IN THE SUPREME COURT OF FLORIDA

AKEEM MUHAMMAD,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,030
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
of the 17th Judicial Circuit.

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TABLE OF CONTENTS

PAGE

AUTHORITIES CITED

CASES CITED — PAGE

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

STATEMENT OF THE CASE

Akeem Muhammad, appellant, appeals his conviction and death sentence for first degree murder in the death of Jimmy Lee Swanson. The jury recommended a death sentence by a vote of 10-2. R 2690. The court found two aggravating circumstances: 1) that appellant had previously been convicted of violent felonies; and 2) that he "knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life." R 2717. In mitigation, it considered appellant's age (23), his good behavior at trial, his cooperation and non-resistance when arrested, and his difficult and unstable childhood. It gave "some weight" to appellant's difficult and unstable childhood, and "little weight" to the other mitigating circumstances. R 2721-22.

A. Swanson made money washing cars outside Ivory's, a drive-through convenience store. R 1698 (testimony of Aftab Katia, store manager). On the day in question, Swanson entered the store and borrowed Katia's cell phone to telephone his mother. R 1699. The mother, Mattie Swanson, testified that Swanson was talking with her about getting a license for his car wash business, "and then at that time I heard someone come up and ask him about a girl." R 1871. She heard Swanson say, "I don't know, I don't know no girl." R 1872. After a few seconds, she heard a shot, and kept calling

for her son, but did not hear anything; she then heard two shots and then, later on, more shots. Id.

Mr. Katia testified that while Swanson was on the phone, a white man entered with a gun and asked "Where is the girl?"; "He [Swanson] said, 'what girl are you talking about,' and he just run." R 1700. The white man ran behind Swanson and then Katia heard 4 or 5 shots. R 1700-01. "After that, I heard the shots and I then ran outside and I saw Swan lying down on the street." R 1702. The other man walked off and left in a reddish car. R 1702-03. "I could say that he did not do it too fast, it was just normal." R 1703. Mr. Katia knew him from his being in the store before, and identified him as appellant. R 1701, 1703.

A crime scene investigator testified to several bullet holes in the area outside the store, including a bullet hole through an ice chest. R 1504-05. (There was no eyewitness testimony regarding these shots.)

Several witnesses testified to hearing gunshots and seeing Swanson run into the street followed by a white man. Debbie Holdren testified that she was coming back from picking up her daughter at school; also in the car were her mother, and niece Melissa. R 1551-53. She heard 5 or 6 popping sounds or shots. R 1554, 1558-59. "Well, when my mother said it was the gun shots, I then slammed on the breaks [sic] and I then turned around the corner and there was a guy standing there and he then looked in the

window and I looked back at him and he just hopped over the car and then fell into the road beside the car." R 1559. "I guess it was like he took one step over the car and I looked at my side view mirror, you know, rear view mirror and then he was lying in the turn lane." R 1562. "He was like on the ground and kind of looking up. I do not think his whole body -- he was lying down, you know, his upper part of his body was like looking up." R 1563. "I looked in the mirror and guy had walked out and he just stood over him and was shooting him." R 1564. "We were slowly pulling away and I don't know at what point but as we were starting to pull away the first thing I saw in the mirror was this guy walking up to him and standing over him." R 1565. As he stood over him, he shot him; she heard 6-7 shots. R 1566-67. She drove to her mother's house and telephoned the police. R 1568-69. The man was white, with a shaved head. R 1570. She identified appellant in court as having a shaved head. R 1571-72. She picked out someone in a photo array as looking "similar" to the man. R 1573-74. The man wore short jeans and a striped colored shirt. R 1577.

