IN THE SUPREME COURT OF FLORIDA

PERRY OMAR BUCKNER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee .

CASE NO. 89,001

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The record on appeal consists of four volumes of pleadings and hearings numbered sequentially by the clerk consisting of 808 pages. Appellant will refer to this portion of the record as (R). The remaining portion of the record consists of seven volumes of transcripts consisting of numerous hearings and Appellant's trial on both guilt and penalty. The trial clerk numbered the 1161 pages sequentially. Appellant will refer to this portion of the record as (T).

Counsel will refer to Perry Omar Buckner by either "Omar, " "Buckner, " "Appellant," or "the defense. " Appellant will refer to the State of Florida as the "State" or the "prosecution. "

STATEMENT OF THE CASE

On June 5, 1995, the Sumter County Sheriff's Department arrested Perry Omar Buckner, the Appellant, charging him with second-degree murder. (R3-5) On June 23, 1995, a Sumter County grand jury indicted Buckner for the June 3, 1995, first-degree premeditated murder' of Thaddeus Richardson. (R2) On March 14, 1996, the grand jury returned with an amended indictment charging Buckner with the additional crime of shooting into an occupied conveyance.[2] Through counsel, Appellant entered a plea of not guilty and requested a jury trial, (R17)

On February 1, 1996, the trial court granted the motion to withdraw filed by the Public Defender's Office and appointed private counsel to represent the Appellant. (R74-76,97-98) Appellant's trial got off to an abortive start in March, 1996, when, during the middle of jury selection, a key state witness became unavailable due to illness. (T182-87) The State moved for a continuance which was granted without objection. (T182-91) Appellant's trial ultimately began on June 3, 1996, before the Honorable John W. Booth. (T203) At the beginning, Appellant objected to his shackling in leg irons during the trial. The court overruled the objection. (T204)

During jury selection three jurors were excused for cause over Appellant's objections. (T259-64) The peremptory challenges were exercised at the bench outside the presence of Omar Buckner. (T393-400,432-39)

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[1] § 782.04(1)(a)1, Fla. Stat. (1995).

[2] § 790.19, Fla. Stat. (1995).

Defense counsel renewed his request to unshackle Mr. Buckner so that he could view a State's exhibit (a videotape) without exposing his leg irons to the jury. (T481-88) The trial court refused to reconsider his position.

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal contending that the evidence supported, at most, second-degree murder. Appellant contended that the State failed to prove the element of premeditation beyond a reasonable doubt. The trial court ultimately denied the motion. (T785-89)

Appellant presented several witnesses in his case-in-chief and testified in his own defense. (T799-907) The trial court did allow Appellant's shackles removed during his testimony and demonstrations to the jury. (T832-35) Appellant rested his case and renewed his motion for judgment of acquittal which the trial court again denied. (T907)

During the State's case in rebuttal, the victim's family members who were spectators in the courtroom held up photographs of the victim and his family. This incident ultimately led to a motion for mistrial which the trial court eventually denied. (T945-65,1017-20)

Following deliberations, the jury returned with verdicts of guilty as charged on both counts. (T1102-4; R690-91) The trial court adjudicated Appellant guilty. (T1104; R692-94) The court subsequently filed an amended judgment on August 21, 1996. (R775-76)

A penalty phase commenced on June 10, 1996. (T1107) The State presented some victim impact evidence. (T1111-34) Appellant presented his case in mitigation. (T1137-66) Following deliberations, the jury recommended the death penalty by a vote of 7-5. (R703; T1225)

Both the State and the defense filed sentencing memorandums. (R726-37,740-48) On

August 21, 1996, the trial court sentenced Perry Omar Buckner to death in Florida's electric chair. The trial court found two aggravating circumstances and four mitigating circumstances. (R762-67) The State prepared a sentencing guidelines scoresheet on the noncapital offense, (R768-69) Appellant scored between 56.25 months and 93.75 months of state prison time. The trial court imposed a consecutive sentence of five years. (R790) The court allowed credit for 444 days previously served. (R770) The trial court denied Appellant's motion for new trial. (R714-15; T1246)

On September 18, 1996, Appellant filed a notice of appeal. (R777) The trial court adjudged the Appellant to be insolvent and appointed the Office of the Public Defender, Fifth Judicial Circuit, to perfect the appeal. (R778-79) On September 19, 1996, that office designated the Office of the Public Defender, Seventh Circuit, to handle the appeal. (R784-85) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Introduction

Omar Buckner was convicted and sentenced to death for the shooting of Thaddeus Richardson outside the Royal Palm Bar in the small town of Royal, Florida located in Sumter County. The Royal Palm Bar seems to attract a group of citizens from the lower socio-economic strata of our society. The shooting occurred in the parking lot shortly after the 2:00 a.m. closing of the club. Therefore, many people were present and either heard or saw some portion of the incident or the aftermath. Unfortunately, the witnesses' perceptions and memories varied greatly. Most of the eyewitnesses were under the influence of alcohol and/or drugs during the shooting. When it came time to testify at trial, many of the eyewitnesses were incarcerated due to various pending criminal charges. Additionally, many of the eye-witnesses provided statements to the police that contradicted their trial testimony. As a result, many of the eyewitnesses were substantially impeached. Despite the aforementioned difficulties, counsel will attempt to provide this Court with a complete, comprehensible, and fair statement of the pertinent facts.

The Royal Palm Bar

The Appellant, Omar Buckner, was an eighteen-year-old boy who seemed to enjoy the company of many young women. On the night of the shooting, Ramona "Joy" Monroe, a former girlfriend of Omar's, loaned her car to her cousin Kareem. Kareem drove Joy's two brothers (Robert and Cleve), a friend named Kojak, and Omar (the Appellant) for a night out on the town. (T606-7,684-85) The group first went to the Shady Oaks Club. When it closed

at midnight, they proceeded to the Royal Palm Bar. (T607,836-39) Throughout the evening, the group smoked marijuana, drank beer, and socialized with others. (T607,836-39,841) Thaddeus Richardson, the victim, was also at the Royal Palm Bar that night. (T559-61) Tasha Hampton, one of Omar Buckner's girlfriends, was there too. (T559-61) Some people saw Tasha dancing with Thaddeus Richardson that night.[3] (T102-7,559-61) One patron claimed that he saw Omar slap Tasha at the club that evening. [4] (T102-7)

Katrina Denise Williams and her cousin, Shawn Mills, were at the Royal Palm that night. Around closing time, the pair walked outside and visited with Thaddeus Richardson who was sitting in his car in the parking lot. Katrina sat inside Richardson's car and the trio talked for a few minutes. (T582-88) Katrina and Shawn then decided to leave and climbed into Shawn Mill's truck which was parked nearby. As Mills backed into the roadway, the pair heard shots being fired. Katrina Williams looked up and saw Omar Buckner standing outside Richardson's car with his hands in a "certain position," The girls could not see a gun. (T588-93,649-70) Williams saw Richardson get out of his car. He appeared to stumble or stagger around to the other side of the car. (T593-95) Williams then heard two more shots and saw two flashes from Omar's outstretched hand.[5] (T593-95)

When Shawn Mills heard the shots, she looked up and also saw Richardson outside of

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[3] Tasha denied this. (T800-2)

[4] However, Jerry Lamar Williams, a/k/a Kojak, admitted that he had been snorting cocaine, smoking marijuana, smoking crack, and drinking alcohol throughout the night. He was very high, the highest in his group, and explained that he was "stuck on stupid," (R102-7) Additionally, Tasha denied any argument. (T813-14,818)

[5] Williams consumed about a quart of beer before witnessing the shooting. (T598-99)

the car. She watched as he ran around the back of his car. She then saw Omar and Richardson on the other (passenger) side of Richardson's car. She did not see any shots fired. The two girls got out of the truck and ran to the scene. Mills noticed Omar run by her headed in the opposite direction, (T649-70)

Reginald David, a/k/a "Bobo," actually saw the shooting." He claimed to have seen Omar walk up to Richardson's car and ask, "What's up?" Bobo noticed that Omar had a gun in his hand as he stood next to Richardson's car while Richardson sat in the driver's seat. [7] Richardson replied, "Just let me go. Let me leave." (T562) Omar then shot twice as Richardson sat in the car. (T562) As the shooting began, Tasha Hampton ran toward Omar and Richardson. Bobo grabbed her around the waist and held her away from the fray. Tasha kept repeating, "Stop!"[8] (T565) After the first two shots, Richardson got out of his car. Omar then shot Richardson two or three more times, (T562) Richardson staggered toward Bobo looking for help. (T567) Bobo reached out his hand, but Richardson fell to the ground, mortally wounded. Bobo used his cellular telephone to call 911 for help. (T564)

Bobo's trial testimony differed dramatically from his statements to police shortly after

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[6] Bobo admitted he'd been drinking. He established he'd quaffed two quarts of beer that night. (T559) Bobo also revealed his three prior felony convictions and four pending misdemeanor charges. Bobo maintained that he expected no concessions from the State for his testimony even though he faced jail time. (T568-70,577) In fact, Omar's prosecutor had agreed to notify Bobo's misdemeanor prosecutor of Bobo's status as a material witness in "an important murder case." (T569-70; R662)

[7] Bobo conceded on cross-examination that he looked up only when he heard the first shot fired. (T580)

[8] Tasha denied witnessing the shooting, saying she only heard about it later from others. (T802-3)

the shooting. Three days after the incident, Bobo told the prosecutor that he had not seen Thaddeus Richardson inside the club at all that night. (T571-72) Bobo also told authorities that the two men began tussling when Omar grabbed Richardson and threw him to the ground. (T572-73) Bobo insisted that his trial testimony was "the truth." (T573)

Garlinda Lewis[9] also claimed to witness the shooting that night. [10] Garlinda was in the Royal Palm parking lot socializing and dealing drugs. (T704,711) Garlinda had just completed a sale of narcotics to Bobo and Pat Rushing. [11] She got into her car and was sitting in the passenger's seat. (T710-12) Garlinda spotted Omar as he walked across the parking lot in the direction of the club, [12] (T712) Omar walked quickly up to Richardson's car, Garlinda heard Richardson say, "Let me explain. " (T715) Omar replied, "[I]t wasn't nothing he could say, fuck nigger, ain't nothing you can explain to me. Ain't nothing you can tell me." (T716)

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[9] Garlinda admitted to twenty-nine felony convictions. (T727) Additionally, at the time of her testimony, she had a pending charge of grand theft in Marion County. (T727-28) Additionally, when Garlinda Lewis first approached the State with her eyewitness account, her new husband had two pending felony charges and one misdemeanor. (T728,758,774-75) Garlinda insisted that the prosecutor's favorable treatment of her husband's charges had no relationship to her testimony at Omar's trial. (T757-63,775-78) The State's official position was that her husband's prosecutor was informed of her cooperation. Additionally, the State agreed to take no position as to the disposition of his cases. (R662)

[10] Garlinda Lewis had been at the club earlier but went home shortly after midnight with her then-boyfriend, Chris Sanders. Garlinda was mad at Sanders for snorting cocaine that evening, so she left and returned to the Royal Palm Bar while Sanders took a bath. Sanders clearly doubted Garlinda's truthfulness when she claimed to witness the shooting. (T620-49,700-704)

[11] Garlinda denied that she was using drugs that evening, insisting that she was only selling. (R7 11)

[12] Garlinda Lewis denied any bias toward Omar. (T697-98) Others said that Omar and Garlinda had a fight earlier in the day about a refrigerator. (T613-14,617-18,692-93,698-700, 714)

After this exchange, Ornar and Richardson began to tussle as Richardson sat behind the wheel with the car door open, (T716) Garlinda observed Omar's hand go up and then down. She heard two shots.[13] (T716-18) Garlinda admitted that she never saw a gun during the entire incident. (T749)

Garlinda then claimed that Omar walked a short distant into a nearby crowd. (T718) Meanwhile, Richardson stumbled out of his car and staggered to the passenger side where he fell to the ground.[14] Richardson was seeking help from the surrounding bystanders. (T718) Garlinda claimed to hear Omar utter, "You motherfucker, you ain't had enough. " (T719) Garlinda saw Tasha in the crowd being restrained by Bobo. Tasha said, "Don't do that. Don't kill him. Don't shoot him." (T720-21) Garlinda could see Omar standing in Richardson's general vicinity on the other side of the car. (T723-25) Garlinda then heard two or three more shots. (T721) Shortly after the shooting, everyone scattered for cover. (T725) Garlinda fled the scene in her car. (T725) Garlinda had a pending charge of grand theft in Marion County (also in the Fifth Circuit) at the time of her trial testimony, (T727-28)

