirement to warn suspects of the right to terminate questioning, the government's failure to so warn is certainly an important factor to consider in determining the voluntariness of any statement made."); United States v. Lares-Valdez, 939 F.2d 688, 689 (9th Cir. 1991) (citing DiGiacomo); Gandia v. Hoke, 648 F. Supp. 1425, 1432 (E.D.N.Y. 1986), aff'd 819 F.2d 1129 (2nd Cir. 1987) (same).

A final relevant circumstance is the fact that, at the time of the interrogation, Appellant was only 20 years old and lacked any experience with the law or legal system. He thus could not be expected to have any independent understanding of the function of a criminal defense lawyer before or during an interrogation. See United States v. Flowler, 476 F.2d 1091, 1093 (7th Cir. 1973) (defendant's young age and lack of experience in the criminal justice system relevant in determining whether defendant). When Appellant was told by Detective Romagni that he could have a lawyer "present" during questioning, he took it at face value, as he testified during the pre-trial suppression hearing. Expecting Appellant to understand that a lawyer's "presence" during questioning also encompassed the right to stop the interrogation so he could consult with the lawyer outside the presence of police is unrealistic.

The "taint" from Detective Romangi's interrogation extended to Detective Diaz's interrogation, which occurred immediately thereafter. That is, when Diaz entered into the same interrogation room and read Appellant the same warning form read to Appellant by Detective Romangi, Appellant had no reason to believe that he had any additional rights. Because of the continuous nature of the late-night interrogations, Appellant had no reason to believe that the right to have an attorney "present" encompassed the right to *consult* with an attorney outside the presence of the police before proceeding any further with the interrogation process.

II.

## THE TRIAL COURT ERRED BY DISALLOWING APPELLANT'S ATTEMPTED EXERCISE OF A PEREMPTORY CHALLENGE AGAINST VENIREPERSON DARIAS.

During jury selection, defense counsel attempted to exercise a peremptory challenge against Venireperson Natali Darias. The prosecution objected to Appellant's attempted exercise of the peremptory on the ground that "[s]he's a female and may be Hispanic." (Tr. 994.)[24] The trial court requested an explanation from defense counsel, who responded as follows:

> She has been on a prior civil jury. She has been a victim of car theft. She has -- I got the impression that she has a problem with -- from her responses with a presumption of innocence . ...I tend to think that she would be too intelligent for the case.

(Tr. 994.)

The trial court denied Appellant's peremptory challenge despite his race-neutral and gender-neutral explanation. Defense counsel sardonically responded, "[f]ine, your honor," and then stated:

> ***Just so the record is clear,*** we have been listening to this garbage about race-neutral [explanations from the prosecution in response to defense counsel's prior objections to the prosecution's exercise of peremptory challenges.] [W]e're looking at the fact that we have accepted ... other Latins [on the jury.]

(Tr. 994-95) (emphasis added). Venireperson Darias was ultimately seated on the jury. (Tr. 995, 1175.)

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[24] The record does not reveal whether Darias was in fact Hispanic, and the trial court did not make a finding whether she was Hispanic.

The trial court's disallowance of Appellant's attempted peremptory challenge was reversible error. Defense counsel's proffered race-neutral and genderl-neutral reasons were "perfectly satisfactory one[s]," Betancourt v. State, 650 So.2d 1021, 1023 (Fla. 3rd DCA 1995), which were supported by the record. (Tr. 792, 797, 893.) See also Miller v. State, 664 So.2d 1082 (Fla. 3rd DCA 1995) (trial court committed reversible error when it disallowed defense counsel's use of peremptory challenge after counsel offered neutral reasons for strike); Purkett v. Elem, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995) (race-neutral explanation "need not be persuasive, or even plausible").

Defense counsel adequately preserved the error for appeal. Following the trial court's denial of Appellant's attempted peremptory challenge against venireperson Darias, defense counsel indicated his objection to the trial court's ruling and intended for the matter to be reviewed on appeal. Although counsel admittedly could have voiced his objection in a more articulate manner,[25] his objection was readily apparent in his vigorous disagreement with the trial court and prosecution. Furthermore, defense counsel's statement, ***"just so the record is clear ...,"*** was an obvious reference to the appellate record that would be reviewed on Appellant's appeal. Here, counsel was clearly making it known that his disagreement with the trial court's ruling would be subject to review on appeal. Cf. Schummer v. State,

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[25] Cf. T.L.G. v. State, 648 So.2d 1248, 1248 (Fla. 5th DCA 1995) ("While defense counsel [could] have been more assertive in objecting ..., there was no waiver of the error.").

654 So.2d 1215, 1217 (Fla. 1st DCA 1995) (defense counsel's statement, "that's ridiculous," in response to a ruling was held to be insufficient to preserve error on appeal because it did not indicate that the defendant intended to appeal the ruling).

The purpose of the contemporaneous objection rule is to make objections known to trial judges so that they have the opportunity to rule at the time of trial, so as to prevent criminal defendants from "laying behind the log" and raising an issue for the first time on appeal. See, e.g., Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995). Defense counsel's statement in this case was sufficient put the trial court on notice that Appellant objected to the trial court's ruling.

Although defense counsel "accepted" the panel of jurors at the conclusion of voir dire (Tr. 1171), that action did not waive the error in this case. In Joiner v. State, 618 So.2d 174 (Fla. 1993), this Court held that, when a defendant objects to the prosecution's racially-biased use of a peremptory challenge and the trial court overrules the defense challenge, the defendant waives the error if he ultimately "accepts" the jury at the conclusion of voir dire. Id. at 176.[26] Unlike Joiner, the

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[26] In Joiner, this Court reasoned that:

> Counsel's actions in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. ... Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised his

instant case does not involve a defense objection to the prosecution's exercise of a peremptory challenge.[27] Rather, it involves the opposite situation: a prosecutor's objection to a defendant's exercise of a peremptory strike, and a subsequent defense objection to the trial court's denial of the defendant's right to use his peremptory. This Court has never applied the procedural rule in Joiner to such a claim.[28] Nor should it. Although superficially the type of error in Joiner and the type of error in the instant case are similar, the error in Joiner is qualitatively different from the type of error that occurred in this case. In Joiner, the claimed alleged that the prosecutor discriminated against a prospective juror based on race; the claim in the instant case concerns an impairment of Appellant's exercise of his peremptory challenges, which resulted in an objectionable juror actually serving on

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> discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling. ... Were we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.

Joiner, 618 So.2d at 176 & n.2.

[27] A compelling argument can be made that Joiner was wrongly decided and should be overruled: Precluding appellate review of unconstitutional prosecutorial discrimination during voir dire based on a procedural default by defense counsel ignores the rationale of the rule against such discrimination, which seeks to remedy an injury to society at large, as well as remedy the injury to a particular litigant. See, e.g., Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992) (Batson error injures society at large).

[28] Although some lower courts in Florida have done so, they have not explained why Joiner's reasoning is equally applicable to both situations. See, e.g., Amores v. State, 664 So.2d 48 (Fla. 3rd DCA 1995) (citing Joiner).

the jury.[29]

Even assuming *arguendo* that Joiner does apply to this type of voir dire error, the error was adequately preserved even though defense counsel "accepted" the jury at the conclusion of voir dire. As noted supra, defense counsel made it clear to the trial court that appellate review would be sought in this case with respect to the trial court's denial of the peremptory challenge. In such a situation, Joiner does not require a defendant to renew his objection at the conclusion of voir dire. See Langon v. State, 636 So.2d 578, 578-79 (Fla. 4th DCA 1994).

Accordingly, this Court must reverse Appellant's convictions and corresponding sentences.

## III.

## THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INFORM JURORS THAT APPELLANT WAS IN CUSTODY ON "AN UNRELATED MATTER" AT THE TIME HE GAVE HIS CONFESSION TO POLICE.

During the guilt phase, the prosecution -- over repeated defense objection -- sought to introduce testimony from the police that Appellant was in custody on an "unrelated

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[29] Virtually every jurisdiction has held that an impairment of a criminal defendant's exercise of his peremptory challenges is *per se* reversible error. See, e.g., Telemaque v. State, 591 So.2d 675, 675 (Fla. 3rd DCA 1991); State v. Carvalho, 880 P.2d 217, 225-26 (Hawai'i App. 1994) (citing cases from numerous jurisdictions); Wilson v. United States, 606 A.2d 1017, 1025 (D.C. App. 1992); United States v. Ricks, 776 F.2d 455 (4th Cir. 1985), aff'd en banc, 802 F.2d 731 (4th Cir. 1986) (en banc). An infringement of a criminal defendant's exercise of peremptory challenges violates the Due Process Clause of the Fourteenth Amendment. See, e.g., Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991).

matter"[30] at the time he gave his confession regarding the murder of Charles Barker. (Tr. 1183-90, 1522-23, 1526, 1528-30.) The trial court permitted the prosecution to do so and also instructed the jury as follows:

> The detective [Det. Saladrigas] is going to testify as to how he came in contact with the defendants in this case. Now, for purposes of establishing time, I have ruled that I am going to allow [Saladrigas] to talk about this, but it's a totally unrelated matter that first came to the attention of the police. Now, I want you to make sure that th[is] unrelated matter has nothing at all to do with this case .... It just was an unrelated matter unimportant as to why, when, where, how, but it [is] being done so that there is a logical sequence of how the detective came in contact with the defendants.

(Tr. 1524.)

Det. Saladrigas then testified that, in the Metro-Dade Police Department's investigation of the "unrelated matter," a "team" of police officers was employed. (Tr. 1525.) That team of officers went to the Hidden Garden Apartments and interviewed "certain friends and/or acquaintances" of Appellant and Cooper before the co-defendants were interrogated about the "unrelated matter." (Tr. 1525.) Six other witnesses were also interviewed in connection with the "unrelated matter," and police stenographers recorded their statements (Tr. 1526-27.) Appellant objected and moved for a mistrial. (Tr. 1528.) Appellant contended that, especially in light of Detective Diaz's prior testimony about the "team" concept used in the Metro-Dade Police Department's Homicide Unit (Tr. 1496), the jury could infer that Appellant and Cooper were in custody in connection with another homicide. (Tr. 1528.) The trial

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[30] Of course, that "unrelated matter" was the Thomas Walker murder.

court overruled the objection and denied the motion for a mistrial. (Tr. 1529.) Counsel for Appellant refused to proceed with a cross-examination of Detective Saladrigas because he feared that he would only exacerbate the error. (Tr. 1530.)