Melissa Herndon (Ms. Holdren's teenage niece), gave similar testimony. After hearing a "loud popping noise", R 1593, she saw a man running followed by a man with a gun in his right hand. R 1596, 1602. The first man ran and stumbled, and "right after he got up, the other person came around the corner". R 1597. When her aunt stopped the car, the first man jumped or stumbled over the

car. R 1602-03. The other man lowered his gun when the first man jumped on the car. R 1603. “Yeah, while he was running towards the car, he was shooting because I heard the ‘popping sounds.’” R 1604. “At that point when he fell to the other side, that is when my Aunt Debbie started to hit the accelerator”. R 1604. “And that’s when I saw him, the Defendant, walking across the street with the guns just walking and the other guy was walking in the middle of the road and all of the cars stopped and he had then, the Defendant, he walked over and just looked at the guy because he fell to the ground the guy was looking at him and he was standing there and he just fired and all I could see is his hands jerking back but I did not hear any sounds.” R 1605. At this point, he had a different gun. R 1605. “Well, his arm jerked back about twice and then I turned back around and I did not look any longer because we had gone ahead a little bit further and then I turned and we were not quite to the intersection at the time, but I turned back around.” R 1607. When they got to intersection, she looked back and “the Defendant was walking back across the street to where he had come from.” R 1607.

Ms. Herndon testified that she is “very bad” at describing people. R 1608. The shooter was white, bald, “did not have a extremely skinny face, but it was like defined features in his face.” R 1607-08. He had on denim shorts, and a long polo type shirt with blue collar with 3 or 4 buttons “one of those type

shirts and white vertical stripes that were blue-white in nature, you know, with greens and blues and whites in it." R 1608. She identified appellant in court, and had previously identified him as person number three in a photo lineup. R 1609-11. The man in the photo looked closest to the shooter. R 1616. The man had "black guns, not very large in size." R 1614. They both looked like semi-automatics. R 1615.

Randy Scharf, a cabinet maker, testified to hearing noises "which sounded like 4 popes [sic]." R 1648. "And I then looked over my shoulder and I then seen a black male come running around the corner of the building and believe behind him was a white male with a gun in each hand firing at him." R 1648. "It just was seconds, you know, the whole incident happened in seconds and after I realized that -- you know, I realized what was happening I just accelerated at that point when the light changed and moved up and I looked in my rearview mirror on the car and I then observed him in the middle of the road and at that point, I seen the black man collapsing in the road and the white male walked toward him and I got out of there." R 1648-49.

Scharf testified that the white man was bald, of medium build, around 5'7" tall; "I vaguely remember like cream colored beige long pants and I don't remember more than that." R 1650. Asked further about the man's clothes, he testified that he had "like a light colored slacks, you know and a dark shirt." R 1651. He saw two

handguns, both seemed to be automatics: "They did not appear to be the type with the cylinder." Id.

Robert Graham, a corrections officer, testified that he saw a white man chase a black man in Ivory's parking lot; "in each one of his hands, there was a gun and he was firing at the black man as he was running." R 1773. The black man crossed the street and was hit by a car and fell to the ground or he jumped on the hood and then hit the ground. R 1774. The white man pointed "at the black man lying on the ground and he then fired at least 3 or 4 rounds at him." R 1775. He then turned around and ran. R 1775. The guns "were not revolvers. I know they were automatics." R 1776.

Sandra DeShields testified that she and appellant met while they both lived in a home operated by Maybel McCoy, "a foster lady". R 1837. DeShields was 16 when she met appellant, some 3 1/2 years before the trial.[1] R 1836-37. Although there was no romantic relationship between DeShields and appellant, he was very close to her son, Tony -- "Like father and son." R 1838. Appellant bought clothes for Tony, read to him, took him everywhere. R 1838. (Tony was three years old at the time of the trial, id., so that appellant would have known him all his life.)

Three or four days before Swanson's death, appellant got into an argument with DeShields over her use of appellant's car. R

[1] The trial occurred 12 months after the death of Mr. Swanson.

1842-43. Appellant "had such an attitude" that DeShields stole two or three thousands dollars belonging to him. Id. She called her friend, Swanson, and he took her to stay at another house. R 1845-46. On the day or night before Swanson's death, R 1847-48, while on the phone with Ms. McCoy, DeShields heard appellant "coming into the room and she [McCoy] said he was finting [sic] to be real upset, you know, and she was quiet at that point, and she went up to him and asked Akeem what was he so upset about." "He said, 'mammy, I know who got my stuff.' And she said, 'who?' And he said, 'yeah, I know who got my shit, I am finting to go get my shit back and tell Sandra not to come back because I will kill her and Tony'". R 1848-49. At midnight, Swanson gave Ms. DeShields a ride to the bus station; she gave him $300 of appellant's money and boarded a bus for North Carolina. R 1852. She had seen appellant in the past with a gun: "I don't know exactly what kind it was, but I think it had a lever or something on it." R 1852.