Paramedics subsequently arrived and pronounced Thaddeus Richardson dead at the scene. (T471-73) He was lying on his side "sort of face down." (T474) Richardson died as a result of blood loss and internal lacerations caused by five small caliber bullet wounds. (T532-34) Four of the wounds were to the front of Richardson's chest while the other wound

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[13] When the first shot rang out, Garlinda ducked for cover and heard, but did not see, the second shot. (T739)

[14] When Richardson staggered and fell on the passenger side of his car, Garlinda could hear but no longer see Richardson. (T723)

was located at the base of the back of the neck. (T516-40) The bullet entrance wound to the posterior portion of the neck showed powder fragments indicating that the gun's muzzle was withing a few inches of the skin when fired. (T523-24) One of the bullets injured the jugular vein. The blood loss from this wound would have cause Richardson's unconsciousness before "too long." (T534) The doctor estimated that Richardson could have remained conscious approximately four to five minutes after the infliction of the wounds. (T534) Prior to unconsciousness, the wounds would have been fairly painful. (T534-35) Richardson had a few superficial wounds also. There was swelling around his right eye which could have been caused by a fall onto the ground, but this was not the probable cause. (T519-20) The medical examiner opined that the bruised eye was much more likely the product of a punch rather than the result of falling to the ground. (T540)

After a couple of days in seclusion with friends and relatives, Omar Buckner made arrangements through his family to turn himself into the police on Monday morning. (T485-86,672-82,849-50,987) Prior to turning himself in, Omar told his uncle that the confrontation with Richardson began when Richardson was "mooshing him or pushing him in the face and they locked up or something. And that some kind of way he thought the guy reached for a gun or something like that. . . .I remember the gun part, but I don't remember if they tied up with the gun in his arm, or did he reach for a gun or what." (T679) Following his arrest, Omar told police that he dropped the gun at the scene. (T486) Authorities never were able to locate the weapon. (T491) Neither the police nor the medical examiner conducted a "gunshot residue/paraffin test" on the victim. The test, which was available, would have determined if Thaddeus Richardson fired a gun before his own death. (T491-92,541)

Omar Buckner's Testimonv

Omar Buckner readily admitted that he was at the Royal Palm Bar that night. He and his friends were smoking marijuana that evening and were feeling its effects. (T836-39) Omar saw Tasha at the club and briefly spoke to her. (T839-40) Omar and Tasha denied arguing that night. (T813-14,818,860) In fact, Omar had made plans that evening to meet Teensie, a new girlfriend, at a motel later that night. (T841-42)

When the bar closed, Omar was walking around the parked cars outside the club in order to avoid a large puddle in the middle of the parking lot. In taking that path, Omar ended up walking right in back of Thaddeus Richardson's car. Richardson was backing up in Omar's direction, so Omar slapped the trunk of the car several times to warn Richardson that he was in his path. (T842-43) Richardson stopped his car, and Omar approached the driver's window. When Omar explained that Richardson almost hit him, Richardson became belligerent saying, "Fuck you. " (T843) The pair exchanged further profanities and Omar threw his hands up in the air. He then noticed Richardson reaching down inside the car and retrieving a handgun. Omar rushed the car and a struggle ensued over possession of the gun. (T844-45) The first shot sped harmlessly through the air. (T851) The next two shots occurred while the two were struggling for the gun. (T851) Richardson eventually got out of his car and the struggle continued. Omar got possession of the gun near the back of the car. Richardson then rushed him, Without aiming, Omar shot the gun three or four more times until he ran out of bullets. (T845-52) He then dropped the gun and fled.

Omar Buckner had never been in such dire straits. (T849) He was scared. (T850) He had not meant to kill Thaddeus Richardson. (T853) He had nothing against the man.

(T850) He fled the scene and ultimately ended up at a motel in Ocala before finally surrendering voluntarily at his parents' home in Wildwood. (T849,853)

State's Rebuttal

In rebuttal, the State presented evidence that Thaddeus Richardson did not have a reputation as a violent man. (T919-27,967-79) Additionally, no one saw a gun in Richardson's car that day, although no one looked for one either. (T921-22,930)

Penalty Phase -- State's Evidence

The only evidence presented by the State at the penalty phase consisted of "victim impact evidence. " (T111 l-l 134) Thaddeus Richardson's father, twin brother, and godbrother[15] told the jury what a unique, wonderful person Thaddeus Richardson was. He was musically inclined and was a hard working individual. (T1114-15,1124-26,113 1-34) He was a person who liked to laugh and have fun. (T1123-24) Thaddeus respected his parents. (T1126) He was also a very generous person. (T1130)

Penalty Phase -- Mitigation Evidence

Omar Buckner was born on July 9, 1976, in Brooklyn, New York. (Tl157) For the first seven or eight years of his life, Omar lived in the Bedford-Stuyvesant neighborhood on Bernard Avenue in Brooklyn. (T1158) During his initial tender years, Omar witnessed a large quantity of drug trafficking in a very rough neighborhood. (T1158)

Omar was very close emotionally to his mother. After overdosing on the prescription

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[15] A tiny portion of the State's case included the godbrother's eyewitness account of the shooting, Shortly after the shooting, he denied seeing anything. (T1166) After the guilty verdict, he claimed to see the shooting. His version did not differ dramatically from others who testified at trial. (T1116-22)

medication at age ten, Omar's mother sent him to live with his grandparents. The mother was attempting to teach Omar a lesson. However, the doctor criticized the family strategy. Omar describes the situation as "very upsetting and troubling. " (T1148) His grandparents eventually moved to Florida with Omar, leaving his mother behind in Brooklyn. This was very hard on the child. (T1148-49) Omar's grades in school were very poor. (T1159) He struggled to finish the tenth grade before dropping out of school altogether. (T1159-60) Omar was baptized at the First Baptist Church on Green Avenue in Brooklyn. (T1160) He attended that church on a regular basis with his mother while living with her. (T1160)

Dorothy Lekarczyk, a licensed psychologist specializing in clinical child/adolescent psychology, examined Omar Buckner for approximately four hours. (T1137-39) Dr. Lekarczyk administered the Wessler Adult Intelligence Scale, the Coffman Test of Educational Achievement, the Western Personality Inventory, and conducted a clinical interview. (T1139) Buckner's overall intelligence quotient was 88, placing him in the low-average range of intellectual function. (T1139-40)[16] However, Omar's reading, spelling, and math levels were very low for a person with low-average intelligence. Omar scored in the bottom two percent of the general population in all three areas, From the combination of these two tests, Dr. Lekarczyk concluded that Omar has some learning disabilities in all three areas. (T1140)

Dr. Lekarczyk described Omar's formative years as "troubled, stormy." (T1141) He witnessed a great deal of severe physical abuse inflicted on his mother by his father. (T1141, 1158-59) He saw his father break his mother's nose. Another time, his father fractured her

[16] The average I.Q. is between 90 and 110. (R1140)

ribs. On at least one other occasion, he choked her so that she passed out, Once, he actually used a blackjack during the beatings. (T1141) Dr. Lekarczyk described Omar's family as "dysfunctional. "

Dr. Lekarczyk explained that children coming from homes with domestic violence suffer a great deal of ill-adjustment and emotional problems. Omar's childhood bore this out. When he was approximately ten years old, he overdosed on his uncle's prescription medication, Nevertheless, his mother deliberately refrained from reporting this incident to a doctor. She was afraid that her children would be taken from her. (T1143) Even though Omar was never in trouble with the law as a child, he ran away from home repeatedly. Dr. Lekarczyk saw Omar's overdose and his history of running away from home as cries for help+ (T1143) Despite his troubles, the family never sought treatment or counseling for Omar. (T 1142-43)

The doctor described Omar's father as distant and psychologically abusive. (T1149) Whenever Omar accompanied his father on an outing, Omar would inevitably return home upset and crying. The father was in the habit of locking Omar in his room and washing his mouth out with soap. (T1149) Omar was not close to his father at all. (T1149)

Dr. Lekarczyk opined that Omar would be able to adjust fairly well to prison life. While he was in jail prior to trial, Omar functioned fairly well, seemed focused, and fairly stable. (T1142) He obeyed the procedures and rules. (T1142) His past behavior in jail is the best prognosticator of his future behavior. (T1142) With some counseling, some education and life skills, and some remediation of his learning disabilities, Omar had the potential of becoming a functional individual. (T1143)

Dr. Lekarczyk also cited Omar's "dysfunctional lifestyle" which was evidenced by his "substantial lack of organization." (T1144) The best indicator of this particular problem was Omar's activity on the day of the shooting. He went to the house of a friend where he had been staying in order to change his clothes. Then he went to another girl's house in order to move a refrigerator to the new apartment of a third girl, Joy. He then went to Garlinda Lewis' house. Then he went to Tasha's home to get clothes to wear that evening, He then went to Teaman's house to get his shoes. He then went to his own house to pick up a jersey he wanted to wear that night, Then he went to Joy's house to iron his pants. (T1144) Dr. Lekarczyk pointed out that this type of disorganization was not typical of a structured lifestyle that most nineteen-year-old kids lead. (T1144)

Dr. Lekarczyk was of the opinion that Omar's age was a mitigating factor. Although he was nineteen at the time, he functioned like an emotionally immature fourteen-year-old. (T1145-47) Dr. Lekarczyk also concluded that Omar's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law could have been substantially impaired but she could not be absolutely certain. (T1156) This conclusion was based on the extensive use of marijuana that day, [17] Omar's tender age, and certain physical and emotional trauma from his childhood. (T1146)

In addressing nonstatutory mitigating factors, Dr. Lekarczyk believes that Omar's social skills are impaired. (T1147-48) Omar's uncorrected learning disabilities would also

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[17] During the fourteen hours prior to his arrival at the Royal Palm that night, Omar smoked nine marijuana joints. (T1145)

qualify as a mitigating factor. (T1148) Additionally, the doctor cited Omar's emotional and psychological trauma as a child as an additional mitigating factor. (T1148) Omar also expressed remorse over the death of Thaddeus Richardson. He told the doctor that he never set out to hurt anyone and that he was sorry that this had happened. (T1145) The doctor believed that Omar was sincere in his remorse, (T1146)

Omar's mother had seen him with Tasha Hampton's baby. He treated the child like it was his own, even though it was not. (T1160-61) Omar's mother loves him. (T1161) He exhibited artistic talent through his drawings. (T1161; Defense Exhibit #1) Eventually, Omar's mother moved to Wildwood and lived with her son. (T1162) He was very nice around the house and helped with the chores. (T1162) He professed his great love for his mother. (T1162)

SUMMARY OF THE ARGUMENTS

This is not a capital case. The trial court should not have sentenced Perry Omar Buckner to death. The trial court should have granted Appellant's motion for judgment of acquittal and reduced the charge to second-degree murder. The State failed to prove beyond a reasonable doubt the requisite premeditation to support a first-degree murder conviction. When ruling on Appellant's motion for judgment of acquittal, the trial court said, on three occasions, that it was **an "extremely close call. "** Thaddeus Richardson, the victim in this case, had been dancing with Omar Buckner's girlfriend at the Royal Palm Bar. Shortly thereafter, Appellant approached Richardson as he sat in his car in the parking lot of the bar. Words were exchanged, There was evidence that the two men "tussled." Shots were fired. Thaddeus Richardson ended up dead.

There is insufficient evidence of premeditation. Additionally, the circumstantial evidence does not exclude the reasonable hypothesis that Appellant intended to kill Richardson **without** the requisite premeditation, This is a case of an argument outside a bar where one of the combatants ended up dead. The State offered to allow Appellant to plead to second-degree murder right up to the days before trial. It is not a first-degree murder,

Even if this Court concludes that the evidence supports a conviction for first-degree murder, the death sentence is clearly inappropriate in this case. After almost granting Appellant's motion for judgment of acquittal based on the lack of evidence regarding premeditation, the trial court found the "heightened premeditation" (CCP) aggravating factor. If the question of simple premeditation was a close call, surely the State failed to prove that

Appellant acted in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. There was no evidence that the murder was the product of cool and calm reflection; nor that Appellant had a careful plan or prearranged design; nor that Appellant exhibited heightened premeditation. Additionally, there is some evidence that Appellant acted with a **pretense** of moral or legal justification. Appellant testified that he acted in self-defense after the victim produced the gun. This murder was the product of an emotional frenzy and panic. The "heightened premeditation" aggravating factor is not supported by the evidence.