The trial court erred by permitting the State to inform the jury that Appellant was in custody in connection with an "unrelated matter." Florida courts have consistently recognized that it is error for the State to introduce evidence that a criminal defendant has had previous involvement with law enforcement. See, e.g., Bates v. State, 422 So. 2d 1033 (Fla. 3d DCA 1982) (reversible error for state to introduce testimony that defendant had previously been in prison); Harris v. State, 427 So. 2d 234 (Fla. 3d DCA 1983) (reversible error for state to introduce evidence that defendant who did not testify had a prior felony past); Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987) (reversible error for police to testify that they knew defendant prior to his involvement in case on trial); see generally Charles W. Ehrhardt, FLORIDA EVIDENCE, § 404.9, at 152-53 (1996) (citing cases). "It is the established law of this state dating back to 1886 that evidence of any crime committed by a defendant, other than the crime or crimes charged for which the defendant is on trial, is inadmissible in a criminal court where its sole relevancy is to attack the character of the defendant or to show the defendant's propensity to commit the crime charged." Vasquez v. State, 405 So. 2d 177 (Fla. 3d DCA 1981), quashed on other grounds, 419 So.2d 1088 (Fla. 1982). Courts have recognized the presentation before a jury of such inadmissible testimony is generally considered classic grounds for a mistrial given its prejudicial impact upon a jury. See id. at 179-80. "Erroneous admission of collateral crimes evidence is

presumptively harmful." Czubak v. State, 570 So.2d 925, 928 (Fla. 1990).

In the instant case, the prosecution contended that introduction of the evidence that Appellant and Cooper were in custody on the "unrelated matter" was necessary because jurors might speculate that Appellant's confession was involuntary because he was in custody for 12 hours before he confessed to the Barker murder. The prosecution stated that it needed to account for those 12 hours so that jurors would not speculate that Appellant was being mistreated during that time. Thus, the prosecution wanted to introduce evidence that police were conducting an investigation and also that Appellant was being interrogated in connection with the "unrelated matter" during that time. (Tr. 1184-88.) Appellant responded that there was no need for the prosecution to introduce the evidence of the "unrelated matter" because the defense was not going to contend that Appellant's confession was involuntary as a result of Appellant being in custody for 12 hours before he confessed to the Barker murder. (Tr. 1184.)

The prosecution's supposed need to introduce the fact that Appellant was in custody on the "unrelated matter" was illusory and, thus, the extraneous offense evidence had no purpose other than to attack Appellant's character. Jurors would not have placed any significance on that fact that Appellant was in custody for 12 hours before confessing unless the defense contended that something happened during that 12 hour period which rendered Appellant's confession involuntary. Defense counsel informed the prosecution and trial court that Appellant intended to do no such thing,

and the defense in fact did not make that argument to jurors, explicitly or implicitly.[31]

The admission of the evidence about the "unrelated matter" -- which jurors could have reasonably inferred was another homicide or at least some other type of serious crime[32] -- clearly harmed Appellant. The trial court's instruction to the jury, which told jurors not to consider the "unrelated matter" in connection with the Barker murder, was ineffective to dissipate the harm to Appellant. See, e.g., Freeman v. State, 630 So.2d 1225, 1226 (Fla. 4th DCA 1994).[33] Indeed, the trial court's instruction only exacerbated the error by underscoring the fact that Appellant was in custody in connection with another serious offense. Therefore, this Court must reverse Appellant's convictions and sentences.

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[31] As discussed in the Statement of the Case, supra, Appellant contended that his confession was false and that the police had supplied him with the inculpatory details. Appellant testified that he lied in order to protect his mother. Neither Appellant nor defense counsel ever suggested that Appellant's confession was involuntary as a result of anything that the police did during the initial 12 hours that Appellant was in custody.

[32] Jurors likely assumed that the "unrelated matter" was at least a serious crime in view of the fact that a "team" of police officers were assigned to investigate the case, and also that those officers interviewed numerous witnesses in connection with the "unrelated matter."

[33] Assuming *arguendo* that the prosecution had a right to introduce the collateral crime evidence, a proper cautionary instruction should have, at a minimum, informed jurors that the collateral crime evidence should have been considered "only" for establishing the sequence of events. Cf. Stand. Fla. Jury Instr. 3.07, in FLORIDA'S CRIMINAL LAWS AND RULES, at 194-94 (West 1996).

## IV.

**BECAUSE JURORS REPEATEDLY SAW APPELLANT IN SHACKLES AND HANDCUFFS, THIS COURT MUST REVERSE HIS CONVICTIONS AND SENTENCES.**

During the guilt phase, counsel for Appellant approached the trial court and made the following objection:

> Our clients were brought over late, and as a result, [they] were walked across in chains in front of the jurors again for the second or third time in this trial. This Court has already attempted to avoid that previously, but this happened again ... Therefore, based upon that, I'd have to move for a mistrial.

(Tr. 1985.) Counsel later clarified that jurors saw Appellant and Cooper "in leg chains and handcuffed to each other." (Tr. 1986.) The trial court did not dispute that this had occurred[34] and instead stated, "I don't think that calls for a mistrial. I think jurors have every reason to believe that the defendants are in jail, and if you want, I'll tell them that they are in jail ...." (Tr. 1985.) Counsel responded, "... I don't want the Court telling them that ...." (Tr. 1985.)

The trial court erred by denying Appellant's motion for a mistrial. The U.S. Supreme Court has recognized that "the sight of shackles ... might have a significant effect on the jury's feelings about the defendant." Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L.Ed.2d 353 (1970); see also Dickson v. State, 822 P.2d 1122, 1127 (Nev. 1992) (reversing conviction because defendant was exposed to jurors while he was in shackles); Marquez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994)

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[34] A subsequent colloquy between the trial judge and the bailiff corroborates defense counsel's assertion. (Tr. 1986.)

("We agree ... that the appearance of a defendant in shackles and handcuffs before a jury in a capital case requires careful judicial scrutiny. Shackling carries the message that the state and the judge think the defendant is dangerous ...."); cf. Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976) (recognizing that due process may be violated if a criminal defendant is exposed to the jury in jail attire). In the instant case, there was not simply a "brief and fortuitous encounter of the defendant in handcuffs ...." Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984). Rather, as defense counsel stated -- and which neither the prosecutor nor the trial judge disputed -- Appellant was *repeatedly* paraded in front of the jury in handcuffs and shackles. Because there was no necessity for doing so, see Marquez, 11 F.3d at 1243-44,[35] the repeated showing of Appellant in chains in front of the jury was error.

The error in this case was not harmless beyond a reasonable doubt. Although the prosecution offered numerous witnesses and items of evidence against Appellant, including Appellant's confession, Appellant himself took the stand at trial and testified in his own behalf. Appellant testified that his confession was false and that the shooting of Charles Barker was, at most, third-degree felony-murder. Furthermore, as defense counsel explained during closing arguments, there was evidence that corroborated Appellant's trial testimony. Jurors obviously believed that the prosecution's case was not air-tight, or they would not have deliberated for almost

[35] Indeed, Appellant was repeatedly seen in chains because jail officials were tardy in bringing him to the court room. (Tr. 1985-86.)

eight hours before returning guilty verdicts.

Because Appellant's credibility was pivotal to his defense, it cannot be said beyond a reasonable doubt the trial court's decision to allow jurors to sit in judgment of Appellant after repeatedly seeing him in shackles and handcuffs did not contribute to the jury's guilty verdicts. See Yates v. Evatt, 500 U.S. 391, 111 S. Ct. 1884, 114 L.Ed.2d 432 (1991) (discussing harmless error standard). Seeing Appellant in shackles and handcuffs sent a message to jurors that Appellant should not be presumed innocent and instead should be considered dangerous. Marquez, 11 F.3d at 1243. Thus, the error cannot be deemed harmless, and Appellant's convictions and sentences must be reversed.

## V.

## THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO SUBMIT SPECIAL VERDICT FORMS REGARDING THE ALTERNATIVE THEORIES OF FELONY-MURDER AND PREMEDITATED MURDER.

The trial court's jury instructions during the guilt phase permitted jurors to convict Appellant of first-degree murder in either or both of two alternate ways -- either for felony-murder or for premeditated murder. (Tr. 2372-74.) As discussed in the Statement of the Case, supra, the prosecution contended that Appellant was guilty of both types of first-degree murder. Appellant, however, presented evidence to negate one or more elements of both types of first-degree murder. Based on the totality of evidence presented at trial, a rational jury could have acquitted Appellant of one or both types of first-degree murder.

During the jury's deliberations, jurors asked the trial court the following question:

"How would our decision between 1st Degree Premeditated Murder and 1st Degree Felony Murder be explained on the [verdict] form which we are to sign?" (R. 261.) Consistent with well-established Florida law,[36] the trial court instructed the jury as follows: "If you have decided on a verdict of first degree murder, it doesn't [matter] -- you don't have to designate it. It's the same form for both of them. You don't have to designate whether it's premeditated or felony-murder. It's the one charge. It doesn't matter which way it is proved, if you're satisfied." (Tr. 2415-16.)

The trial court's failure to instruct the jury that it should specify which type of first-degree murder that Appellant was guilty of and further specify whether Appellant was being acquitted of the alternate type of first-degree murder was fundamental error.[37] The jury's note indicated that the jury believed that Appellant was guilty of only one of the two types of first-degree murder -- likely felony-murder.[38] The jury's note revealed that the jury had made "a decision between 1st Degree Premeditated Murder and 1st Degree Felony Murder"; that is, that the jury was willing to convict on only one theory and acquit on the other.

Under these unusual circumstances, Appellant was constitutionally entitled to have the jury instructed that they should specify which type of first-degree murder Appellant

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[36] See, e.g., Parker v. State, 641 So.2d 369, 375 (Fla. 1994).

[37] Appellant is raising this issue for the first time on appeal.

[38] The fact that the jury concurrently convicted Appellant of robbery and burglary belies the suggestion that jurors did not believe that Appellant was guilty of felony-murder.

was guilty of and acquit Appellant of the other type if jurors unanimously believed that the prosecution had not proven that alternate theory of first-degree murder beyond a reasonable doubt. Although Appellant would still have been guilty of first-degree murder and the prosecution could still have proceeded to seek the death penalty during the sentencing phase, as explained infra, an acquittal of one of the two alternate theories would have had a significant impact on the capital sentencing phase.

During the sentencing phase, the prosecution contended and the trial court found that the murder was "cold, calculated, and premeditated" and also that the murder was committed during the course of two enumerated felonies, robbery and burglary. (R. 629-32.) See Fla. Stat. § 921.141(5)(d) & (i). Had the jury only convicted Appellant of one of the two alternate theories of first-degree murder and acquitted Appellant of the other theory, the prosecution would have been collaterally estopped under Double Jeopardy principles[39] from relying on both of these statutory aggravating circumstance during the sentencing phase: If the jury had acquitted Appellant of premeditated murder during the guilt phase, then the prosecution would have been collaterally estopped from relying on the CCP aggravator;[40] likewise, if the jury had acquitted Appellant of felony-murder, then the prosecution would have been

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[39] See generally Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970).