Additionally, the murder was not heinous, atrocious, or cruel. A shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders is, as a matter of law, not heinous, atrocious, or cruel. The victim died as a result of five gunshot wounds. The shooting occurred in a matter of seconds. The victim did not suffer. Additionally, Appellant did not torture the victim nor intend for him to suffer.

Since no valid aggravating factors exist, Appellant's death sentence cannot stand. Banda v. State, 536 So.2d 221, 225 (Fla. 1988). Even if this Court upholds one (or even both) aggravating factor(s), the death penalty is disproportionate in this case. This Court almost never affirms a death sentence with only one valid aggravating factor. In the few cases where the death sentence is affirmed with only one valid aggravator, there is little or no mitigation, Appellant's crime is not the most aggravated and unmitigated of first-degree murders. Looking at other capital cases reviewed by this Court, Appellant's death sentence cannot stand. This Court has reduced other death sentences where the murder was much more egregious than in the instant case,

Additionally, the trial court found substantial mitigation in this case. Unfortunately,

the court improperly rejected valid, uncontroverted mitigating evidence. Furthermore, the trial court inappropriately gave valid mitigating evidence little to no weight. The trial court applied incorrect standards, made illogical conclusions, and ignored the body of caselaw from this Court.

The trial court also abdicated its responsibility by failing to conduct an independent weighing of the evidence to determine the appropriate sentence. Prior to the jury's close (7-5) recommendation for death, the court made it abundantly clear that he would follow whatever recommendation the jury returned. This was also error. By failing in his duty to independently weigh the evidence and law, the trial court's imposition of the death sentence is constitutionally infirm.

Appellant raises two issues dealing with his rights to be present at trial and to confront witnesses and evidence presented against him. Appellant contends that he was involuntarily absent from bench conferences where peremptory challenges were exercised, in violation of Coney v. State, 653 So.2d 1009 (Fla. 1995). His absence occurred without a knowing, voluntary, and intelligent waiver of this important constitutional right. The statements on the record by defense counsel are inadequate to waive Appellant's presence. The trial court's insistence that Omar Buckner remain shackled in leg irons was one reason that Appellant did not participate in any of the bench conferences throughout the proceedings, The trial court's order regarding the shackles also resulted in a separate and distinct violation of Appellant's right to be present at his trial. Because of the leg irons, Appellant could not leave counsel table so that he could view a videotape of the crime scene. The trial court refused to listen to reason when Appellant objected.

During the rebuttal portion of Appellant's guilt/innocence phase, one of the jurors brought to the court's attention that spectators in the courtroom were holding up photographs. The spectators were identified as members of the victim's family who were holding various photographs of the victim in family settings. Although the jurors insisted that the incident would not affect their ability to render a fair and impartial verdict based on the evidence alone, the incident created an unacceptable risk that the jury decided the case based on sympathy rather than evidence. The jury's assurances that they could be fair should be given little weight, if any. Appellant's motion for mistrial should have been granted.

Appellant also challenges the trial court's granting of the State's challenges for cause on two potential jurors who expressed problems with the death penalty, but were still qualified to serve. Appellant also challenges the constitutionality of excusing jurors who express opposition to the death penalty. Furthermore, Appellant challenges the constitutionality of Florida's death penalty scheme. Particularly, Appellant attacks the propriety of allowing a jury to recommend death by a bare majority. Appellant's jury recommended death by the slimmest of margins (7-5). As a result, Appellant's death sentence is unconstitutional.

ARGUMENTS

Perry Omar Buckner discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections **9,** 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT. I

THE TRIAL COURT ERRED IN DENYING BUCKNER'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE FAILED TO PROVE PREMEDITATION BEYOND A REASONABLE DOUBT.

Right up to the beginning of trial, Omar Buckner could have accepted the State's offer to plead guilty to second-degree murder and face thirty-five years imprisonment. However, Buckner insisted that he acted in self-defense, turned down the plea bargain, and was ultimately sentenced to death. (T199-201)

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal contending that the evidence proved nothing more than a second-degree murder. (T786-88) Defense counsel argued that without the testimony of Reginald David, a/k/a Bobo, and Garlinda Lewis, there was simply no evidence to support premeditation. (T787) Counsel pointed out that the testimony of these two witnesses was completely inconsistent. They could not **both** be telling the truth. Additionally, neither witness was credible. (T787) The trial court replied:

> It's an extremely close call on both -- Count II [shooting into an occupied vehicle], but more close, extremely close call, as to the motion as to first degree. However, I feel that there is enough evidence and it should be submitted to the jury by the law, the caselaw, that we work under. I again say it's extremely close, but I'm going to deny the motion in its entirety.

(T788-89) (emphasis added). After Appellant's case-in-chief, wherein Buckner testified that he acted in self-defense, defense counsel renewed the motion for judgment of acquittal on "essentially the same grounds." (T1020) In denying the motion, the trial court reiterated, "Well, as I indicated earlier, I think it's an extremely close call, but I feel it remains a jury question under the existing caselaw." (T1020) (emphasis added).

This Court has the responsibility in this case to determine whether "there is substantial, competent evidence to support the judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). See also Troedel v. State, 462 So.2d 392, 399 (Fla. 1984). "Premeditation," a necessary element of first-degree murder, is a fully-formed conscious purpose to kill. Appellant recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act. Assay v. State, 580 So.2d 610 (Fla. 1991). Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury that may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon[18] used, the presence or absence of adequate provocation, previous

[18] The gun in this case was a small caliber handgun. (T532)

difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Jackson v. State, 575 So.2d 181, 186 (Fla. 1991).

Omar Buckner did not know Thaddeus Richardson. [19] Thaddeus Richardson had, probably unknowingly, provided at least some provocation by dancing with Omar's girlfriend that night at the club in front of all of Omar's friends. Thaddeus Richardson was bigger and stronger. (T5 16- 18,869-70) When Omar approached Thaddeus Richardson's car, he undoubtedly intended to **confront** Richardson. Aside from that fact, nothing else is crystal clear. Words were exchanged, shots were fired. The two combatants may or may not have "tussled." Thaddeus Richardson ended up dead. We cannot even be sure which man possessed the gun initially. [20] Thaddeus also had a "black eye" which indicates a scuffle or fight prior to the shooting. (T519-20,540)

The evidence in this case fails to exclude a "heat of passion" killing and therefore would support, at most, a conviction of second-degree murder. See. Forehand v. State, 126 Fla. 464, 171 So, 241 (1936). In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Ross v. State, 484 So.2d 1170, 1173 (Fla. 1985). If the State seeks to prove premeditation by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. See, Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA 1983).

Tien Wanq demonstrates the heavy burden that the State must carry on the matter of

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[19] See, e.g., Knowles v. State, 632 So.2d 62, 66 (Fla. 1993).

[20] The State presented testimony that Omar had possession of the gun before the shooting. (T629)

premeditation, Even though witnesses saw Tien Wang chase the victim down the street, strike him repeatedly, and the victim died, the appellate court held the evidence as to premeditation to be insufficient. The court acknowledged that although the testimony was "not inconsistent with a premeditated design to kill," the evidence was "equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill **without** any premeditated design." 426 So.2d at 1006. (Emphasis added). In Appellant's case, the State also failed to exclude the reasonable hypothesis that Omar intended to kill Thaddeus without the requisite premeditation.

Florida law is filled with similar cases where appellate courts have found the evidence of premeditation to be insufficient. See, e.g., Rogers v. State, 660 So.2d 237, 241 (Fla. 1995) [victim grabbed defendant's gun which fired during the struggle]; Jackson v. State, 575 So.2d 181 (Fla. 1991) [evidence was consistent with theory that store owner resisted robbery, inducing gunman to fire single shot reflexively]; Clay v, State, 424 So.2d 139 (Fla. 3d DCA 1982) [defendant stated her intent to procure firearm in order to shoot victim, but she was under a dominating passion and fear of victim]; and Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990) [killing may have occurred in the heat of passion or without premeditation where unfaithful husband killed unfaithful wife]. This Court must examine the evidence presented and also conclude that the State failed to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis that the Appellant premeditated the murder of Thaddeus Richardson.

POINT II

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE HE WAS INVOLUNTARILY ABSENT DURING PORTIONS OF THE PROCEEDINGS. ADDITIONALLY, WHEN BUCKNER WAS PRESENT HE WAS SHACKLED IN LEG IRONS WHICH HINDERED HIS ABILITY TO EFFECTIVELY PARTICIPATE IN HIS OWN CAPITAL MURDER TRIAL.

The Coney[21] Violation

Prior to the commencement of jury selection, defense counsel expressed concern about the trial court's insistence that Omar Buckner had to wear leg irons during his trial.

> MR. HARRISON (Defense counsel): Your Honor, I'm concerned about it that he has to stay seated. He should be able to rise when the Judge comes in or rise when the jury comes in. He ought to be like everybody else, I don't think they'll see his leg irons.
>
> THE COURT: I don't care. That will be all right, he can rise.
>
> MR. HARRISON: Just set [sic] back far enough so that you can get up, Omar.
>
> THE COURT: If he does anything to expose his leg irons to the jury, that's on him.
>
> MR. HARRISON: Yes, sir

(T204) Throughout jury selection and the remainder of the trial, the prosecutor and defense counsel participated in numerous bench conferences. See, e.g., (T13,213,215-24,241-46,259-60,264,296,300-3,318) During many of these bench conferences, defense counsel made

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[21] Coney v. State, 653 So.2d 1009 (Fla. 1995).

challenges for cause, as did the State. Some jurors were excused based on hardship. Omar Buckner was not present at any of these bench conferences.

Prior to the exercise of any peremptory challenges, defense counsel explained to Omar that he had a constitutional right to be present at the bench conferences.

> MR. HARRISON: Omar, you have a legal right to participate in the legal arguments when we approach the bench. However, it is somewhat cumbersome. It also means the jury -- we have to work out for them to some way not see the leg irons. I recommend that you waive that. We'll talk to you before we come up here. Is that all right for us to come up alone at the bench and leave you at the table?
>
> THE DEFENDANT: Yes.
>
> MR. HARRISON: He would waive that right: Your Honor.
>
> THE COURT: Okay. That's the only thing I wanted to be sure about.

(T320-21)

The remainder of jury selection included several bench conferences where peremptory challenges were exercised. (T393-98,432-38) During one bench conference conducted outside Appellant's presence, the trial court put on the record that defense counsel "had ample opportunity in each break in the discussion to consult with the Defendant, and that the Defendant agrees to that procedure, and in fact, that is what's been taking place now." (T400) Defense counsel agreed with the prosecutor's statement. At the final bench conference during jury selection where the jury members were finalized, the prosecutor again placed on the record that "counsel has had an opportunity to discuss these challenges with the Defendant

during the break, and he's satisfied with the procedure. " (T439) Defense counsel agreed that that procedure occurred. (T439) Omar never personally agreed to the procedure on the record other than the initial, "Yes" during the first part of voir dire. (T320-21)

The jury was then sworn in open court and the trial commenced the following day. (T440-49) During the evidentiary portion of the trial, the parties continued to conduct bench conferences where evidentiary and other matters were discussed outside the presence of Omar Buckner. (T475,497-99,517-18,547-51,580-81,747-48,792-99,818-19,898-901,965-67,973-74,979-80,996,1009-13,1013-15,1086-91,1094-97,1107-8,1134-35,1165-85,1223,1228-30) Some of these bench conferences were not even reported. Some were not actually bench conferences but were in-court proceedings without the presence of the jury or the Defendant. Omar Buckner was not present at the bench for any of them. He remained in shackles at counsel table.

Appellant submits that his rights were violated under Coney v. State, 653 So.2d 1009 (Fla. 1995), because he was not present at the bench during the exercise of peremptory challenges. In Coney, this Court held that "[t]he defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." Id. at 1013. This type of error is a fundamental one that may be raised for the first time on appeal. See Brower v. State, 21 Fla. L. Weekly D2612 (Fla. 4th DCA December 11, 1996). Subsequent to the Coney decision, this Court clarified the pertinent rule of criminal procedure. r ' s trial was held in the summer of 1996, Therefore, he clearly falls within the Coney window. Id.

Appellant recognizes that this Court has subsequently severely limited Coney's

application almost strictly to bench conferences where peremptory challenges are exercised. Omar Buckner was clearly not present at the bench when the peremptory challenges were exercised and the jury was selected, (T393-400,432-39) Omar Buckner was sitting at counsel table in leg irons.

The only question that remains for this Court is whether the trial court adequately certified through proper inquiry that Omar Buckner's waiver was knowing, intelligent, and voluntary,

> Where [a defendant's physical presence] is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary, Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. Again, the court must certify the defendant's approval of the strikes through proper inquiry .

Coney v. State, 653 So.2d at 1013. Appellant emphasizes that there is no intelligent, knowing, and voluntary waiver personally made on the record by Omar Buckner. The only statement from Omar on this matter is cited at the beginning of this point where defense counsel explains that he has a right to participate in the "legal arguments" at the bench. (T320) Defense counsel explained that this would be cumbersome in light of the trial court's insistence that Omar remain in leg irons. (T320) Defense counsel recommended that Omar waive this particular constitutional right. When defense counsel asked if this would be "all right," Omar replied, "Yes." (T320-21) That is the only personal "waiver" by Omar Buckner in the record. Appellant submits that the "waiver" is insufficient.

Initially, Appellant points out that Omar Buckner was to remain in leg irons during most of the trial despite his defense counsel's objection. (T204) Additionally, defense counsel's explanation to Omar on the record talks about the "legal arguments," not jury selection, at the bench. **Nowhere does defense counsel or anyone explain to Omar Buckner that his jury will be selected at the bench outside of his presence,**

Appellant concedes that defense counsel never refuted the prosecutor's statements on the record that defense counsel had conferred with Omar prior to the exercise of peremptory challenges at the bench. Indeed, Appellant concedes that defense counsel affirmatively states that this was done. Even the record reflects that defense counsel was conferring with Omar (about something) on at least one occasion immediately prior to the exercise of challenges at the bench.[22] (T393) In light of defense counsel's affirmative responses, the Third District Court of Appeal would hold any error to be invited error. See. e.g.. Williams v. State, 687 So.2d 858 (Fla. 3d DCA 1996). If defense counsel did in fact confer with Buckner on the exercise of peremptory challenges, any error could be harmless. Meiia v. State, 675 So.2d 996 (Fla. 1st DCA 1996).

Appellant submits that the record is insufficient to conclusively establish that Omar Buckner intelligently, knowingly, and voluntarily waived his fundamental, constitutional right to be present at the immediate site where peremptory challenges were exercised. Omar's affirmative response to defense counsel's insufficient explanation of the subject matter of the waiver is completely inadequate. (T320-21) Omar never personally ratified the selection of

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[22] A remand may be necessary to determine if, in fact, Omar participated in selecting which jurors to excuse. See, e.g., Golden v. State, 688 So.2d 419 (Fla. 1st DCA 1996).

the jury on the record. (T439-41) All of the statements on the record regarding defense counsel conferring with Omar and his agreement with the procedure were done at the bench outside Omar's presence. This is not a case where Omar could hear the bench conferences. Gonev v. State, 22 Fla. L. Weekly D930 (Fla. 5th DCA April 11, 1997) (defendant had head-phones that allowed him to hear bench conferences and could interrupt at any time if he wanted to confer with counsel), Nor is this a case where Omar Buckner was "welcome to come up" to the bench. See, e.g., Williams v. State, 687 So.2d 858 (Fla. 3d DCA 1996). Omar Buckner was shackled in leg irons at counsel table. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21 and 22, Fla. Const.

Shackling Omar in Leg Irons Resulted in His Involuntary Absence and Prevented Him From Seeing Evidence that the State Used Against Him.

The trial court insisted that Omar Buckner remained shackled in leg irons during most of his capital trial. (T204) Thankfully, the trial court relented and allowed the shackles to be removed, but only while Omar Buckner testified in his own defense, (T832-35) Defense counsel convinced the trial court that he needed Omar to be able to move about the courtroom freely during his testimony in order to demonstrate the relative positions of the men during their struggle. (T832-35)

Unfortunately, the trial court committed reversible error when Omar's leg irons prevented him from watching a videotape of the crime scene without exposing his leg irons to the jury.

> [Defense counsel] : . , . [T]he Defendant indicates he would like to see the video also. He is in shackles. There is going to be another time, if the Defendant takes the stand, when we're going to want to have him step down and

> show how things happened, his version of how things happened. And his behavior has been quite innocent, it appears to me, in the courthouse to the present time, He appeared without shackles, I believe, at grand jury with no incident whatsoever. His behavior in court has been exemplary.
>
> I would suggest that also perhaps it would be reasonable to let him be unshackled to watch this video, and we could have him maybe sit in a chair right here, you know, so that he's not right over by the jury like we usually get, but maybe sit him right here in front.
>
> THE COURT: If he wants to watch it, just march him right over there and sit down and he stays in shackles.
>
> [Defense counsel]: Okay. He will choose not to watch it at this time, Your Honor.

(T482) (emphasis added). The State then called Captain Lavern Jenkins who authenticated a videotape of the crime scene which was then played to the jury. (T486-91) The trial court granted defense counsels' requests to reposition themselves to that they could watch the video-tape as it played. (T488) Appellant cites this portion of the record to demonstrate that Omar Buckner clearly could not see the videotape as he sat shackled at counsel table. His lawyers had to move from counsel table to see the tape. Omar had to remain at counsel table where he obviously could not see.

Among the areas of discussion during the playing of the videotape was the positioning of the victim's car that night:

> Q. This car here, would that be positioned about where the victim's car was that night?
>
> A. It's pretty close, yes, sir.

(T488); and the lighting of the area:

Q. Is there a light on that pole there, sir?

A, Yes, sir.

Q. Was it on that night?

A, Yes, sir.

Q. Is there a light on that pole?

A, Yes, sir, it is,

Q. And is there a light on that pole?

A. That's correct.

Q. Now, this is right above where the car was?

A. Yes, sir, it is.

Q. Were those lights on that night?

A. Yes, sir.

(T489-90)

The trial court proposed a Hobson's choice. If Appellant wanted to watch the videotape that the State used to convict and sentence him to death, he would be forced to allow the jury to see him in shackles. The United States 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 (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); Marauez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994) ("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.. . .”). This Court cannot blame Appellant for choosing not to watch the videotape under the circumstances. His choice was even more clear in light of the fact that he knew that he would testify and his credibility was pivotal to his defense. See Yates v. Evatt, 500 U.S. 391 (1991) (discussing harmless error standard).

Appellant had an absolute right to view all of the evidence the State presented at his capital trial. The trial court’s ruling violated Buckner’s constitutional right to confront witnesses and evidence. Buckner was also deprived of his fundamental right to be present at all critical stages of his trial. Even though defense counsel objected, this type of error is fundamental. Salcedo v. State, 497 So.2d 1294 (Fla. 1st DCA 1986). ‘Additionally, Appellant’s rights to confrontation, due process, effective assistance of counsel, and a fair trial were violated. Amends. V, VI, VIII, and XIV, U.S. Const. ; Art. I, §§ 2, 9, 16, 17, 2 1 and 22, Fla. Const.

Certainly, the presentation of evidence constitutes an essential stage of the trial. Numerous decisions for both this Court and the United States Supreme Court have recognized that the right to be present is one of the most “fundamental” rights accorded to criminal defendants. See, e.g., 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. ”)

In Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986), the prosecutor used aerial views of the crime scene and permitted witnesses to point out the location of objects and persons. From counsel’s table, the defendant was unable to see the exhibits that the witnesses

were utilizing. The Fifth District Court of Appeal, held that the right to be present must be interpreted so that a defendant must be able to view, and not merely hear, the evidence against him. The restriction of the defendant's ability to see the witnesses compelled reversal:

> Presence must be interpreted to mean that the defendant is allowed to view not merelv hear the evidence against him. The primary purpose of the requirement that a defendant be present during trial is to allow the defendant to confront witnesses and the evidence against him. Without being able to actually see what the witnesses were testifying to the appellant was not permitted to adequately confront the witnesses and the evidence and prepare a cross examination. Significant restrictions on cross examination deprive a defendant of the right to confrontation and compel reversal.

486 So.2d at 615. See also D.A.D. v. State, 566 So.2d 257 (Fla. 5th DCA 1990) (noting that child's testimony via speaker phone, as opposed to closed circuit TV, did not permit the defendant to be aware of what the child was doing -- this type of proceeding would not pass constitutional muster).

This Court was presented with the same issue litigated in Waters in Wright v. State. 688 So.2d 298 (Fla. 1997). However, Wright failed to bring to the trial court's attention the defendant's inability to see the displays, This Court pointed out that, had defense counsel timely objected, the trial court could have easily altered the procedure without compromising the whole trial. Wright, 688 So.2d at 299.

Omar Buckner objected loudly and clearly. Defense counsel explained his request in a reasonable and logical manner. Counsel pointed out that Buckner had behaved throughout the

trial, and that he had appeared unshackled at the grand jury proceedings. [23] Omar expressed a desire to watch the videotape of the crime scene. Defense counsel made his pitch, ". . .we could have him maybe sit in a chair right here,, . " (T482) The trial court's response:

> If he wants to watch it, just march him right over there and sit down and **he stays in shackles,**

(T482) (Emphasis added). This "choice" was no choice at all.

The videotape of the crime scene was critical in this case, Appellant shot the victim at 2:00 a.m. outside the Royal Palm Bar just after closing. Buckner claimed that it was self-defense. The witnesses' versions of that night's chaotic scene varied greatly. Many of the witnesses were substantially impeached with evidence of prior inconsistent statements, bias and motive, prior felony convictions, and pending criminal charges. The relative positions of the combatants, the cars, and the witnesses were points of contention and disagreement.

The credibility of Garlinda Lewis, perhaps the most damaging State witness, was critical. Defense counsel began his cross-examination by asking that the videotape be played again. (T735) Mr. Adams, Appellant's co-counsel, again asked permission to move from counsel table so that he could see the videotape. (T735) Omar Buckner remained shackled in leg irons at counsel table, unable to view the evidence presented against him. Defense counsel then used twelve pages of cross-examination of Garlinda Lewis regarding her account of the crime. Throughout these twelve pages, defense counsel and the witness focused on the

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[23] The trial court later made an inconsistent ruling when he allowed Omar to testify without his leg irons. (T832-35) This demonstrates (1) that Omar posed no security risk, and (2) that the trial court recognized the inherent prejudice in allowing the jury to see Omar in shackles.

videotape of the crime scene. At various points, the tape was stopped and the witness described where people went and, in doing so, she used the videotape. It reached a point where the trial court called a bench conference to express his concern that the record on appeal would not adequately reflect exactly which portion of the videotape was referenced by the witness. (T747-48) The trial court's concerns were justified. Neither counsel nor this Court can discern exactly what the witnesses are talking about in their references to the videotape. We find ourselves in a situation similar to Omar Buckner. Instead of being shackled at counsel table, we are shackled to the limitations of the printed page.

This was a close case. The credibility of the witnesses was a critical issue. Appellant's absence during the presentation of evidence violated his rights under the Confrontation Clause of the Florida and United States Constitutions. Because this viewing of the testimony by use of exhibits was reasonably related to the "fullness of the opportunity to defend against the charge, " Appellant was denied his right to due process under the United States and Florida Constitutions. See Snyder v. Massachusetts, 291 U.S. 97 (1934); Kentucky v. Stincer, 482 U.S. 730 (1987) (defendant has right to be present if his presence would contribute to the fairness of the proceedings); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) (defendant has constitutional right to be present where fundamental fairness might be thwarted by his absence). See also Cov v. Iowa, 487 U.S. 1012 (1988) (confrontation clause prohibits screen that blocks defendant's view as victim testified). The inability to see the witnesses' use of exhibits also deprived Appellant of the ability to confer with his counsel, thus depriving him to effective assistance of counsel pursuant to the Florida and United States Constitution. This cause must be remanded for a new trial. Amends. V, VI, VIII, and XIV,

U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21 and 22, Fla. Const.