[40] It is well-established that the type of "heightened premeditation" necessary to apply the CCP aggravator subsumes the "ordinary" premeditation necessary to convict a defendant of premeditated first-degree murder. See, e.g., Jackson v. State, 648 So.2d 85, 88 (Fla. 1994).

collaterally estopped from relying on the felony-murder aggravator. See Delap v. Dugger, 890 F.2d 285, 314-17 (11th Cir. 1989) (holding that, under collateral estoppel doctrine, the prosecution could not rely on felony-murder aggravator when defendant was previously acquitted of felony-murder); cf. Ex Parte Mathes, 830 S.W.2d 596, 598 (Tex.Crim.App. 1992) (applying collateral estoppel doctrine to capital sentencing phase).[41]

Of course, there is no way to know with certainty that the jury in this case believed that Appellant was not guilty of one of the two theories of first-degree murder. However, the wording of jury's note and the fact that Appellant was concurrently convicted of robbery and burglary strongly suggest that the jury did not believe that Appellant was guilty of premeditated murder. Had special verdict forms been submitted, then there is certainly a reasonable likelihood that Appellant would have

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[41] In Schiro v. Farley, 510 U.S. 222, 114 S. Ct. 783, 127 L.Ed.2d 47 (1994), the U.S. Supreme Court granted certiorari to decide whether the collateral estoppel doctrine prevented the prosecution from relying on an aggravating factor during the capital sentencing phase when the jury had previously acquitted the capital defendant of a theory of capital murder that involved the same "issue of ultimate fact" as the aggravator. However, because the Court found that the defendant had not been acquitted of any type of murder, the Court did not address the issue. See id. at 790. In the instant case, as noted, the jury did not acquit Appellant of either of the two types of first-degree murder because it returned a general verdict. However, because Appellant is not raising a collateral estoppel claim *per se* -- and instead is discussing collateral estoppel principles only insofar as they support Appellant's contention that the trial court should have submitted special verdict forms -- this Court must necessarily address the collateral estoppel issue left open in Schiro.

been acquitted of premeditated murder and only convicted of felony-murder.[42] Therefore, there is an unacceptable risk that Appellant's death sentence is tainted in view of the fact that the trial court found the CCP *and* felony-murder aggravators. The likelihood that Appellant was sentenced to death when the jury did not believe he was guilty of both types of felony-murder cannot be tolerated. The Eighth Amendment requires "extraordinary measures to ensure the prisoner sentenced to death is afforded a process that will guarantee, as much as humanly possible, that the sentence will not be imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) (O'Connor, J., concurring).

Although Appellant did not raise this claim in the trial court, this Court should review the merits of the claim as "fundamental error." See, e.g., Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992) ("Fundamental errors must rise to the level of a denial of due process where the 'interests of justice present a compelling demand for its application.'") (citing cases). In particular, it is appropriate to review the merits of this claim as a fundamental error because of its collateral estoppel implications. It is

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[42] In this regard, it is noteworthy that the prosecution felt compelled to re-call Admonia Blount-Coleman to testify during the punishment phase about an alleged conversation that she overheard between Appellant and Cooper before the Barker murder. During the guilt phase, Coleman testified that Cooper had stated that he intended to kill (as well as rob) Barker, but she did not testify that Appellant similarly expressed an intent to do anything more than rob Barker. (Tr. 1580, 1584-85.) Appellant's confession also suggested that he only intended to rob and not to kill Barker. (Tr. 1831) (stating that Cooper "freaked out" and started shooting at Barker, suggesting that Appellant had not planned on killing Barker). During the punishment phase, Coleman significantly embellished her guilt-phase testimony and stated that Appellant *and* Cooper had evinced an intent to kill Barker well before the crime. (Tr. 2899-2909.)

well-established that a Double Jeopardy claim may be raised for the first time on appeal as fundamental error. See, e.g., State v. Johnson, 483 So.2d 420, 422 (Fla. 1986). Finally, in view of the novelty of this claim -- which focuses on the likelihood that the collateral estoppel doctrine would have prevented the trial court from finding a statutory aggravating factor if special verdict forms had been submitted to the jury -- this Court should not find it in procedural default. See, e.g., Reed v. Ross, 468 U.S. 1, 104 S. Ct. 2901, 82 L.Ed.2d 1 (1984) (holding that the novelty of a claim is a basis for excusing procedural default); Black v. State, 816 S.W.2d 350 (Tex.Crim.App. 1991) (same).

Although the harm that occurred as a result of the trial court's failure to submit special verdict forms was limited to the punishment phase, the appropriate remedy is to reverse Appellant's first-degree murder conviction and death sentence and remand for an entirely new trial.[43] This is because there is simply no way to know with certainty whether the jury would have acquitted Appellant of the felony-murder count or the premeditated murder count.[44] At the very least, if this Court is confident that

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[43] Because the same potential collateral estoppel problem likely will arise in other Florida capital cases where juries are willing to convict only on one first-degree murder theory and acquit on the other, Appellant believes that this Court should recede from its prior holding that special verdict forms are not required in capital cases. See, e.g., Parker v. State, 641 So.2d 369, 375 (Fla. 1994). Prior cases such as Parker did not address the collateral estoppel implications of special verdict forms in first-degree murder cases in which the prosecution is seeking the death penalty.

[44] If this Court reverses Appellant's first-degree murder conviction, this Court must also reverse Appellant's non-capital life sentences and remand for resentencing since the trial court imposed those guidelines-departure life sentences

the jury necessarily convicted Appellant of felony-murder in view of the concurrent robbery and burglary convictions, then this Court should strike the CCP aggravator. If that aggravator is struck, this Court must remand for resentencing since it cannot be said beyond a reasonable doubt that the trial court's reliance on that aggravator was harmless.

## VI.

## BECAUSE APPELLANT'S TWO COURT-APPOINTED LAWYERS WERE ABSENT DURING A "CRITICAL STAGE" OF THE SENTENCING PROCEEDING, THIS COURT MUST VACATE APPELLANT'S DEATH SENTENCE AND REMAND FOR RESENTENCING.

### A. Relevant Facts

As discussed in the Statement of the Case, supra, Appellant and his co-defendant, Albert Cooper, were tried before a single jury. That same jury served in an advisory capacity during the capital sentencing phase following Appellant and Cooper's first-degree murder convictions. During the sentencing phase, the prosecution first presented its case-in-chief (consisting of aggravating evidence applicable to both defendants), and then Cooper and Appellant each presented their respective cases in mitigation.

The record reveals that Appellant and his two court-appointed attorneys were absent from the courtroom during co-defendant Cooper's presentation of his punishment phase witnesses and the prosecution's cross-examination of those

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in part as a result of Appellant's first-degree murder conviction. (R. 641.)

witnesses.[45] (Tr. 2667, 3116, 3151-52.)[46] During Cooper's case in mitigation, numerous witnesses claimed that Appellant had dominated Cooper and led him into criminal activity. Cooper's mental health expert, Dr. Hyman Eisenstein, testified that Cooper had significant brain damage and, thus, had an impaired ability to exercise judgment. (Tr. 2677-78.) According to the expert, Cooper was "vulnerable" to the domination of others. (Tr. 2678.) When Cooper's counsel asked Dr. Eisenstein whether Cooper was "under the influence of Mr. Johnson" at the time of the murders, Dr. Eisenstein emphasized repeatedly that Appellant had dominated Cooper. (Tr. 2680, 2683, 2722-24.) Dr. Eisenstein also testified that Cooper had informed him that Appellant (not Cooper) had planned the robbery and murder of Charles Barker, which was contrary to Appellant's confession. (Tr. 2724.)

Cooper's sisters and mother likewise suggested that Appellant contributed to Cooper's criminal actions. (Tr. 2755-76, 2993-95, 3009.) A long-time friend of the Cooper family, Dorothy Haynes, testified about Cooper's decline from "one of the sweetest young men you could know" to a violent, foul-mouthed teenager who seemed to be abusing drugs. (Tr. 2760-63.)[47] Haynes testified that this dramatic

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[45] One of Appellant's lawyers, Marian Garcia, was present during closing arguments in Cooper's punishment phase (Tr. 3146-47.)

[46] Not only did the two attorneys note on the record that they had been absent during the testimony of Cooper's witnesses, but also the trial judge stated "[n]obody stopped you from being present ...." (Tr. 3152.)

[47] Cooper's aunt and mother also testified that he was abusing drugs around this time in his life. (Tr. 2798-99, Tr. 2995.) Another witness for Cooper, Dr. Gary Schwartz, later testified that Cooper told him that "[h]e and his co-defendant drank

change occurred after Cooper started associating with Appellant. (Tr. 2761-62, 2767-69.) Haynes also testified about a conversation between Appellant and Cooper which she overheard in May of 1991: "... I remember Tivan telling ... Albert, 'That you are going to have to do what you have to do.' [Tivan Johnson] said, 'You are going to have to do it.' [Albert Cooper] said, 'Okay, don't keep telling me. I know what I have to do. I'm just going to have to do it, okay?'" (Tr. 2769). Haynes testified that, although she did not know it at the time, this conversation obviously referred to planning the murders: "I did not put it together until this had happened. When they told me about the murders, all this is coming back. ... I believe that Tivan was coaching him on what he was supposed to do." (Tr. 2769-70.)

During closing arguments following Cooper's punishment hearing, Cooper's counsel argued that Cooper was less morally culpable than Appellant in view of Appellant's supposed substantial domination of Cooper:

> Another thing we need to discuss, and I think we need to seriously address, is the domination because our theory of the mitigators go towards the domination that Tivan Johnson had over Albert Cooper. There is one truth in this case, ladies and gentlemen, it is not an accident that Albert Cooper self destructs when he associates himself with Tivan Johnson. I don't think anyone can seriously question that. Tivan Johnson turns Albert Cooper on to drugs. We know that from the testimony of the family. We know from the testimony of Dr. Schwartz that Albert Cooper, at Tivan's prompting, started smoking marijuana laced with crack cocaine ... How do we know this? Because the family saw it. Everyone saw the changes in Albert Cooper, his aunt, ... his mom, his sisters, his neighbors. Even more so, when he was under the

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a case of beer [on the day of the offense]. ... They had both -- he had smoked -- they had both smoked ... marijuana cigarettes with crack cocaine mixed in with it." (Tr. 2936.)

> influence of these narcotic substances, his temper changed, something the family had never seen before. All of a sudden Albert Cooper can't get along with mom any more. All of a sudden he has these wild rages .... Tivan Johnson lit Albert Cooper's views [sic; fuse] and he made sure it stayed burning for that miserable horrible 19 day period [when the two murders occurred]. There is no other reasonable explanation.

(Tr. 3134-35.)