POINT III

LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IS THE APPROPRIATE SENTENCE FOR OMAR BUCKNER.

A. The Murder of Thaddeus Richardson was Not Cold, Calculated and Premeditated Without any Pretense of Moral or Legal Justification.

In finding that the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, the trial court wrote:

> Defendant had a plan in mind, as he waited in the parking lot until the establishment closed at 2:00 a.m. and the customers left. He admitted that he did not have a gun in his possession earlier in the evening, so he obviously went to another location to get the gun, and returned. The Defendant walked up to the victim, who was sitting in his car, minding his own business, aimed his gun, and shot the victim twice, then turned and started to walk away. The victim staggered from the car and tried to walk around the back of the car toward the building, seeking help, when the Defendant turned, looked, and walked back toward the victim, saying, "... ain't you had enough yet?" At that point he fired his gun again, shooting the victim three more times. All during this period the victim was terrified, trying to get away from the Defendant, struggling for his life. The testimony of witnesses indicates that the victim was conscious for several minutes after being struck with five bullets, at least three of which were in the lungs, which would be excruciatingly painful. During this entire time, beginning when the Defendant walked up to the victim's car, the victim was filled with terror and fear for his life, desperately trying to get away, to seek help, right up to the last moment when the Defendant purposefully and in a cold, calculated manner, stood over the injured man after having once walked away, and shot him in the back of the neck from a distance of two inches, to make sure he was dead. This was indicative of the cold, calculated, premeditated manner in which the evidence shows that

> this murder was committed. See Rivera v. State, 451 So.2d 536 (Fla. 1990); Preston v. State, 607 So.2d 404 (Fla. 1992); Marshall v. State, 604 So.2d 799 (1992); and Hildwin v. State, 531 So.2d 124 (1988).

(R764-65) Like all aggravating circumstances, this one must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The State failed to meet its burden of proof in this case.

This Court set forth the definitive commentary on Section 921.141(5)(i), Florida Statutes (1995) (the CCP aggravating factor), in Jackson v. State, 648 So.2d 85, 89 (Fla. 1994):

> in order to find the CCP aggravating factor under our caselaw, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold). . . ; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated) . . . ; and that the defendant exhibited heightened premeditation (premeditated). , . ; and that the defendant had no pretense of moral or legal justification.

(Citations omitted). A pretense of justification is any colorable claim based at least partly on uncontroverted evidence, even though such evidence is insufficient to excuse the murder Walls v. State, 641 So.2d 381 (Fla. 1994). "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be " . , .a careful plan or prearranged design to kill. . . . " Rogers v. State, 511 So.2d 526 (Fla. 1987). This Court has "consistently held that application of this aggravating factor requires a finding of . , . a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a

conviction for first-degree murder. " Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

The record in this case is absolutely devoid of any evidence that Omar Buckner planned and calculated the killing of Thaddeus Richardson well in advance of the shooting. [24] The totality of the evidence indicates that the shooting was quickly accomplished (one witness estimated thirty seconds) and was probably the product of rage or passion. The apparent motive (although the State's theory is lacking in this regard) was jealousy. Thaddeus Richardson had been dancing with Buckner's girlfriend at some time during the evening. The State failed to prove the time lapse between the provocation and the shooting. The State even failed to prove when Omar left the club prior to the shooting, [25] The evidence is just as consistent that Omar left the club with the other patrons when it closed, walked through the parking lot, and encountered Thaddeus Richardson, Words were exchanged and the shooting occurred. Richardson was bigger and stronger. (T516-17,869-70) The autopsy showed that Richardson had a "black eye" which is consistent with a "fight" before the shooting. (T519-20,540)

The facts of this case show a killing in a fit of rage or panic. This type of homicide does not qualify as cold, calculated, and premeditated without any pretense of moral or legal justification. See, e.g., Crump v. State, 622 So.2d 963, 972 (Fla. 1993); Mitchell v. State, 527 So.2d 179 (Fla. 1988); and Jackson v. State, 648 So.2d 85 (Fla. 1994). Thaddeus Richardson had danced with Omar's girlfriend, and Omar was angry. Omar testified under

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[24] In fact, the State failed to prove an advanced "plan" of any duration, much less a plan of lengthy duration.

[25] No one saw Appellant prior to his approach to Richardson's car.

oath that Thaddeus Richardson initially had the gun. Omar testified that he acted in self-defense. Either one of these scenarios (self-defense or jealous rage) eliminate the application of this aggravating factor. Under either one Omar acted with a **pretense** of moral or legal justification. This kind of case is precisely the type to which the last clause in the definition applies ("a pretense of moral or legal justification"),

The requisite "heightened premeditation" is also clearly absent in this case. The State failed to prove this essential element at all, much less beyond a reasonable doubt. In fact, the trial court almost granted Appellant's motion for judgment of acquittal at the close of the State's case and again at the Defendant's case-in-chief. The trial court **almost** accepted Appellant's argument that the killing was, at most, second-degree murder due to the failure of the State to prove premeditation beyond a reasonable doubt, On two occasions, the trial court said [the premeditation issue] was an "extremely close call. " (Emphasis added). In his sentencing order the trial court leaped to the erroneous conclusion that the State had proved the requisite "heightened premeditation" to support CCP even though they almost failed in their quest to prove simple premeditation to support a first-degree murder conviction. The State certainly offered no further proof of "heightened premeditation" at the penalty phase, instead offering only "victim impact" evidence.[26] Appellant does not understand why the trial court believed that the State's case regarding premeditation got stronger with no additional evidence.

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[26] A tiny portion of the State's case included the victim's godbrother's eyewitness account of the shooting. Shortly after the shooting, he denied seeing anything. (T1166) After the guilty verdict, he claimed to see the shooting. His version did not differ dramatically from others who testified at trial. (T1116-22)

This Court has rejected this particular aggravating factor in other cases where the proof was much greater than in the instant case. See. e.g., Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (defendant selected his victim in a calculated manner and armed himself but only planned to rape, rob, and burglarize -- not kill); Douglas v. State, 575 So.2d 165 (Fla. 1991) (following prison release, defendant kidnapped girlfriend and her new husband at gunpoint, led them to a remote location, forced them to have sex at gunpoint [like a last meal], then shattered the man's skull with the stock of the rifle and fired several shots into his head); and Irizarry v. State, 497 So.2d 822 (Fla. 1986) (ex-wife killed and her new lover critically injured in machete attack by defendant who had a prearranged alibi[27]).

In the sentencing order, the trial court cites four cases in support of his finding that the shooting of Richardson was cold, calculated, and premeditated without any pretense of moral or legal justification. (R781) Of the four cited cases on which the trial court relies, three of them did not involve CCP at all. The factor was not found by the trial court in those cases nor was it discussed on appeal. The one case cited by the trial court that does deal with CCP is a case where this Court found the evidence **insufficient** to support the circumstance, Rivera v. State, 561 So.2d 536 (Fla. 1990).[28] Rivera choked a young girl to death "after things got out of hand." Rivera, 561 So.2d at 540. the evidence as to the CCP factor to be insufficient even though Rivera had admitted fantasizing about raping young girls, and

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[27] This Court's opinion did not directly address whether the aggravating factors were improperly found; it simply reversed the death sentence as disproportionate under the circumstances.

[28] The trial court cited the wrong volume in the cite to Rivera, but counsel is confident that he has found the case to which the trial court meant to refer. (R781)

prowled neighborhoods in search of a victim. However, he did not mean to kill the girl. He only wanted to look at her and play with her. Id.

The State failed to meet its burden of proving this circumstance beyond a reasonable doubt. The State failed to show **any** evidence of a calculated plan. The trial court found the State's evidence of **simple** premeditation in support of a first-degree murder conviction to be an "extremely close call. " This finding flies in the face of the trial court's later finding of "heightened premeditation." The State clearly failed to prove that the killing was the product of cool and calm reflection. The shooting was accomplished in a matter of seconds, not minutes. Finally, there was at least a **pretense** of moral or legal justification. Appellant's defense at trial was one of self-defense. At the very least, he acted in an emotional frenzy, panic, or fit of rage when he became jealous that Thaddeus Richardson was dancing with his girlfriend,

B. The State Failed to Prove Beyond a Reasonable Doubt that the Murder was Especially Heinous, Atrocious, or Cruel Under the Definition of that Term by Caselaw.

In finding that the murder was especially heinous, atrocious or cruel, the trial court wrote:

> The victim suffered great anxiety from the moment he was approached by the Defendant while he was sitting in his car, defenseless, at which time the witnesses testified that he begged to be allowed to explain, until the moment he lost consciousness after the Defendant shot and mortally wounded him. The medical examiner testified that the victim would have suffered significant pain from the five bullet wounds he suffered, but that would not have rendered him unconscious for about four to five minutes, and would not have prevented him from moving, seeing, or hearing. This opinion is supported by the observations of the eyewitnesses at the scene,

> While sitting in his car, which was blocked, preventing him from escaping from Defendant, the victim, Thaddeus Richardson was shot twice. He then got out of his car and staggered toward the building, seeking help. He fell, and called out to God for help, which inspired the Defendant to taunt him, asking if he hadn't had enough yet. The Defendant's girlfriend, Tasha Hampton, then yelled at the Defendant not to shoot the victim again.
>
> Although the victim was feeling the pain of two bullet wounds, and panic that others can only imagine, he could hear those remarks, and he could see the Defendant returning. He recognized that he was about to die, and made a futile attempt to get away from his killer, before more bullets were pumped into his body, the last being in the back of his neck from a distance of two inches. There's no doubt that Thaddeus Richardson suffered great pain and extreme mental torture during the last ten minutes of his life. The finding of this aggravating circumstance is clearly supported by the record.

(R763-64)

In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), this Court announced the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." In the realm of first-degree murders, Thaddeus Richardson's shooting was "ordinary." Even viewing the seriously flawed and contradictory evidence in the light most favorable to the State, Omar Buckner shot Thaddeus Richardson in a fit of jealous rage.

Buckner walked up to Richardson and began firing the gun almost immediately. Words were exchanged and the shooting began. The entire incident lasted a matter of seconds. It was over in less than a minute. Buckner certainly did not intend for Richardson to suffer. Richardson did remain alive for a short period of time only because Buckner was using a .22 caliber handgun, an extremely inefficient tool to kill anyone. Buckner certainly did not intend

for Richardson to suffer. He intended to kill him.[29] When the encounter began, Richardson had no reason to believe he was about to die. He only knew that Appellant was apparently jealous and angry. The fact that Richardson's car was blocked by another parked car was no fault of Appellant.

Florida law reserves this particular aggravating factor for killings where the victim was tortured, e.g., Douglas v. State, 575 So.2d 165 (Fla. 1991), or forced to contemplate the certainty of their own death,[30] e.g., Sochor v. State, 619 So.2d 285 (Fla. 1983). There must be "such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim," State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The factor applies to torturous murders, "as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908 (Fla. 1990). Furthermore, the defendant must have intended to cause the victim "extreme pain or prolonged suffering. " Elam v. State, 636 So.2d 1312 (Fla. 1994).

This Court has refused to uphold this aggravating circumstance in other, factually similar cases. Brown v. State, 526 So.2d 903, 906-7 (Fla. 1988) (HAC improperly found where victim shot in the arm, begged for his life, then shot in the head); Rivera v. State, 545 So.2d 864 (Fla. 1989) (defenseless police officer shot three times within sixteen seconds held

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[29] Although, without any premeditated design. See Point I.

[30] The trial court's conclusion that Thaddeus Richardson knew he was about to die is not supported by the evidence. In reality, the entire event took place in seconds. Less than a minute, and it was over.

not to be HAC or CCP); Street v. State, 636 So.2d 1297 (Fla. 1994) (defenseless police officer watched his partner being killed with the knowledge that he was next held not to be HAC or CCP); Green v. State, 641 So.2d 391 (Fla. 1994) (victim's hands tied behind back, victim driven a short distance, and victim knew defendant had gun were not adequate "additional acts" to justify HAC); Clark v. State, 609 So.2d 513 (Fla. 1992) (HAC improperly found even though victim was probably conscious after the first shot and therefore was probably aware of his impending death prior to the second shot); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979) (HAC improperly found where victim shot in the chest, attempted to flee, then shot in the back); Burns v. State, 609 So.2d 600 (Fla. 1992) (trooper shot once during struggle causing rapid unconsciousness followed by death within a few minutes); Ferrell v. State, 686 So.2d 1324 (Fla. 1996) (HAC not supported where victim was shot five times after being brought to remote area); Amoros v. State, 531 So.2d 1256 (Fla. 1988) [murderer fired three shots into the victim at close range]; Teffeteller v. State, 439 So.2d 840 (1983) [victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain, and knew he was facing death]; Elam v. State, 636 So.2d 1312 (Fla, 1994) [victim was bludgeoned to death with a brick to his head and had defensive wounds, the attack lasted for about one minute]; McKinnev v. State, 579 So.2d 80 (Fla. 1991) [HAC not shown where semiconscious victim suffered seven gunshot wounds on right side of body and two acute lacerations on head]; Hallman v. State, 560 So.2d 233 (Fla. 1990) [guard killed with single shot to the chest with death probably occurring within a matter of a few minutes]; and, Williams v. State, 574 So.2d 136 (Fla. 1991) [defendant restrained bank guard, then shot her with little delay].

Several opinions from this Court are practically indistinguishable from Richardson's shooting. In Kearse v. State, 662 So.2d 677 (Fla. 1995), the victim sustained extensive injuries from the numerous gunshot wounds, but there was no evidence that Kearse "intended to cause the victim unnecessary and prolonged suffering." Kearse, 662 So.2d at 686, quoting Bonifay v. State, 626 So.2d 1310, 1313 (Fla, 1993). The medical examiner in Kearse could not offer any information about the sequence of the wounds and stated that the victim could have remained conscious for a short time or rapidly gone into shock. The taxi driver who arrived at the scene as the shooter sped away described the victim as "dead or dying, "[31] Kearse, 662 So.2d at 686. not find beyond a reasonable doubt that the murder was heinous, atrocious, or cruel. (Emphasis added).

This Court must also remember that Omar's motive was apparently based on his extreme jealousy and resulting anger at Richardson for dancing with his girlfriend. The mental state of the perpetrator is an important factor in determining whether or not the State has proven this aggravating circumstance beyond a reasonable doubt. There must be proof that the defendant **intended** to inflict pain or was utterly indifferent to it. Generally, murders committed in the heat of passion are not heinous, atrocious, or cruel. See. e. g., Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); and Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990).

Appellant wants to make sure this Court understands what the shooting was **not**. Thaddeus Richardson's shooting was **not** a long, drawn-out affair. Appellant did not intend

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[31] Similarly, Thaddeus Richardson was pronounced dead at the scene by the paramedics who responded. (T47 1-73)

for the victim to suffer. This Court has upheld a finding of HAC where shootings are separated from "ordinary shootings" by additional acts and a perpetrator's intent that the victim suffer. See. e.g., Hannon v. State, 638 So.2d 39 (Fla. 1994) (victim witnessed his friend and roommate savagely stabbed -- victim pled for his life, ran upstairs, hid under bed before being shot six times as he huddled, defenseless); Lucas v. State, 613 So.2d 408 (Fla. 1992) (defendant stalked and threatened victim for days before shooting, then savagely beat victim as she pled for her life before he finished her off with additional shots); and Rodriguez v. State, 609 So.2d 493 (Fla. 1992) (defendant bragged that he shot victim first in the knee and then in the stomach before victim ran over 200 feet pleading for his life only to be chased down and shot a fourth time behind car where he sought cover).

This Court rejected the HAC circumstance in Shere v. State, 579 So.2d 86 (Fla. 1991), where the victim suffered ten gunshot wounds. The victim in Shere died quickly. Court also pointed out the importance of the defendant's intent:

> Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain, Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him,

Shere, 579 So.2d at 96. Buckner's shooting of Thaddeus Richardson occurred very quickly, a matter of seconds. Less than one minute. There was much confusion at the scene which the contradictory testimony reflected. [32] Although Omar may

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[32] The conclusiveness of the sequence of events that night at the Royal Palm Bar is one consideration that this Court has looked at in the past. Se, e.g., Hamilton v. State, 547 So.2d 630 (Fla. 1989) (record less than conclusive even though trial court provided detailed description of shootings); McKinney v. State, 579 So.2d 80 (Fla. 1991) (record unclear on exact sequence of events leading to death).

clearly have intended to kill Thaddeus Richardson, he did not intend for Richardson to suffer. Appellant used all the fire power at his disposal and killed Thaddeus Richardson. The evidence does not prove the existence of the aggravating circumstance beyond a reasonable doubt.

C. Since There are No Valid Aggravating Circumstances Supported by the Evidence, the Death Sentence is Inappropriate Under Well-Established Florida Law. Even if this Court Finds that One or Two Aggravating Circumstance(s) is/are Present, the Death Sentence is Still Disproportionate in Light of the Uncontroverted Mitigating Evidence.

The fundamental fairness of Florida's death penalty law rests on this Court's success in reviewing each death sentence to assure even-handed application of this most extreme punishment. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). The Eighth and the Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court's duty at this point is to independently review the propriety of Omar Buckner's death sentence. Such a process is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v, Dugger, 498 U.S. 308 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

It is clear from the aforementioned arguments, that there are simply no valid aggravating factors in this case. The two aggravating circumstances found by the trial court are not supported by the evidence or the caselaw. Therefore, Omar Buckner's death sentence cannot stand. See Banda v. State, 536 So.2d 221, 225 (Fla. 1988) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist. ")

Even if this Court upholds one of the aggravating factors, Appellant's death sentence is disproportionate under Florida law. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), this Court stated that, because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." This Court has affirmed death sentences supported by a single valid aggravating factor, only in cases where there is "either nothing or very little in mitigation." See, e.g., Arango v. State, 411 So.2d 172 (Fla. 1982). See also Armstrong v. State, 399 So.2d 953 (Fla. 1981). This Court will uphold the death sentence based on a single aggravating factor where the murder was extremely torturous. See. e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978).

This Court found the death sentence disproportionate in Llovd v. State, 524 So.2d 396 (Fla. 1988), where the only valid aggravator related to felony murder. In Deangelo v. State, 616 So.2d 440 (Fla. 1993), this Court upheld one valid aggravator (CCP) but vacated the death sentence as disproportionate even though the trial court rejected the statutory mental mitigators.

This Court has also rejected the propriety of a death sentence even where two valid aggravating factors exist. In Terry v. State, 668 So.2d 954 (Fla. 1996), two valid aggravating circumstances existed (prior violent felony conviction and pecuniary gain), However, this was simply a "robbery gone bad" and the aggravation is not "extensive." Terry's death sentence was reduced to life even though there was "not a great deal of mitigation." Terry, 668 So.2d at 965. In Blakelv v. State, 561 So.2d 560 (Fla. 1990), the trial court found both HAC and CCP and only one mitigating circumstance (no significant prior criminal activity). This Court

found the death sentence disproportionate since it was the result of a long-standing domestic dispute. In Curtis v. State, 21 Fla. L. Weekly S442 (Fla. October 10, 1996), this Court upheld two aggravating factors (pecuniary gain and prior violent felony conviction) but found death disproportionate in light of the substantial mitigation.

Even the fact that a capital defendant may have multiple homicide convictions does not automatically mandate the death penalty. See. e.g., Kramer v. State, 619 So.2d 274 (Fla. 1993) (defendant killed another man in a similar fashion, but was convicted of attempted murder before the victim died of his injuries); Cochran v. State, 547 So.2d 928 (Fla. 1989) (three valid aggravators and defendant killed man during drug deal four days earlier); and, Fead v. State, 512 So.2d 176 (Fla. 1987) (override improper despite defendant's prior murder conviction). But see, Duncan v. State, 619 So.2d 279 (Fla. 1993) (death disproportionate where defendant had prior murder conviction, was not intoxicated and neither mental mitigating factors applied).

In the unlikely event that this Court finds that the evidence does support one or both aggravating factors, Omar Buckner's death sentence is disproportionate when compared to other capital cases. The aggravating factors found by the trial court are not entitled to much weight. Appellant does not have a prior murder conviction, In fact, Buckner does not even have a prior violent felony conviction on his record. This crime is not the most aggravated and the most unmitigated when compared to other murders. Appellant was only eighteen. The trial court found three statutory mitigating circumstances but inappropriately gave them slight consideration. The trial court also found substantial nonstatutory mitigating factors, but again, inappropriately gave them little weight. A valid consideration of the evidence and the

law supports the conclusion that Omar Buckner should not be executed. Instead, he should spend the rest of his life in prison without possibility of parole.

D. There was Much Mitigation in this Case, Both Statutory and Nonstatutory.

"Finding or not finding that a mitigating circumstance has been established and determining the weight to be given.. .is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence." State v. Bolender, 503 So.2d 1247, 1249 (Fla. 1987). A trial court's discretion is never absolute; it is subject to "the test of reasonableness.. . [which] requires a determination of whether there is logic and justification for the result. " Cannakiris v. Cannakiris, 382 So.2d 1197, 1203 (Fla. 1990). See also Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990). The trial court's rejection of valid, uncontroverted mitigating evidence and the diminution of the weight accorded the mitigating factors was not supported by substantial, competent evidence. Additionally, the trial court's reasoning expressed in the sentencing order was arbitrary and illogical.

Regarding the first proposed mitigating circumstance, the trial court wrote:

> As to Mitigating Circumstance No, 1: namely, "The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental and emotional disturbance" the Defendant alleges that he had been smoking marijuana before the shooting occurred, and there was testimony that the Defendant was jealous because his girlfriend, Tasha Hampton, had been dancing with the victim, Thaddeus Richardson, before the shooting occurred. However, the Defendant testified that he didn't know how much pot he had smoked, but that he had a clear head at the time of the killing. Certainly there's no proof that the Defendant was substantially impaired, or under extreme mental or emotional disturbance. This mitigating circumstance should be given only slight consideration.

(R765) Initially, Appellant expresses confusion at the trial court's treatment of this mitigating factor. He writes that there is no proof that Appellant was substantially impaired or under extreme mental or emotional disturbance. The court concludes, "This mitigating circumstance should be given only slight consideration." Perhaps the trial court is finding a nonstatutory mitigating circumstance rather than the statutory mitigator which requires "substantial impairment" or "extreme disturbance." Regardless, the trial court errs in finding this circumstance, yet giving it only slight consideration. Apparently, since the evidence did not support the statutory mitigator, the trial court is of the opinion that nonstatutory mitigating circumstances are not entitled to as much weight. That is simply not the law. See, e.g., Nibert v. State, 574 So.2d 1059 (Fla. 1990).

In dealing with Appellant's age as a mitigating circumstance, the trial court wrote:

> As to Mitigating Circumstance No. 2: namely, "At the time the crime was committed, the Defendant was only 18 years and 11 months of age and was not sufficiently mature to appreciate the consequences of his actions," there's no question but that Defendant was chronologically just under 19 years old, but testimony of a psychologist who examined him was that he was functioning mentally at the level of a 14 year old, The Defendant's IQ tests indicate a score of 88 (90-110 is average) so he was only slightly below average intelligence. He was not brain damaged, he was not mentally ill, and he knew right from wrong and was able to understand the nature and consequences of his actions. These should only be given slight consideration. Legally, he was an adult at the time of this shooting and responsible for his actions. See Cooper v. State, 492 So.2d 1059 (Fla. 1988)
>
> The defense alleges that the Defendant came from a dysfunctional family, had a troubled youth, an abused mother, and repeatedly ran away from home. At the age

> of 10 or 11 he attempted suicide. His capacity to appreciate his conduct was impaired by his age and childhood experiences, as well as the traumatizing experience of being sent to live with his grandparents after suffering an abusive relationship with his father. These events all occurred many years before this shooting incident, when the Defendant was just a child. This is not mitigating of factors dealing with the murder, and should be given only slight weight, if any at all. See Campbell v. State, 571 So.2d 415 (Fla. 1990) and Rogers v. State, 511 So.2d 526 (Fla. 1987).