Cooper's counsel then argued that Appellant was a "manipulator" and had committed perjury on the witness stand during the guilt phase:

> How do we know that Tivan Johnson ha[s] the power of psychological manipulation? Well, I can only point to one thing and I think it is the most important thing to point to; remember what Tivan Johnson said [on] that witness stand when he testified in the guilt or innocence phase? Tivan Johnson lied about everything but his name. That was the only truth he told you from that witness stand. He assassinated Charles Barker again with his story and he tried to psychologically manipulate you, ladies and gentlemen. This is a man who tried to save himself by perjury so you would render a third degree [murder] verdict so he wouldn't have to face the electric chair or life imprisonment. He has a dominant personality. He perjured himself and tried to manipulate you. That question is obvious and clear. Absolutely.... [Albert Cooper] was under extreme duress or under the substantial domination of [Tivan Johnson]. We know that to be true.

(Tr. 3135, 3136-37.)

One of Appellant's lawyers, Marian Garcia, who was present during the closing argument by Cooper's counsel, stated, "I have [a] very vehement objection about [Cooper's counsel's] closing argument." (Tr. 3146.) The trial court responded, "[t]here is nothing wrong with one [co-defendant] blaming the other [co-defendant] for everything that happened. There is nothing illegal about it." (Tr. 3147.) Appellant's other court-appointed lawyer, Michael Von Zamft, subsequently arrived and further objected that Cooper's counsel had previously "chose[n] to participate in the defense

given" by Appellant during the guilt phase. "Now [Cooper's counsel] called Mr. Johnson a liar to the same jury that is now deliberating [punishment]" and was "essentially creating two prosecutors against Mr. Johnson. ... This was not planned, expected by us. I had no anticipation [of] it ..." (Tr. 3151.) Appellant's counsel, Marian Garcia, further contended that:

> Sitting here this morning and listening to [Cooper's counsel's] closing argument, I learned that my client dominated Mr. Cooper, that he gave him crack, made him some kind of cocaine, marijuana cigarettes that influenced him into committing that crime. Because we were not present, we [were] not able to cross examine any of the witnesses that testified [for] Mr. Cooper.

(Tr. 3151-52.) The trial court responded, "[n]obody stopped you from being present and nobody stopped you from cross examining. This was a decision made by you ...." (Tr. 3152.)

**B. Argument and Authorities**

At the outset, Appellant notes that he is not raising a claim of ineffective assistance of counsel, which would be governed by the familiar two-pronged standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).[48] Rather, he is raising a related yet distinct claim that there was a "complete denial of counsel" during a "critical stage" of trial. United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. at 692. In such circumstances, a reviewing court must not

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[48] Appellant does not waive the right to raise such a claim on post-conviction review, in the event that this Court affirms his convictions and sentences on this direct appeal.

apply Strickland's two-pronged standard. Instead, a court must merely determine whether counsel was absent during a "critical stage" of trial; if so, reversal is automatic. See Cronic, 466 U.S. at 659 & n.2 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of trial.... This Court has uniformly found constitutional error without any showing of prejudice when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.") (citing numerous cases). Numerous lower courts have thus concluded that reversal is required when a lawyer is absent -- temporarily or permanently -- during any "critical" stage of trial.[49] In capital cases, the United States Supreme Court has traditionally been particularly adamant that defendants have counsel at any and all critical stages and that denial of counsel at any critical point in the trial proceedings requires reversal without any inquiry into prejudice. See, e.g., Hamilton v. Alabama,

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[49] See, e.g., McKnight v. South Carolina, 465 S.E.2d 352 (S.C. 1995) (reversing defendant's conviction where counsel was absent during portion of testimony of one of prosecution's witnesses); People v. Margan, 157 A.D.2d 64, 554 N.Y.S.2d 676 (N.Y.App. 1990) (reversing defendant's conviction where trial judge directed prosecution to begin direct examination of a witness before defense counsel had arrived); Green v. Arn, 809 F.2d 1257, 1261 (6th Cir.) (reversing conviction where defense counsel was absent during portion of testimony of one of prosecution's witnesses), vacated on other grounds, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (6th Cir. 1988); Carter v. Sowders, 5 F.3d 975, 979 (6th Cir. 1993) ("The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial *per se* and justifies the automatic granting of the writ [of habeas corpus] without any opportunity for a harmless error inquiry.'") (citation omitted); United States v. Rimell, 21 F.3d 281, 286 (8th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275-76 (7th Cir. 1993); United States v. Swanson, 943 F.2d 1070, 1075 (9th Cir. 1991); United States v. Osterbrock, 891 F.2d 1216, 1218 (9th Cir. 1989); Siverson v. O'Leary, 764 F.2d 1208, 1216 (7th Cir. 1985).

368 U.S. 52, 54-55, 82 S. Ct. 157, 7 L.Ed.2d 114 (1961) (holding that "an accused in a capital case `requires the guiding hand of counsel at every step in the proceedings against him'"; reversing without a showing of prejudice when capital defendant lacked counsel at his arraignment) (citing Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L.Ed.2d 158 (1932)); White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L.Ed.2d 193 (1963) (*per curiam*) (same).

Therefore, the only issue here is whether Appellant's two court-appointed lawyers were absent during a "critical stage" of the proceedings in the court below.[50] A stage of trial is deemed "critical" under the Sixth Amendment if denial of counsel at that particular stage "might derogate" the defendant's right to a fair trial. United States v. Wade, 388 U.S. 218, 226 (1967). Under this standard, the United States Supreme

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[50] Because the record is clear that Appellant did not validly waive his right to counsel during the testimony of Cooper's punishment phase witnesses, Appellee cannot contend that this claim is waived because counsel chose to be absent. The right to counsel, unlike most of a defendant's constitutional rights, cannot be waived by the defendant's mere failure to assert it. See Carnley v. Cochran, 369 U.S. 506, 514, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed.2d 1461 (1938)); Stano v. Dugger, 921 F.2d 1125, 1143 (11th Cir. 1991) (*en banc*) ("The right to counsel ... attaches automatically and must be affirmatively waived to be lost. ..."); see also Mack v. State, 537 So. 2d 109, 110 (Fla. 1989) (Grimes, J., concurring) ("It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those rights which go to the very heart of the adversary process," such as the right to counsel). It is the "responsibility, obligation, and duty of the Trial Judge" to make the "serious determination of waiver" and "such determinations should appear plainly on the record." Ford v. Wainwright, 526 F.2d 919, 922 (5th Cir. 1976). Counsel cannot make a waiver for a criminal defendant because the right to the assistance of counsel at a critical stage of the trial proceedings is "an 'inherently personal right of fundamental importance.'" United States v. Joshi, 896 F.2d 1303, 1307 (11th Cir. 1987).

Court has held repeatedly that a sentencing proceeding -- separate and apart from the trial on the merits -- is a "critical stage." See Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977) (citing Mempha v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L.Ed.2d 336 (1967)). If a non-capital sentencing proceeding is a critical stage, see Mempha v. Rhay, supra, then *a fortiorari* a capital sentencing proceeding is a critical stage under the Sixth Amendment. See Gardner, 430 U.S. at 357-58 (explaining that "death is [a] different" form of punishment, requiring heightened procedural protections in the capital sentencing phase); Woodson v. North Carolina, 428 U.S. 280, 304-05, 96 S. Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976) (same).[51]

The fact that Appellant's two lawyers were absent for only a portion of the sentencing proceedings is irrelevant for Sixth Amendment purposes. A temporary absence of counsel is as much a Sixth Amendment violation as a total deprivation of counsel during the entire trial. See, e.g., McKnight v. State, 465 S.E.2d 352 (S.C. 1995); Green v. Arn, 809 F.2d 1257 (6th Cir. 1987); cf. Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L.Ed.2d 592 (1976) (defense counsel's lack of access to defendant during overnight trial recess was grounds for automatic reversal under Sixth Amendment); Crutchfield v. Wainwright, 803 F.2d 1103, 1110 (11th Cir. 1987)

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[51] Even before the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), the Court recognized that "death is different" regarding the Sixth Amendment's requirement that a capital defendant have the assistance of counsel at all "critical stages" of trial. See, e.g., Hamilton v. Alabama, supra.

*(en banc)* (defense counsel's lack of access to client during brief trial recess was grounds for automatic reversal under Sixth Amendment). The critical factor is whether the presence of counsel might have assisted the defense in some way. See United States v. Wade, 388 U.S. at 226; see also McKnight, 465 S.E.2d at 354 n.2 ("We do not mean to suggest ... that an automatic reversal is required every time counsel is absent from any part of a trial. Some absences might be so de minimis they would have no constitutional significance.") (citing Green, 809 F.2d at 1261)).

Appellant's two attorneys' absence in the instant case cannot be deemed "de minimis" under the Sixth Amendment. As discussed supra, numerous witness called by Cooper testified that Appellant "dominated" Cooper and otherwise caused him to transform from a sweet young man into a foul-mouthed, violent, drug-abusing murderer. One of those witnesses also testified about an alleged conversation between Appellant and Cooper in which Appellant supposedly directed Cooper to commit the murders. That conversation directly contradicted Appellant's statements to police, which claimed that Cooper was the driving force behind both murders and which suggested that Appellant did not intend to kill either Charles Barker or Thomas Walker.[52] The witnesses presented by Cooper during the punishment phase -- who

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[52] As discussed in the Statement of the Case, supra, in Appellant's confession regarding the murder of Charles Barker, Appellant stated that Cooper planned the robbery and that he also "freaked out" and starting shooting Barker (suggesting that Appellant had not planned to kill Barker). In Appellant's confession regarding the murder of Thomas Walker, Appellant indicated that he did not wish for Cooper to shoot Walker and that, instead, Appellant wished to lock Walker in the walk-in freezer at the restaurant and turn off the electricity.

were not subjected to cross-examination by Appellant's absent lawyers -- provided Cooper's counsel with a basis to attack Appellant during closing arguments.

Cooper's theory of mitigation was clearly contrary to Appellant's theory of mitigation. Appellant's evidence painted the picture of an immature, emotionally-disturbed young man who had engaged in highly aberrational conduct[53] in late May and early June of 1991. Appellant's counsel also undoubtedly hoped to rely on the fact that Cooper was the triggerman in the Walker murder and that, according to the confessions of both co-defendants, Cooper fired the first fatal shot at Charles Barker after Cooper "freaked out." Cooper's witnesses contradicted Appellant's theory of mitigation. They portrayed Appellant as a dominant personality who influenced Cooper to commit crimes and engage in bad conduct. Cooper's counsel became, in effect, a "second prosecutor."

In view of these divergent theories of mitigation, it cannot be gainsaid that Appellant's two attorneys could have assisted their client's case in mitigation by being present during the testimony of Cooper's mitigation witnesses. Appellant's lawyers could have moved for a severance at the outset of Cooper's case[54] and, if that were denied, at least they could have cross-examined Cooper's witnesses in the attempt to correct the damage that they did to Appellant's case in mitigation. Thus, in view of the

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[53] As noted, Appellant was the first African-American Eagle Scout in Dade County and was also repeatedly described as a "mama's boy."

[54] As discussed in the following ground of error, a severance should have been granted in the punishment phase in this case.

highly unusual circumstances in this case, Cooper's presentation of witnesses in his own behalf was a "critical stage" of Appellant's own case. Cf. United States v. Morrison, 946 F.2d 484, 502-03 (7th Cir. 1991) (holding that co-defendant's counsel's cross-examination of a prosecution witness at joint trial was not a "critical stage" of defendant's case because nothing addressed in the cross-examination concerned the defendant; court noted, however, that "[o]ur conclusion might be different if [the defendant] and his co-defendants were presenting antagonistic defenses; if this were the case, [the defendant's attorney's] presence during co-counsel's cross-examination would indeed be important").

Because Appellant lacked the assistance of counsel during a critical portion of the capital sentencing phase, this Court must vacate his death sentence and remand for an entirely new sentencing phase.

## VII.

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO SEVER APPELLANT'S CAPITAL SENTENCING HEARING FROM CO-DEFENDANT ALBERT COOPER'S CAPITAL SENTENCING HEARING.

### A. Relevant Facts

As discussed supra, Appellant and co-defendant Albert Cooper were jointly tried before a single jury, which convicted both co-defendants of all of the charges contained in the joint indictment, including first-degree murder. During the pre-trial stage, counsel for Appellant and Cooper did not move to sever the co-defendants or have the two cases tried together in front of separate juries (who would each only hear

evidence relevant to a particular co-defendant).[55] (Tr. 619-20.) As counsel for Appellant later explained, Appellant initially did not move for a severance because Cooper's counsel represented to Appellant's counsel that Cooper's defensive theory would be consistent with Appellant's theory. (Tr. 3151.)

After both Appellant and Cooper had been convicted of first-degree murder, however, it became apparent that a severance during the punishment phase was required. At the outset of the punishment phase, the prosecution indicated that it would be introducing the confessions of Appellant and Cooper in the Thomas Walker murder case, in order to prove the circumstances of the two co-defendants' prior violent felony convictions. (Tr. 2450-53.) The prosecution stated that the underlying facts of the prior convictions were relevant in determining whether the death penalty should be imposed in the Barker murder case. (Tr. 2482.)

The prosecution itself recognized the conflict created between Appellant and Cooper regarding their respective confessions in the Walker murder case, noting that Cooper's confession claimed that Appellant instructed him kill Walker, while Appellant's confession indicated that Cooper killed Walker without any urging by Appellant. (Tr. 2451, 2454.) As the prosecution conceded, "[i]t would not be fair to Johnson" to admit Cooper's confession against Appellant. (Tr. 2455.) In order to obviate this problem, the prosecution requested that the trial court proceed with Appellant's punishment hearing first; at such hearing, the prosecution would not

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[55] At Appellant and Cooper's first joint trial -- regarding the robbery and murder of Thomas Walker -- Appellant and Cooper had separate juries. (Tr. 2451.)

introduce Cooper's confession until after the jury had returned its advisory sentence regarding Appellant. (Tr. 2451.)

The trial judge then requested that Appellant proceed with his case, yet Appellant's counsel stated that they would not be ready until April 27, 1995 -- ten days later. (Tr. 2452.) Although the prosecution agreed with Appellant's request to begin on April 27th, counsel for co-defendant Cooper objected and stated that "[w]e are ready and our experts are ready to go." (Tr. 2452, 2454.) Appellant objected to the jury hearing Cooper's confession in the Walker murder case before the jury returned an advisory verdict regarding Appellant. (Tr. 2473, 2475.) At this point, the prosecution abandoned its reservations about introducing Cooper's confession before the jury returned a recommendation regarding Appellant's punishment. (Tr. 2475.) The trial court then stated that, "I do not believe it is reversible error to go forward" with Cooper's case first, including permitting the prosecution to admit Cooper's confession. The court further stated: "It is accepted that Mr. Johnson does not want to do this. Okay, that is his decision. We will let an appellate court decide whether he was correct or not." (Tr. 2477.) In response to the trial court's ruling that Cooper's confession could be considered against Appellant, counsel for Appellant moved for a severance. (Tr. 2488-90.) The trial court permitted the prosecution to proceed with the joint punishment hearing as planned and overruled the repeated defense objection to the admission of Cooper's confession and the related motion for severance. (Tr. 2492, 2524, 2432, 2578.)

The prosecution then introduced evidence relevant to Appellant and Cooper's

respective roles in the Thomas Walker murder case. Among the State's evidence introduced to the advisory jury was Cooper's confession, in which he stated that Appellant had instructed him to kill Thomas Walker. (Tr. 2555.) Appellant's confession, which was also introduced, did not state that he ordered Cooper to shoot Walker and, conversely, indicated that he did not intend for Walker to be killed. (Tr. 2627.)

After the prosecution had introduced its aggravating evidence relevant to both Cooper and Appellant, Cooper introduced his mitigating evidence. As discussed in the previous ground of error, Cooper's counsel introduced the testimony of various witnesses who claimed that Appellant had "dominated" Cooper and led him to commit crimes, including the Walker murder and Barker murder. Such testimony occurred in the absence of Appellant's two lawyers. One of Appellant's lawyers, Marian Garcia, was present during Cooper's counsel's closing argument, in which Cooper's lawyer blamed Appellant for Cooper's criminal actions and accused Appellant of having perjured himself during his testimony at the guilt phase. (Tr. 3134-35.) Ms. Garcia objected to Cooper's counsel's closing argument and moved for a mistrial, and also renewed Appellant's motion to sever. (Tr. 3146-47, 3150.) Appellant's lead counsel, Michael Von Zamft, explained to the court that Appellant's counsel had been unaware of Cooper's mitigation theory -- which was to make Appellant more culpable than Cooper and contend that Appellant had lied during his guilt phase testimony -- until co-counsel Marion Garcia heard Cooper's counsel's closing arguments. (Tr. 3151.) As Von Zamft explained, Cooper's counsel "chose to participate in the defense given

[during the guilt phase]. Now [Cooper's counsel] called Mr. Johnson a liar to the same jury that is now deliberating [punishment] [and] is essentially creating two prosecutors against Mr. Johnson. ... This was not planned, not expected by us. I had no anticipation [of] it or I would have moved for a severance [on this ground] before the case ever got started in the guilt phase." (Tr. 3151.)

Von Zamft asked the trial court "to empanel another jury to deliberate on Mr. Johnson's sentencing issue." (Tr. 3151.) The trial court denied the motion to sever and ordered Appellant's punishment case to proceed in front of the same jury. (Tr. 3151.) Appellant subsequently filed a renewed motion to sever, which contended that the trial court's refusal to sever denied Appellant his Eighth Amendment right to an "individualized sentencing determination" (as a result of the two co-defendants' inconsistent theories of mitigation) and also violated Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968) (as a result of Cooper's Walker murder confession being admitted in the joint proceedings). (R. 592-97.) The trial court overruled that renewed motion as well. (Tr. 3422.)

**B. Argument and Authorities**

***(1) Appellant's motion for severance in the punishment phase was timely***

Florida Rule of Criminal Procedure 3.152(b)(1)(B) provides that:

> On motion of ... a defendant, the court shall order a severance of defendants in separate trials ... during trial, ... on a showing that the order is necessary to achieve a fair determination of the guilt or innocence of 1 or more defendants. * * *

Rule 3.153 further provides:

> (A) A defendant's motion for severance of multiple ... defendants ... shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for such a motion, but the court in its discretion may entertain such a motion at the trial. The right to file such a motion is waived if it is not timely made. * * *

Appellant did not file a motion to sever prior to trial. As Appellant's counsel explained in the court below, during the pre-trial phase, counsel for Appellant and counsel for Cooper agreed that a joint trial in front of the same jury was not considered objectionable because Cooper's theory of the defense would be consistent with Appellant's theory. However, at the outset of the punishment phase, when the prosecution announced that it would be introducing the confessions of Appellant and Cooper in the Walker murder case, Appellant -- and originally the prosecution -- contended that the admission of Cooper's confession to the Walker murder would prejudice Appellant.[56] Thus, Appellant moved to sever as soon as Appellant realized that this ground for severance existed. Likewise, Appellant's second ground for severance during the punishment phase -- Cooper's vilification of Appellant -- was not anticipated by Appellant or his lawyers. Thus, Appellant's motion to sever was timely. See Crum v. State, 398 So.2d 810, 811 (Fla. 1981) ("The motion at trial was based on facts which were not known before trial and should have been granted."); Hernandez v. State, 570 So.2d 404, 405 (Fla. 2nd DCA 1990) (same).

***(2) The trial court erred by denying Appellant's motions to sever***

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[56] The prosecution did not ask for a severance, but merely requested that Appellant's punishment hearing occur before Cooper's punishment hearing -- so that Cooper's confession to the Walker murder would not be introduced to the jury until after jurors had returned an advisory sentence for Appellant.

As noted, Rule 3.152(b)(1)(B) states that severance should be granted during trial if it would be "necessary to achieve a fair determination of the guilt or innocence of 1 or more defendants." In the instant case, Appellant's two grounds for severance arose after Appellant and his co-defendant had been convicted but before sentencing was complete. Although the plain language of Rule 3.152(b) speaks only of grounds for severance during the guilt-innocence phase, this Court should apply the same standard to grounds for severance during the capital sentencing phase, which has virtually all of the hallmarks a guilt-or-innocence trial. See Bullington v. Missouri, 451 U.S. 430, 438, 101 S. Ct. 1852, 1858, 68 L.Ed.2d 270 (1981).

The trial court's refusal to sever Appellant's capital sentencing hearing from Cooper's capital sentencing hearing deprived Appellant of a "fair determination" of his punishment in two different ways. First, the introduction of Cooper's confession to the Walker murder -- in which Cooper claimed that Appellant directed him to shoot Walker -- prejudiced Appellant because Cooper did not testify and thus was not subject to cross-examination. Cooper's confession, which clearly would have been inadmissible against Appellant during a guilt-innocence trial, see Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L.Ed.2d 162 (1987),[57] should not have been admitted merely because Appellant and Cooper had already been convicted and were "only" facing a decision regarding their punishment for the Barker murder. It is beyond dispute that, in a Florida capital sentencing proceeding, the protections of the Bill of

[57] Indeed, at the Walker murder trial, the trial court in effect severed the two defendants by having joint juries.