(R765-66) The trial court is obviously applying an incorrect legal standard in giving this valid mitigating circumstance only "slight consideration." (R781) The trial court appears to require some psychosis or insanity in order to justify a finding of Omar Buckner's tender age (18) as a mitigating circumstance. That is not the law in this state. Omar Buckner was eighteen years old at the time of the crime. There was unrefuted, expert testimony that he functioned mentally at the level of a fourteen-year-old. This is clearly mitigation. Appellant has done more than simply shown a chronological age (18). He has proven, without contrary evidence from the State, that he was mentally immature. Buckner has certainly met his burden of proving this mitigating factor. The trial court's action in giving this valid, powerful mitigating circumstance only "slight consideration" is clear error, The trial court relies on the fact that the Appellant was eighteen years old and therefore legally of age in this state. This completely overlooks the fact that there was unrefuted testimony that Buckner functions at the mental level of a fourteen-year-old. While teenagers are not insane, they are not as mature and responsible as adults.

The trial court then incongruously begins discussing nonstatutory mitigating evidence in the middle of his treatment of statutory mitigating factors. Regardless of his timing, the

trial court makes an age-old mistake. The trial court accepts the fact that Omar came from a dysfunctional family, had a troubled youth, an abused mother, an abusive relationship with his father, a suicide attempt at age ten, a history of running away from home, and other assorted traumatizing experiences, However, the trial court concludes that Appellant's childhood background is not mitigating in this case since "[t]hese events all occurred many years before this shooting incident, when the Defendant was just a child." (R765) The trial court's mistake is the same one condemned by this Court in Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). The Nibert trial judge dismissed a physically and psychologically abused childhood as "possible" mitigation, but also pointed out the passage of years since the abuse occurred. This Court found that analysis inapposite.

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

574 So.2d at 1062. The trial court's treatment of this powerful, valid, uncontroverted mitigating evidence by allowing it only "slight weight, if any at all" is clear error.

The trial court wrote about the third mental mitigating circumstance:

> As to Mitigating Circumstance No, 3: namely, "The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" was reasonably established by testimony that he had smoked nine marijuana cigarettes in the 14 hour period immediately preceding the shooting, and that his reasoning capacity was diminished due to the effects of

> this drug. No one who observed the Defendant on the night of the shooting testified about any "substantial" or "extreme" impairment of his faculties. He obviously appreciated the criminality of his conduct, as he got rid of the gun and left the scene of the shooting as soon as possible. He then secreted himself in a motel room, registered in someone else's name, which is indicative of the fact that his intent was to "hide out" after the incident. No one made him walk up to the victim and shoot him five times; and no one made him run and hide after the shooting, He knew what he did was wrong, and he elected to do so anyway, then ran and hid.

(R766) The trial court finds that this mitigating circumstance is "reasonably established" by Appellant's large consumption of marijuana the day of the shooting. The trial court then focuses on the facts of the case and Appellant's fleeing the scene following the shooting. Counsel does not understand the trial court's treatment of this mitigating factor that he found was "reasonably established." (R766)

The trial court's treatment of the nonstatutory mitigating circumstances was as follows:

> As to Mitigating Circumstance No, 4: namely, "Any other aspect of the Defendant's character or record, and any other circumstance of the offense" was reasonably established, that is, by a preponderance of evidence, and such level of proof is supported by the following:
>
> a, Defendant expressed remorse over the shooting.
>
> b. A poor student, Defendant quit school in the tenth grade, and never completed his formal education.
>
> c. Defendant has artistic talent, as evidenced by drawings submitted into evidence during the penalty phase.
>
> d. Just prior to the shooting, Defendant had been

> living a chaotic lifestyle, with no actual home, but sleeping at various places, wherever he happened to be. This instability and confusion contributed to his emotionally disturbed state.
>
> While all of the above may be true, they bear only a slight weight in relation to the murder of a young man who posed no threat whatsoever to the Defendant, and who was sitting in his car, minding his own business, when Defendant purposefully approached the victim and shot him while he sat in the vehicle. While Defendant expressed remorse, it did not appear to be "substantial" remorse; and his artistic talent has absolutely no relationship to this shooting incident. These issues should be given only slight weight.

(R766-67) Initially, Appellant objects to the trial court's treatment of a plethora of non-statutory mitigating circumstances as only one mitigating factor. It is abundantly clear from the trial court's sentencing order that the trial court is considering the nonstatutory mitigating evidence as a single factor. This is clear error. Gudinas v. State, 22 Fla. L. Weekly S181, 186 & n.21 (Fla. 1997) (Anstead, J., concurring in part, dissenting in part).

Furthermore, the trial court continues its cavalier treatment of valid mitigating evidence. The trial court does not seem to want to recognize Appellant's remorse unless he can prove "substantial" remorse. The court dismisses Omar's artistic talent as having "no relationship to this shooting incident." The trial court fails to recognize that mitigating circumstances sometimes relate to the individual rather than to the crime. The trial court's written order, especially his treatment of mitigating evidence, reveals that he fails to understand the relationship and role that mitigating circumstances have in Florida's capital sentencing scheme.

E. Conclusion

The State failed to meet its burden in proving that the murder was either heinous, atrocious or cruel, or committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In fact, the evidence indicates otherwise. With no valid aggravating circumstances, Florida caselaw does not allow Appellant's death sentence to stand. Additionally, the trial court erred in its treatment of valid, uncontroverted, powerful mitigating evidence. Additionally, this first-degree murder is not one of the most aggravated and least-mitigated first-degree murder. In fact, there is a real question whether or not the State proved the requisite premeditation to support a first-degree murder rather than a second-degree murder. When compared to other first-degree murders analyzed in this Court's capital decisions, it is abundantly clear that life imprisonment without possibility of parole is the proper sanction for Omar Buckner. A proper weighing of the aggravating circumstances (if any) and the valid, uncontroverted, substantial mitigating evidence leads to the inescapable conclusion that Omar Buckner does not deserve to be executed.

POINT IV

APPELLANT'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE TRIAL COURT INDICATED THAT IT WOULD FOLLOW WHATEVER RECOMMENDATION THAT THE JURY MADE AS TO THE APPROPRIATE SENTENCE.

At the conclusion of the charge conference at the penalty phase, the trial court was discussing the proper procedures regarding sentencing. The trial court asked if it was still his responsibility to write an order with findings of fact if a death sentence is imposed.

> THE COURT: Unless they have changed it, they want the Court to tie in the testimony and evidence that supports the aggravating and the mitigating; right?
>
> MR, GROSS [Prosecutor]: That's what they want you to do, If there's a finding, a recommendation for death.
>
> THE COURT: Right.
>
> MR. GROSS: If there's a recommendation for life --
>
> THE COURT: I'll go ahead and sentence him.
>
> MR. GROSS: Yeah. I'm certainly not asking for an override.
>
> THE COURT: I'll just go ahead and sentence him today to life. If it's not, then there's going to be a finding that -- if they do recommend it, I'm going to impose it, in all likelihood. You know, get -- look at the facts that are presented, that were presented in these stages.
>
> What I'm just saying at this time, I want to put you on notice that if they do make a recommendation of

> the death sentence, I would want each side to tie in the evidence that they feel supports their respective [positions] .

(T1182-83) (Emphasis added).

The trial court's statement is unequivocal, He had decided beforehand that he would follow whatever recommendation the jury made. A death sentence must be reversed if the record indicates that the trial judge made up his mind before the sentencing proceedings were complete. See 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 be unbiased and impartial. See, e.g., Tumey v. Ohio, 273 U.S. 510 (1927). Additionally, the Eighth Amendment requires reliability in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Although Appellant did not object to the trial judge's comments nor move for disqualification, this claim is properly raised for the first time on appeal. See Alamo Rent-A-Car v. Phillins. 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).

Buckner's trial judge had not made up his mind whether to sentence Buckner to death or to life imprisonment without parole. However, the trial court h&decided to follow the jury's recommendation as to sentence, **whatever it might be.** In doing so, the trial court failed to follow the dictates of this Court to perform an independent reweighing of the evidence presented to determine whether or not to follow the jury's recommendation. While it is true that the jury's recommendation is entitled to "great weight," see. e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975), a trial judge cannot merely abdicate his own responsibility and

duty in determining the appropriate sentence, The jury weighs the evidence and makes a recommendation. The trial court is supposed to reweigh the evidence as well as conduct proportionality review to determine the appropriate sentence. This Court then conducts a ***de novo*** review to determine the appropriate sentence. See. e.g., Blakelv v. State, 561 So.2d 560 (Fla. 1990). The entire process is a three stage procedure. The trial court made it clear that he was going to let the jury decide. While he indicated a willingness to write an order to "tie in the testimony and evidence," he made it clear that the jury's decision was the ultimate one in the case, The trial court's action in giving the jury's recommendation undue emphasis, calls the validity of the entire process into question. The error is exacerbated by the fact that the jury's recommendation was by the slimmest of margins (7-5). See, Point VII. Appellant's death sentence is unconstitutional. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21 and 22, Fla. Const.

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S TIMELY AND SPECIFIC MOTION FOR MISTRIAL WHERE THE JURY BECAME INFECTED BY EXTRA-JUDICIAL EVIDENCE THAT CREATED UNDUE SYMPATHY.

The State had presented two witnesses during its rebuttal presentation at Appellant's guilt/innocence phase when a controversy arose. Juror DeFiore told the bailiff during one of the breaks that she noticed spectators in the courtroom holding up photographs. (T945-46) The photographs were gathered and a record was made. Juror DeFiore noticed one of Thaddeus Richardson's family members holding up a large collage containing five or six photographs. The photographs showed Thaddeus Richardson either alone or with a young black female and/or an African-American baby. The person holding the collage was sitting in the fourth row of the courtroom. (T932-34,937-38,940,945-49) Other family members were holding up two 8x10 photographs of Thaddeus Richardson in rows further back. (T938) Apparently, none of the jurors saw the 8x10 photographs. However, two of the jurors did see the collage of small photographs.

Juror DeFiore testified that she assumed that the spectators with the photographs were Thaddeus Richardson's family. (T946-48) She apparently could tell that the photographs were "family pictures." (T946-47) She did not think it right that the family was holding up the photographs during the trial. (T947) Ms. DeFiore claimed that her brief glance at the photographs would not influence her in any way. (T947) However, she knew that at least one other juror saw the photographs and others may have also. (T948,950) She was certain that

all members of the jury panel had heard the two discussing the problem and thus were aware of the existence of the photographs. (T950)

Juror Sumner testified that she noticed the photographs but "refused to look at them." (T953) She was not even certain that the spectators holding the photographs were members of the victim's family. (T953-54) Juror Sumner insisted that the incident would not affect her deliberations. (T955) Ultimately, the trial court addressed the problem with the entire jury panel. (T961-65) The rest of the jurors claimed not to have seen the photographs displayed by the victim's family. (T961-62) All said that the incident would not affect their deliberations. (T962-65)

Defense counsel initially reserved his right to move for a mistrial. [33] Ultimately, defense counsel did move for a mistrial based on the "photograph incident." Counsel contended that the incident fundamentally flawed the process by exposing the jury to a blatant appeal for sympathy. Defense counsel maintained that his client could no longer get a fair trial. (T1017-18) The trial court agreed that the display of the photographs was totally inappropriate. However, the court denied the motion for mistrial based on the juror's assurances that the incident would not affect their ability to render a fair and impartial verdict. (T1019-20) Appellant renewed his arguments in his motion for new trial which the court also denied. (T1243-46) Even the prosecutor recognized that the incident was improper. Instead, the State and the trial court focused on the jurors' assurances that the incident would not affect their ability to render a fair and impartial verdict based completely on the evidence presented.

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[33] Defense counsel wanted to discuss the issue with co-counsel as well as the defendant before making a decision. (R967,1001,1009-13)

"Mere sympathy cannot sustain a judgment.. .the jury system should not function on emotion, but on logic. " Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 790 (Fla. 1985). Appellant recognizes that victims have a constitutional right to be present at court proceedings. Art. I, $16, Fla. Const.; Farina v. State, 680 So.2d 392 (Fla. 1996). However, a victim's family must conform to expected courtroom behavior. See. e.g., Hardwick v. Dugger, 684 So.2d 100 (Fla. 1994) [victim's cousin made obscene gesture while jury was present and had outburst regarding the crime and Hardwick's guilt when the jury was not present].