Rights do not disappear simply because the defendant has been convicted of murder. Cf. Fla. Stat., § 921.141(1) ("[T]his subjection shall not be construed to authorize the introduction of any evidence seized in violation of the Constitution of the United States ...."). Because Cooper's confession could not have been introduced against Appellant if Cooper had not been a co-defendant at the joint trial, a severance should have been granted. Cf. Espinosa v. State, 589 So.2d 887, 892 (Fla. 1991) ("No evidence was introduced in this trial that could not have been introduced against [either co-defendant] if either had been tried alone."), rev'd on other grounds, 505 U.S. 1079 (1992).

During the capital sentencing phase in the instant case, the prosecution contended that Appellant should be sentenced to death in part because of his prior convictions in the Walker case. The prosecution specifically introduced the circumstances of that prior murder and robbery in order to add weight to the statutory aggravating factor found in Florida Statutes, § 921.141(5)(b) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."). A rational jury would likely give much more weight to that aggravator if it believed that the defendant directed a co-defendant to shoot the victim -- as opposed to believing that the defendant was only guilty of felony-murder and did not intend or anticipate that his co-felon would kill anyone. Cf. Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982) (non-triggerman who did not intend for his co-defendants to kill during course of felony is less morally culpable than co-defendant

who kills or intends to kill).[58] Appellant was prejudiced because the sentencing jury may have believed Cooper's version of the Walker murder and discredited Appellant's considerably less aggravated version. If so, giving added weight to the § 921.141(5)(b) aggravator may have led jurors to recommend a death sentence for Appellant. Thus, the trial court should have granted a severance under these circumstances. See Hernandez v. State, 570 So.2d 404, 405 (Fla. 2nd DCA 1990) ("A motion for severance should be granted if there is evidence directed at a co-defendant which is prejudicial to [the] defendant.")

Appellant was also prejudiced by the trial court's refusal to sever as a result of Cooper's antagonistic mitigation strategy. As discussed supra, Cooper's counsel repeatedly sought to shift the blame to Appellant for both the Walker murder and Barker murder. Cooper was portrayed as a brain-damaged youngster who fell prey to Appellant's domination and criminal proclivities. Cooper's counsel argued that Appellant was a manipulator and liar who had perjured himself during his guilt-phase testimony. This was a classic case of a co-defendant's lawyer becoming a "second prosecutor." Under such circumstances, a severance should have been granted. See Crum v. State, 398 So.2d 810, 811-12 (Fla. 1981) ("By denying the [severance] motion, the trial court forced [the defendant] to stand trial before two accusers: the State and his co-defendant."); United States v. Lee, 744 F.2d 1124, 1126 (5th Cir. 1984) ("Perhaps the primary danger against which the [severance] rule is designed to

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[58] As discussed supra, Appellant's confession indicated that he did not intend for Thomas Walker to be killed.

guard is that of a defendant having to face what amounts to two prosecutors -- the State and his co-defendant."); People v. Cardwell, 580 N.E.2d 753, 754 (N.Y. 1991) (same). The harm to Appellant was exacerbated because Cooper's counsel had not informed Appellant's counsel that they were planning to vilify Appellant as part of Cooper's mitigation strategy. See McCray v. State, 416 So.2d 804, 807 (Fla. 1982) (severance should be granted where co-defendant at trial takes a position antagonistic to defendant without fair warning).

The trial court's refusal to grant a severance after it became apparent that Cooper was attempting to shift the blame to Appellant was particularly egregious because of the special nature of a capital sentencing proceeding. It is axiomatic that a capital sentencing hearing should provide an "individualized sentencing determination." See, e.g., Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L.Ed.2d 56 (1987). It is repugnant to this cardinal Eighth Amendment principle to permit one capital defendant to attempt to save his own life by introducing evidence and making arguments that a co-defendant (who is being tried in the same proceeding) is more morally culpable. Although Cooper had a constitutional right to attempt to shift the blame to Appellant, Cooper's exercise of that right in front of the same capital sentencing jury who sat in judgment of Appellant directly collided with Appellant's own Eighth Amendment right to an individualized sentencing determination. A severance was the only way to preserve both co-defendants' Eighth Amendment rights. Because the trial court

refused to sever the two capital defendants during the joint punishment phase, Appellant's death sentence must be vacated. See Espinosa v. State, 589 So.2d 887, 894 (Fla. 1991) (Barkett, J., dissenting, joined by Kogan, J.) (where co-defendants present antagonistic defenses, severance "should always be the rule in the penalty phase of a death case"; severance is required under such circumstances because "the [capital] penalty phase ... is premised on the principle of individualized punishment").[59]

## VIII.

**BECAUSE APPELLANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS STATUTORY AND CONSTITUTIONAL RIGHT TO BE PRESENT DURING A "CRITICAL STAGE" OF THE CAPITAL SENTENCING HEARING, THIS COURT MUST VACATE APPELLANT'S DEATH SENTENCE.**

As discussed in Ground of Error VI, supra, Appellant was absent from the courtroom during the testimony of Albert Cooper's mitigation witnesses in the punishment phase. As explained in that ground of error, that portion of the punishment phase was a "critical stage" of Appellant's own sentencing hearing because Cooper's witnesses offered testimony relevant to Appellant's own moral culpability.

### A. The Right to be Present

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[59] Judge Barkett's dissent in Espinosa broadly addressed an issue which the majority did not address in that case -- whether the Eighth Amendment requirement of "individualized sentencing" in the capital sentencing phase requires a severance *during the sentencing phase* when there are antagonistic co-defendants. In Espinosa, the antagonism between the defendants was limited to the guilt phase and did not concern inconsistent mitigation theories in the sentencing phase, as the instant case did. See Espinosa, 589 So.2d at 892.

Both a Florida Rule of Criminal Procedure and the due process clauses of the state and federal constitutions provide that a criminal defendant has a right to be present during any "critical" or "essential" stage of trial. See generally Faretta v. California, 422 U.S. 806, 819 n.5, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Fla. R. Crim. Pro. 3.180. Numerous decisions of both this Court and the U.S. Supreme Court have recognized that the right to be present is one of the most "fundamental" rights accorded to criminal defendant. "The right to be present has been called a right scarcely less important to the accused than the right to trial itself." 14A FLA. JUR. 2D, *Criminal Law*, § 1253, at 298 (1993) (citing state and federal cases); see also Mack v. State, 537 So. 2d 109, 110 (Fla. 1989) (Grimes, J., concurring) (characterizing a criminal defendant's right to be present, along with right to counsel and right to a jury trial, as one of "those rights which go[es] to the very heart of the adjudicatory process").

**B. Waiver Analysis**

This Court has held that the absence of a criminal defendant from a critical stage of trial does not violate the defendant's right to be present if the defendant waived that right in a "knowing, voluntary, and intelligent" manner. See, e.g., Turner v. State, 530 So. 2d 45, 49 (Fla. 1988).[60] This Court made no exception for capital cases.[61]

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[60] Although FLA. R. CRIM. PRO. 3.180(b) generally provides that a defendant's "voluntary absence" without leave of the court after an initial appearance at trial does not violate a defendant's right to be present, this Court has held that Rule 3.180(b) merely "codifies the well-established principle that defendants may voluntarily *waive* their right to be present during crucial stages of the trial ...." Capuzzo v. State, 596 So. 2d 438, 439 (Fla. 1992) (emphasis added). That is,

Rule 3.180(b), although it speaks of a "voluntary absence," concerns waiver of the right to be present. This Court has further held that waiver of the right to be present "must be knowing, intelligent, *and* voluntary." Turner v. State, 530 So. 2d at 49 (citations omitted) (emphasis added); see also DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983) (same) ("'Waivers of constitutional rights not only must be voluntary but [also] must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'") (quoting Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970)). Thus, although Rule 3.180(b) only speaks of a "voluntary" absence as constituting waiver of the right to be present, such a waiver must also be "knowing" and "intelligent" in order to be a valid relinquishment of the fundamental right to be present.

[61] See Peede v. State, 474 So. 2d 808, 812-14 (Fla. 1985); but see Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984) ("We read Proffitt to hold that a [capital] defendant may not waive his presence at any critical stage of trial.") (citing Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983)); Near v. Cunningham, 313 F.2d 929, 931 (4th Cir. 1963) ("So fundamental is [the right to be present] that it may not be waived [by a capital defendant]."). This Court has explicitly rejected the Eleventh Circuit's position that "the presence at a capital trial is nonwaivable." Peede v. State, 474 So. 2d at 814 n.* (citing Proffitt v. Wainwright, supra).

This Court should reconsider its rejection of Proffitt and its progeny. The Eleventh Circuit correctly stated that numerous U.S. Supreme Court decisions, albeit nearly century-old cases, have stated that the right to be present at all critical stages of a *capital* case is nonwaivable. See Proffitt, 706 F.2d at 312 ("Early Supreme Court cases held that the right to presence in capital cases is so fundamental that the defendant cannot waive it.") (citing Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L.Ed. 500 (1912), and Hopt v. Utah, 110 U.S. 574, 579, 4 S. Ct. 202, 28 L.Ed. 262 (1884)); State v. Amaya-Ruiz, 800 P.2d 1260, 1283 (Ariz. 1990) ("We recognize that the United States Supreme Court held, more than 100 years ago, that one accused of a capital crime may not constitutionally waive his right to be present.... The Eleventh Circuit has [also] held that a [capital] defendant may not waive his right to be present.") (citations omitted). Although subsequent decisions by the Supreme Court have held that the right to presence may be waived in *non-capital* cases, see, e.g., Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970), the older decisions have never been explicitly or implicitly overruled with respect to *capital* cases. Although the Supreme Court in 1975 implied that it may one day reconsider the validity of Diaz's continued application to capital cases, see Drope v. Missouri, 420 U.S. 162,

Recently, in Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), this Court held that waivers of the right to be present must be "certif[ied] through proper inquiry [by the trial court] that the waiver is knowing, intelligent, and voluntary." Appellant's trial occurred after Coney was decided and, thus, he is entitled to benefit from Coney's rule.[62] Because no such on-the-record personal waiver occurred, this Court must vacate Appellant's death sentence and remand for sentencing.

Even if this Court were to apply pre-Coney law, it still cannot be said that Appellant validly waived his right to be present. Prior to Coney, under this Court's precedent a defendant could theoretically waive his right to be present in a variety of ways. First, he could personally waive the right on the record *prior* to absenting himself from the courtroom; such a personal waiver was accomplished by questioning from the trial

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182, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975) (citing Diaz); Proffitt, 706 F.2d at 312, until that day in the future, the older cases bind this Court under the Supremacy Clause. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85, 109 S. Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) ("If precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision.")