In Burns v. State, 609 So.2d 600 (Fla. 1992), this Court implicitly recognized that prejudicial exhibition of emotion by a victim's family could deprive a defendant of a fair trial. The Burns record revealed the victim's wife crying on three occasions in the courtroom. n affirming the convictions, this Court pointed out that the trial court was on guard for any "overt behavior. " Additionally, Burns' lawyer evidently never moved for a mistrial, so the issue was not preserved. Other courts have recognized that the behavior of spectators can lead to a deprivation of a defendant's constitutional right to a fair trial. See, e.g., Woods v. Dugger, 923 F.2d 1454, 1456-60 (11th Cir. 1991) [new trial required and prejudice presumed in this "extreme" case where half of spectators at prison guard murder trial were uniformed prison guards].

In order for Omar Buckner to prevail on his claim of being denied a fair trial, Appellant must show either actual or inherent prejudice. Holbrook v. Flynn, 475 U.S. 560 (1986) and Irving v. Dowd, 366 U.S. 717 (1961). Appellant concedes that he cannot show actual prejudice. The test for inherent prejudice is "not whether jurors actually articulated an

conscienceness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play."' Holbrook v. Flynn, 475 U.S. at 570 (quoting Estelle v. Williams, 425 U.S. 501 (1976). This Court must examine two factors: first, whether there is an "impermissible factor coming into play, " and second, whether it poses an "unacceptable risk. " Woods v. Dugger, 923 F.2d at 1457.

The trial court, the prosecutor, and defense counsel all agreed that the spectator's behavior was improper and inappropriate. The only question left is whether the family's action posed an "unacceptable risk." This Court should remember that the unfortunate incident occurred at the guilt/innocence phase of Omar Buckner's trial. The jury was wrestling with the extremely contradictory evidence and substantially impeached testimony Omar Buckner testified that he acted in self-defense, The trial court very nearly granted Buckner's motion for judgment of acquittal as to first-degree murder, reducing it to second-degree murder. The trial court said it was a "close call." (T788-89,1020) Obviously, the case was a close one, at least on the issue of premeditation. Appellant submits that the issue of self-defense should have been fairly debatable with an untainted jury. The victim's family's actions created an unacceptable risk that the jury's decision was based on the improper consideration of sympathy.

In Norris v. Risley, 918 F.2d 828 (9th Cir. 1990), the court determined that spectators at a kidnapping and rape trial who were wearing buttons inscribed with the words "women against rape" posed an impermissible factor, " [b]ecause the buttons.. .conveyed an implied message [of guilt], and because the buttons were not subject to the constitutional safeguards of confrontation and cross examination, they are clearly the sort of 'impermissible factors' that

courts must ensure receive no weight." Id. at 830. The jurors' assurrances that they could be fair are entitled to "little weight." Irving v. Dowd, 366 U.S. 717, 728 (1961). Indeed, "'going through the form of obtaining the jurors' assurrances of impartiality is insufficient.. . .'" Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968). Additionally, the State cannot claim that the error was harmless, The denial of a fair trial can never be harmless because the right is so fundamental to our notion of due process. Coleman v. Kemp, 778 F.2d 1487, 1541 (1 lth Cir. 1985). The trial court's ultimate ruling denied Omar Buckner his constitutional right to a fair trial by an impartial jury (at both the guilt/ innocence phase as well as the penalty phase). Amends, V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21 and 22, Fla. Const.

POINT VI

APPELLANT'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE TRIAL COURT EXCUSED THREE PROSPECTIVE JURORS OVER DEFENSE OBJECTION.

The trial court granted the State's challenges for cause and excused three prospective jurors (Mobley, Harris, and Cash)[34] over Appellant's objection.[35] Appellant contends that the trial court's ruling constitutes reversible error. Wainwright v. Witt, 469 U.S. 412 (1985) set forth the appropriate standard for a death-qualified juror:

> A juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,

469 U.S. at 424. Generally, a trial court's determination to excuse a juror is a finding of fact. Id.

Prospective Juror Harris

Prospective Juror Harris initially said that he was, "not in favor of the death penalty at all." (T230) He said that he could not envision any circumstances where he could actually recommend death for "this young man." (T235) He agreed that an accused person deserves to be tried by a fair cross-section of the community. (T251) He agreed that it was not fair for

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[34] Ms. Cash was the most adamant about the inability to recommend the death penalty in "any case." (T229,234-35,250-51,261)

[35] Appellant objected (twice) based on the "Eighth and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution," (T260,264)

a jury in a capital case to be made up entirely of people who strongly favor the death penalty. (T251) He said that he could objectively weigh the aggravating and mitigating circumstances and vote accordingly but, "I doubt that my outcome would be any different.. . .I would try. " (T252) He agreed that some cases were "bad enough" for the death penalty. "Yeah, somewhere. " (T252) Defense counsel then asked if Harris would be willing to objectively weigh the aggravating and mitigating circumstances, give them the weight that you think they deserve, and vote for death. Harris said, "Yes, I do." (T252)

When the prosecutor later asked Juror Harris if he could think of any circumstance where he could make [a death] recommendation:

> PERSPECTIVE JUROR HARRIS: Without saying -- well, I doubt it.
>
> MR. GROSS [Prosecutor]: You doubt it?
>
> JUROR HARRIS: I wouldn't.
>
> MR. GROSS: Without suggesting you might, can you or not?
>
> JUROR HARRIS: No, sir, I wouldn't. If I had a chance between him and I, then I would have to pick life in prison.
>
> MR. GROSS: And that's just with your own values and your own morals?
>
> JUROR HARRIS: Yeah.
>
> MR. GROSS: Regardless of what the evidence showed?
>
> PERSPECTIVE JUROR HARRIS: Yes.

(T258) Defense counsel then asked Juror Harris if he could tell the judge that he could

recommend death in this particular case, Harris replied, "No, I couldn't.. .I don't believe I could. " (T259) The trial court questioned Harris further after the State challenged him for cause. Harris agreed that he could fairly judge the guilt/innocence phase, but maintained that he was "very adverse to the death penalty. " (T261) The trial court asked Harris if he could conceive of any case where the circumstances might lead to his recommendation for a death sentence, Harris replied in the negative, (T261)

Perspective Juror Mobley

When the prosecutor questioned Perspective Juror Mobley, Mobley replied that he could not recommend death for Mr. Buckner under any circumstances. (T236) Mobley also agreed that capital defendants deserve juries picked from a fair cross-section of the community. (T247-48) Mobley also agreed that it was not fair to exclude opponents of capital punishment from capital juries. (T248) Mobley then agreed that there were some murders that were so terrible that the perpetrators deserve death. (T249) He then agreed that he could weigh the aggravating and mitigating factors objectively and vote based on the instructions from the court. (T250)

> MR. HARRISON [Defense counsel] : So you wouldn't automatically say written in stone, I could never vote for death in this particular case until you've heard this case and saw the evidence; right?
>
> PERSPECTIVE JUROR MOBLEY: Until I heard it,
>
> MR. HARRISON: It could be bad enough that the man might need to be put to death; right?
>
> JUROR MOBLEY: It could be.

(T250) The prosecutor then questioned Mobley:

. . .I thought that you indicated that there was just no way that your personal values would ever allow you, ever, to recommend that that young man over there die. But I'm now wondering.

JUROR MOBLEY: I recommend that he die, I said, you know, depending on what kind of murder it was. You know, not him personally.

* * *

[Prosecutor]: If you recommend that he die, he will get death for his crime. That man over there sitting at that table right now; okay?

So, we're talking about him. Do you think under any -- and I know you haven't heard the evidence. But what we're asking you to do now is to search your soul. Is there any possibility at all that you could recommend that that man over there die?

JUROR MOBLEY: No I couldn't.

MR. GROSS: You could make that recommendation, or you could not?

JUROR MOBLEY: I couldn't.

MR. GROSS: I can't hear you.

JUROR MOBLEY: I couldn't with him. I could not.. . .I could not.. .I said I couldn't.. .no.

(T257) After the State's challenge for cause, the trial court questioned Perspective Juror Mobley :

THE COURT: And, Mr. Mobley, how do you feel? There is not -- if the State proves its case beyond and to the exclusion of every reasonable doubt and go on to the second stage, are there any circumstances under which you feel that you could vote to impose the death penalty?

PERSPECTIVE JUROR MOBLEY: I don't think I could.

(T26 1)

Initially, Appellant points out that the trial court and the lawyers were mostly focusing on the perspective jurors' ability to sentence Omar Buckner to death. That is not the standard. The jurors' opinions were understandable. Omar Buckner's case is not a capital case, The test should be whether or not the juror could **consider** a death recommendation in an authentic capital case, Ted Bundy's for example, or Adolf Hitler's. Appellant submits that all three jurors' answers were ambiguous and equivocal at best. Juror Cash is the strongest case for the State, However, even she said I don't "think I could impose the death sentence." (T229) Harris and Mobley both said that, with the right case, they could vote for death. Some cases are so bad that the perpetrators deserve death. (T249,252) Juror Mobley's last response in his examination by the judge before being excused was "I don't **think** I could [impose the death penalty], "

Appellant submits that the jurors were somewhat equivocal in their answers. -The trial court should not have granted the State's challenges for cause. The excusal of these three jurors over objection violated Omar Buckner's constitutional rights. Additionally, Appellant's right to a fair cross-section of the community was violated. People who are substantially opposed to the death penalty should be allowed to participate in the capital sentencing process. Amends. V, VI, VIII, and XIV, U.S. Const. ; Art, I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

POINT VII

OMAR BUCKNER'S DEATH SENTENCE WHICH IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (7-5) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Omar Buckner shot Thaddeus Richardson outside the Royal Palm Bar at 2:00 a.m. Buckner claimed self-defense, The witnesses' accounts of the incident varied widely, The trial court almost granted Appellant's motion for judgment of acquittal as to first-degree murder to a lesser charge of second-degree murder. In denying the motion, the trial court said it was an "extremely close call, as to the motion as to first degree,. . .there is enough evidence and it should be submitted to the jury by law.. .I again say it's extremely close,. . . . " (T788-89) The trial court reiterated his opinion in denying Appellant's renewed motion for judgment of acquittal at the close of all of the evidence. "Well, as I indicated earlier, I think it's an extremely close call,. . . . " (T1020) Unfortunately, the jury resolved the extreme conflicts in the evidence and convicted Omar Buckner of first-degree murder. Following a brief penalty phase, the jury recommended, by the slimmest of margins (7-5), that Omar Buckner should be executed for his crime. (R703) Prior to the jury's recommendation, the trial court indicated that "in all likelihood" he would sentence Buckner to whatever sanction the jury recommended. (T1182-83) [See Point IV]

The Eighth and Fourteenth Amendments requires a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be

given great weight. Grossman v. State, 525 So.2d 833, 839 n. 1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare-majority jury recommendations, See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However, Appellant maintains that allowing a bare majority of the jury to determine Buckner's fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.

In addressing the number of jurors[36] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty," Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Omar Buckner's jury recommended **by the slimmest of margins,** that Omar be

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[36] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as persuasive authority by analogy.

electrocuted in Florida's electric chair. One single solitary vote ultimately made the difference in whether Omar Buckner lives or dies, Such a result makes Florida's death penalty scheme arbitrary and capricious in violation of Furman v. Georgia, 428 U.S. 238 (1972).

Florida's scheme further violates constitutional guarantees due to its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Unless a capital jury finds that the State has proven at least one aggravating circumstance beyond a reasonable doubt, a death sentence is not legally permissible. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Florida's procedure currently allows a death recommendation even where five of the twelve jurors find that the State proved no aggravating factors beyond a reasonable doubt, as long as the other seven jurors conclude otherwise.

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a different aggravating factor. Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. Omar Buckner's death sentence, which is based on a bare majority (7-5) vote of the jury, is unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9, 16, 17, 21, and 22, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Point I, vacate Appellant's conviction and sentence for first-degree murder and remand with instructions to adjudicate Appellant guilty of second-degree murder and resentence accordingly;

As to Points II, V, and VI, reverse and remand for a new trial; and,

As to Point III, vacate Appellant's death sentence and remand for the imposition of a life sentence without possibility of parole;

As to Point IV, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for resentencing;

As to Point VII, vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, for a new penalty phase.

Respectfully submitted,

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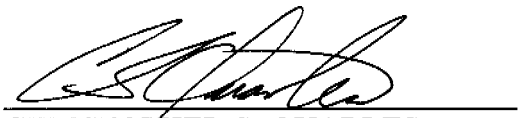
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Perry Omar Buckner, DC #124314, Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 22nd day of May, 1997.



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