[62] Courts in numerous other jurisdictions have required on-the-record, personal waivers of the right to be present, in compliance with the constitutional axiom that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that [courts] do not presume acquiescence in the loss of fundamental rights." Carnley v. Cochran, 369 U.S. 506, 514, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed.2d 1461 (1938)). See, e.g., Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990) ("Several circuits have held that defense counsel cannot waive a defendant's right of presence at trial.") (citing numerous cases); United States v. Gordon, 829 F.2d 119, 124-26 (D.C. Cir. 1987); United States v. Kupau, 781 F.2d 740, 743 (9th Cir. 1986).

court. See, e.g., Chandler v. State, 534 So. 2d 701, 704 (Fla. 1988). Second, a defendant's counsel could waive the defendant's right to be present, although subsequent to the waiver the defendant must have "ratified" or "acquiesced" in counsel's waiver on behalf of the defendant in a knowing, voluntary, and intelligent manner. See, e.g., State v. Melendez, 244 So. 2d 137, 139 (Fla. 1971). With respect to this type of waiver, this Court repeatedly held prior to Coney that "it [was] the better procedure" for a defendant in such a situation to ratify or acquiesce in his trial counsel's actions in his absence by responding to appropriate questions by the trial court on the record. See, e.g., Amazon v. State, 487 So. 2d 8, 11 & n.1 (Fla. 1986). Finally, a defendant could engage in a constructive waiver of his right to be present by engaging in some form of "misconduct," such as being disruptive during trial. See, e.g., Capuzzo v. State, 596 So. 2d 438, 440 (Fla. 1992); accord Illinois v. Allen, 397 U.S. 337 (1970).[63] See generally 14A FLA. JUR.2D, *Criminal Law*, §§ 1271-79, at 316-21 (1993) (generally discussing waiver of right to be present). Appellant did not waive his right to be present in any of these ways.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done *with sufficient awareness of the relevant circumstances and likely consequences*." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (emphasis added); see also DeConingh v. State, 433 So. 2d 501,

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[63] Because there is no indication in the record that Appellant engaged in any type of misconduct at trial, only the first two categories of waiver will be discussed herein.

503 (Fla. 1983) (same). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." Carnley v. Cochran, 369 U.S. at 514 (citations and internal quotations omitted).[64] The record indicates that Appellant's two court-appointed lawyers apparently made the decision that Appellant's presence (as well as the lawyers' own presence) was not required during the testimony of Cooper's mitigation witnesses. (Tr. 2667, 3151-52.) Nowhere in the record is there any indication that Appellant knew that he had a right to be present during Cooper's witnesses' testimony. It simply cannot be said that Appellant waived his right to be present in a "knowing, intelligent, and voluntary" manner -- particularly when Appellant had no idea that Cooper's witnesses would offer testimony against Appellant.

**C. Harmless Error Analysis**

Once a violation of a defendant's right to be present is established, this Court has held that the burden is on the state to show beyond a reasonable doubt that the error was harmless. See Garcia v. State, 492 So. 2d 360, 364 (Fla. 1986) (citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)).[65] In this context,

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[64] This presumption against waiver fully applies to the right to be present. See Illinois v. Allen, 397 U.S. 337, 343 (1970); Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990); United States v. Gordon, 829 F.2d 119, 125 (D.C. Cir. 1987).

[65] This Court has erred in applying harmless-error analysis to this type of constitutional violation. The right to be present at a critical stage of trial is a "structural" error that is not amenable to harmless-error analysis. See Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995) (violation of defendant's right to presence is "structural defect" not amenable to harmless-error analysis if the defendant's presence could have "influenced the [adversary] process" of that

an error is not deemed harmless unless the State can show -- beyond a reasonable doubt -- that the defendant's absence had no effect on the defense. Turner v. State, 530 So. 2d 45, 49 (Fla. 1987).

In the instant case, had Appellant been present during the testimony of Cooper's witnesses, Appellant could have significantly aided in his own defense. In particular, Appellant could have assisted his lawyers -- assuming that they were present[66] -- in cross-examining Cooper's witnesses. Appellant would have known the truth or falsity of what was said by Cooper's witnesses (*e.g.*, that Appellant led Cooper into drug use and that Appellant "dominated" Cooper). Thus, Appellant could have assisted in the important task of cross-examining those adverse witnesses. Therefore, Appellant's absence was not harmless. Cf. Ford v. State, 466 S.E.2d 11, 13 (Ga. 1995) ("[G]iven that the substance of the testimony which Ford missed did not involve him in any way,

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critical stage of the trial); see generally Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991) (distinguishing between "trial errors" and "structural defects"; only former are subject to harmless-error analysis).

Nevertheless, whether this Court treats the violation of Appellant's right to be present during jury selection as a "structural defect" or subjects it to harmless-error analysis is an academic question. A violation of the right to be present is a "structural error" *only if* the defendant's presence could have "influenced the process" of that critical stage of trial. Hegler v. Borg, supra. As discussed infra, this Court makes that very same inquiry in determining whether a violation of the right to be present at trial is harmless under Chapman v. California, 386 U.S. 18 (1967). See Turner v. State, 530 So. 2d 45, 49 (Fla. 1987). As explained infra, had Appellant been present during the testimony of Cooper's witnesses, he very well could have significantly aided in his own defense. Thus, for this reason, the error in this case cannot be deemed harmless or, alternatively, is "structural" error.

[66] In a prior ground of error, Appellant has contended that his lawyers' absence during Cooper's witnesses' testimony also violated Appellant's rights.

the [trial] court's decision to proceed in his absence constituted, at most, harmless error.").

## IX.

## THIS COURT SHOULD REFORM APPELLANT'S DEATH SENTENCE TO A SENTENCE OF LIFE IMPRISONMENT BECAUSE THE IMPOSITION OF CAPITAL PUNISHMENT IN THIS CASE WOULD BE DISPROPORTIONATE.

Although the trial court found three statutory aggravating factors,[67] the court also found one statutory mitigating factor and a great deal of compelling non-statutory mitigation. (R. 626-41.) A death sentence in this case is disproportionate because the murder for which Appellant was sentenced to death and the collateral murder of Thomas Walker were clearly exceptions in Appellant's otherwise admirable life. As the trial court noted in its order, Appellant was the first African-American Eagle Scout in Dade County and had displayed other positive character traits during his life. Appellant, who was only 20 years old, suffered from psychological problems which contributed to the commission of the offenses during that 19-day period of his life. Appellant has redeeming features which make him an inappropriate candidate for capital punishment.

## X.

## THIS COURT MUST VACATE APPELLANT'S DEATH SENTENCE IN VIEW OF THE TRIAL COURT'S EXTEMPORANEOUS COMMENTS MADE PRIOR TO SENTENCING.

Immediately after the advisory jury returned its recommendation that Appellant be

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[67] The trial court actually found four aggravators, but determined that two of them -- the felony-murder and pecuniary gain factors -- merged. (R. 631.)

sentenced to death, the trial court made the following comments to the family members of Charles Barker and Thomas Walker, the two murder victims:

> To the members of the family here, I appreciate you being here. My condolences ..., of course. This has been a very trying case for me. It has convinced me of two things[:] one, that this is the last capital murder case that I will ever try in my life, it is the end. ... Secondly, I have tried many death cases and I have sentenced a lot of people to the electric chair. When they say senseless murders, this was not a senseless murder, this did not happen senselessly, this was well planned. They knew in advance. I'm convinced that these two gentlemen had every intention of executing Mr. Barker and the other gentlemen [*i.e.*, Thomas Walker]. They had no chance at all. They were never given the opportunity to have a chance no matter if they cooperated and they gave them everything. These were people damned from the moment they walked in. Most of the murders that I try are truly senseless. They didn't have to kill them. They didn't have to do anything.
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> The most famous case I tried was the Tracy Einstein murder. A little ten year old girl. He didn't have to kill that girl. It was absolutely senseless. In this case they had to kill the people and in the Rudy's case, they had to kill the people because that was the plan. You don't rob a place where they can recognize you and leave the person alive. You just don't do it because that is part of the plan. Unfortunately, your family had to be the victims in the case. ... I think justice was done in this case as much as it could be done in any case.

(Tr. 3414-15.)

The foregoing extemporaneous remarks from the trial judge evinced a disposition to impose the death penalty before the sentencing hearing was complete. Particularly objectionable was the comment, "I think justice was done in this case" -- which apparently referred not only to the guilty verdicts, but also to the advisory jury's death penalty recommendations. The trial court's remarks were made well before the sentencing hearing in front of the court sitting without the advisory jury.

A death sentence must be reversed if the record indicates that the trial judge made

up his mind before the sentencing proceedings were complete. Cf. Spencer v. State, 615 So.2d 688, 690 (Fla. 1993) (vacating death sentence where trial judge prepared sentencing order before sentencing hearing in front of trial court). More generally, due process requires that a trial judge to be unbiased and impartial. See, e.g., Tumey v. Ohio, 273 U.S. 510, 532-34, 47 S. Ct. 437, 444-45, 71 L.Ed.2d 749 (1927). Such impermissible bias is evinced when a trial judge makes up his or her mind about the verdict before the conclusion of the proceedings. In the instant case, the trial court's remarks, which occurred before the sentencing proceedings were complete, clearly revealed that a death sentence would be imposed. Therefore, this Court must vacate Appellant's death sentence and remand for a new sentencing hearing in front of a different judge.[68]

## XI.

## CAPITAL PUNISHMENT, AT LEAST AS PRESENTLY ADMINISTERED, VIOLATES THE STATE AND FEDERAL CONSTITUTIONS.[69]

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[68] Although Appellant did not object to the trial judge's comments and move for disqualification in the court below, this claim is properly raised for the first time on appeal. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56, 58 & n.1 (Fla. 1st DCA 1992) (judicial bias constitutes "fundamental error" that may be raised for first time on appeal); see also Ware v. State, 560 N.E.2d 536, 539 (Ind.App. 1990) (same).

[69] Although this claim was not raised in the trial court, this Court should address the merits of the claim. If capital punishment is in fact unconstitutional, it would undoubtedly constitute "fundamental error." See, e.g., Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992) ("Fundamental errors must rise to the level of a denial of due process where the 'interests of justice present a compelling demand for its application.'") (citing cases). Even if this Court does not believe that capital punishment is unconstitutional, this Court should nevertheless address the merits of

Appellant recognizes that this Court has repeatedly rejected constitutional challenges to capital punishment. However, recent developments call for a comprehensive re-examination of capital punishment under both the state and federal constitutions.[70]

For instance, this Court has never considered the primary argument advanced by former Justice Blackmun in his landmark dissent from denial of certiorari in Callins v. Collins, 114 S. Ct. 1127, 127 L.Ed.2d 435 (1994) (capital punishment unconstitutional in view of paradoxical constitutional commands of non-arbitrariness and need for jury discretion to consider all mitigation). Lower court judges have begun to echo Justice Blackmun's views. Flamer v. State of Delaware, 68 F.3d 736, 772 (3rd Cir. 1995) (*en banc*) (Lewis, J., dissenting, joined by Mansmann & McKee, JJ.) ("the torturous analytical route it has taken the majority and me to set out our respective views in these cases compels me to add that I believe that they perfectly

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the claim and not rest on procedural default grounds -- in order to afford the U.S. Supreme Court the opportunity to address the claim. The State of Florida has no legitimate state interest in precluding federal review of an important claim such as this one on procedural default grounds.

[70] Attacks on the constitutionally of capital punishment in the mid-1990s have been increasingly evident. See Joan Biskupic, *Judges Attach the Death "Machine": Top Jurists Find Fault with the Effectiveness of Capital Punishment,* WASHINGTON POST, April 16, 1995, at A16. See, e.g., John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994) (quoting interview with retired Justice Powell in which he stated that he now believes that capital punishment is unconstitutional); Jeffers v. Lewis, 38 F.3d 411, 425-28 (9th Cir. 1994) (*en banc*) (Noonan, J., dissenting, joined by Pregerson & Norris, JJ.) (*sua sponte* arguing that Arizona's post-Furman system of capital punishment is unconstitutional because of the arbitrary and slow pace of executions).

illustrate -- perhaps epitomize -- why, in the words of Justice Blackmun, we should 'no longer tinker with the machinery of death.'") (quoting Callins v. Collins, supra).

Nor has this Court discussed the larger issue discussed in Justice Stevens' opinion respecting the denial of certiorari in Lackey v. Texas, 115 S. Ct. 1421, 131 L.Ed.2d 304 (1995), subsequent proceeding, 115 S. Ct. 1818, 131 L.Ed.2d 741 (1995) -- namely, that the modern death penalty may be unconstitutional because of the inordinate delays between sentencing at trial and actual execution which inhere in our current system of capital punishment.[71] In Lackey, a death row inmate contended that the state could not constitutionally carry out his death sentence in view of the inordinate amount of time that had passed since his original death sentence was imposed at trial. Justice Stevens, joined by Justice Breyer, agreed that this claim was a "substantial" one which found support in three sources: (1) the Supreme Court's post-Furman jurisprudence, which holds that the death penalty operates in an unconstitutional manner if its method of implementation does not promote the recognized social purposes of capital punishment -- namely, retribution and deterrence;[72] (2) the Anglo-American common law, which presupposed that capital

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[71] It is noteworthy that the highest court in South Africa recently declared capital punishment unconstitutional in a unanimous decision in large part because of the inherent delays between sentencing and execution. See State v. Makwanyane & Mchunu, Case No. CCT/3/94 (S. Afr. Const. Ct. June 6, 1995).

[72] See Gregg v. Georgia, 428 U.S. 153, 183-87, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.); see also Furman v. Georgia, 408 U.S. 238, 312-13, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972) (White, J., concurring); Coker v. Georgia, 433 U.S. 584, 592 n.4, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977). Substantial delays between sentencing at trial and execution

punishment would be implemented in a swift manner and which considered lengthy delays between sentencing and execution to be cruel and unusual punishment;[73] and (3) a growing body of international law that prohibits executions when substantial delays occur after trial.[74] See Lackey, 115 S. Ct. at 1421-22; see also Lackey v. Scott, 115 S. Ct. 1818 (1995) (staying Lackey's execution and remanding for district court to consider his claim). As the presiding judge of the South African high court

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undermine both retribution and deterrence. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 959-60, 101 S. Ct. 2994, 68 L.Ed.2d 334 (1981) (Rehnquist, J., dissenting from denial of certiorari).

[73] See, e.g., IV BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 404 (5th ed. 1773) (to be effective capital punishment must be carried out swiftly) (citing Beccaria's ESSAY ON CRIMES AND PUNISHMENTS 74-75 (1764)); Pratt & Morgan v. Attorney General of Jamaica, 2 A.C. 1, 4 All E.R. 769, 774 ("It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. *But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.*") (emphasis added); see also id. at 775 (noting "the pre-existing common law practice that execution followed as swiftly as practical after sentence"); id. at 783 ("[b]efore independence [from England] the law would have protected a Jamaican citizen from being executed after unconscionable delay"); see also Riley v. Attorney General of Jamaica, 1 A.C. 719, 734-35 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) (arguing that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in Section 10 of the Bill of Rights of 1689," and concluding that "the jurisprudence of the civilized world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading").

[74] See, e.g., State v. Makwanyane & Mchunu, Case No. CCT/3/94 (So. Afr. Const. Ct. June 6, 1995); Pratt & Morgan v. Attorney General, supra; Soering v. United Kingdom, 11 E.H.R.R. 429, 161 Eur. Ct. H.R. (Ser.A) (Eur. Ct. Hum. Rts. 1989)

recently observed that: "The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a higher standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of cruelty and inhumanity, is apparent." State v. Makwanyane & Mchunu, supra, slip op., at para. 55 (opinion of Chakalson, P., joined by a majority of the members of the court).

Even jurists in favor of capital punishment have questioned its present usefulness and validity as a result of such systemic delays. See, e.g., Ninth Circuit Judge Alex Kozinski, *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 1, 1-2 (Fall 1995) ("[W]e are left in limbo, with [death penalty] machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts, that visits repeated trauma on victims' families, and that ultimately does not produce anything like the benefits we would expect from an effective death penalty. As time passes, the balance is likely to shift even farther toward to costs and away from the benefits. This is surely the worst of all worlds.").[75]

Another relevant factor to consider is that -- over two decades after Furman -- invidious racial discrimination is still manifest in the administration of the death penalty. There are numerous post-Furman studies, based on data in Florida cases and

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[75] Commentators have also increasingly suggested that our current system of capital punishment, if it is to remain constitutional, must be significantly "retooled." See, e.g., Stephen R. Mcallister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039 (1995).

in other American death penalty jurisdictions, which conclude that capital punishment is administered in a racially-biased manner. These studies focus both on discrimination based on the race of the capital defendant (concluding that minority defendants are more likely to receive capital punishment) and also on discrimination based on the race of the victim (concluding that killers of whites are considerably more likely to be sentenced to death than killers of minorities).[76]

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[76] See, e.g., *Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission*, at xvi (Dec. 11, 1991) ("the application of the death penalty in Florida is not colorblind"); Michael Radalet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Samuel Gross & Robert Mauro, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); United States General Accounting Office, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990); David C. Baldus, et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 SOC. SCI. Q. 853 (1988); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); Samuel R. Gross, *Race and the Judicial Evaluation of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); William Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Peternoster, *Race of the Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

In 1990, the United States General Accounting Office surveyed various studies on racism and the death penalty and concluded that the studies show "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision" and that "race of victim

Although in McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987), a bare majority of the Supreme Court refused to find that a statistical study of racism in Georgia was sufficient to warrant a finding that the death penalty was unconstitutional in that state, the McCleskey Court was not considering the evidence of systemic racial bias as simply one of many reasons to invalidate capital punishment (as the Court considered such systemic racism in Furman).

Accordingly, in light of these recent developments in legal thought, this Court should reconsider whether, at least as currently administered, capital punishment violates the United States and/or Florida Constitutions. It is noteworthy that the excessive punishments clause of the Florida Constitution prohibits punishments that are either cruel *or* unusual and is, therefore, broader than the Eighth Amendment to the federal Constitution, which prohibits only punishments that are both cruel *and* unusual. *Compare* U.S. Const. amend. VIII *and* Fla. Const. art. I, § 17; see Allen v. State, 636 So. 2d 494, 497 & n.5 (Fla. 1994); Hale v. State, 630 So. 2d 521, 526 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991). This Court has stressed that, "[w]hen called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution *and to give independent legal import to every phrase and clause contained therein*." Traylor v.

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influence was found at all stages of the criminal justice system." The studies recounted in the GAO survey make it clear that discrimination based on race remains widespread and systematic in the imposition of the death penalty in the United States; in particular, such racism manifests itself most vividly in discrimination based on the race of capital murder victims. See U.S. General Accounting Office, DEATH PENALTY SENTENCING, at 5-6 (1990).

State, 596 So. 2d 957, 962 (Fla. 1992) (emphasis added); see also Harry Lee Anstead, *Florida's Constitution: A View from the Middle*, 18 NOVA L. REV. 1277 (1994). Consistent with the primacy principle enunciated in Traylor, this Court has given independent meaning to the state constitution's prohibition of "unusual" punishments. See Tillman, 591 So. 2d at 169 (citing article I, § 17 as one basis for proportionality review of capital cases); Allen, 636 So. 2d at 497 (imposition of death penalty on 15-year-old offender violates Florida constitution because it is unusual).

The death penalty, as it is imposed under Florida's capital sentencing statute, has become "unusual" because the fundamental problem of arbitrariness remains unresolved. In the seminal case of Dixon v. State, 283 So. 2d 1, 7 (Fla. 1973), the Florida Supreme Court approved the newly-enacted capital sentencing statute, believing that the statute would winnow out "only the most aggravated and unmitigated of most serious crimes" for imposition of the death penalty. While noting the impossibility of "computer justice," id., the Court optimistically predicted that "the discretion charged in Furman v. Georgia ... can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." Id. at 10.

Twenty-three years later, Florida's experience with the death penalty belies Dixon's optimism. Not only has the death penalty statute fail to winnow out the most aggravated and least mitigated of first degree murders, but -- as noted above -- racial discrimination in the imposition of the death penalty remains intractable in Florida as elsewhere, and inmates spend decades on death row before execution while the death

row population continues to expand at a pace far exceeding executions. In an exhaustive analysis of Florida's post-Furman experience with the death penalty, author and former *Miami Herald* reporter David Von Drehle illustrates all of these flaws in the imposition of Florida's death penalty and concludes that "[t]he only way to make the death penalty work, reasonably quickly and reliably, may be to have a lot less of it" -- by defining capital offense more narrowly rather than relying on broader laws that require judges and juries "to weigh ineffable shades of evil." DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD 411 (1995).[77]

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[77] Appellant does not intend to suggest that a constitutional system of capital punishment is unachievable. Two prominent jurists have recently suggested that certain reforms of our current system, such as further "narrowing" of the "death-eligible class" of offenders and dramatic improvements in the quality of capital defense counsel at trial, would have the effect of breaking the logjam that presently exists in the enforcement of capital punishment. See Kozinski, supra; Judge Betty Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 826-27 (1995).

## CONCLUSION

In view of the foregoing grounds for reversal, this Court must reverse Appellant's convictions and corresponding sentences and remand for a new trial on all counts in the indictment. In the alternative, this Court must vacate Appellant's death sentence and reduce it to a sentence of life imprisonment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's initial brief was served by U.S. mail on the Office of the Attorney General, 401 N.W. Second Ave., P.O. Box 013248, Miami, Florida 33101, on this 14th day of June, 1996.

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