DeShields testified that appellant and Swanson had only a slight acquaintance with each other: "They seen each other one time at my house." R 1840. "Oh, it was like a year before they seen each other before he died and it was Akeem was just leaving and Swan was just coming over and that's when they ran into each other." R 1841. She did not introduce them to each other as they passed. Id.

A firearms examiner testified that bullet fragments recovered from Mr. Swanson's body were fired from a 38 special revolver, R 1630-31, 1639-40. Various shell casings and one bullet recovered from the scene were from a 9 mm. automatic. R 1633-35, 1639-40. No gun was recovered and submitted for examination in the case. R 1638.

The medical examiner testified that Mr. Swanson died of multiple gun shot wounds: one to the elbow, one to the shoulder, one to the back, one to the chest, and two to the head. R 1457-61. The elbow, shoulder, back and chest shots were not fired at close range, but the two shots to the head were fired within several inches. R 1465-72. The autopsy revealed cocaine, "velum" [sic], and marijuana in his blood. R 1483.[2]

Around 5:30 p.m. on the day of the shooting,[3] appellant was arrested by officer Scott Russell, who testified as follows. Pursuant to BOLO information, he was following appellant's car and asking for backup assistance. R 1782-87. Appellant pulled off the road, "and he put his hands right outside of the window indicating to us that he was unarmed." R 1787. He obeyed all instructions

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[2] In its opening statement and final argument, the state characterized Swanson as "a small time drug dealer". R 1422-23, 2002.

[3] Trial testimony put the time of the shooting as between around noon and the arrival of crime scene officers at 1:45 p.m. R 1493, 1590.

during the arrest. R 1789. When Russell said he was glad he (Russell) did not shoot him, appellant "said that at that point he wished that I had done something because he has nothing to live for anyway and that he new [sic] that he was wanted for murder. He stated that he received that information from a friend." R 1790. The friend "told him to get out of town that he was basically wanted for murder." R 1790-91. Appellant "was kind of like just a little bit depressed in a way." R 1792.

B. At penalty, the state introduced into evidence appellant's convictions for armed robbery in two prior cases. R 2205-07.[4]

The state also presented, through Det. Michael Walley, a transcript of a taped statement given to the police by Curtis Ream, who committed suicide before appellant's trial. The prosecutor read the questions from the transcript, and Walley read Ream's responses. R 2185-2204. In the transcript, Ream said that he saw "a guy run from a hot dog sausage place". R 2188. He "got hit by the car and fell down in the median, I mean, in the middle section of the roadway there, I guess, on 19th Street or right here I'm not real sure but he was at the height, I would say 5'7, a white guy with green and white stripes, green and white shirt and the white

[4] The state also introduced documents showing that appellant was charged with attempted murder in those cases, but told the jurors: "You cannot consider attempted murder because it does not exist. The only one you could consider is the armed robbery count but again, you cannot consider attempted murder." R 2207.

guy was chasing him out there, I guess, and he, uhm, uhm, it's where he shot him at him and he was running away and he ran into the middle of the road where he got hit by the car and he fell on the ground in the center of the road and that's when the white -- the guy -- bald-headed guy runs up and shoots him like twice, you know, in the head and then he runs back and he gets in a maroon '87 four-door Olds '88, I believe." R 2188-89. Ream followed the car on his motorcycle "and when I caught up with him, and he threw the gun out of the window and he shot twice at me." R 2190. Ream backed off. R 2189-90. Ream heard two shots when the white man walked up to the black man. R 2193. He was "not completely bald. It was peach fuzz on top, you know." He was about 18 or 20, looked strong, pretty healthy. R 2197. As he walked up to the black man, he had the gun down between his legs. R 2198-2202. The gun "looked shiny, and it might have been cream." R 2202.

Det. Walley testified further that Ream identified appellant in a photo lineup "as being that person most likely being the person that he saw that day." R 2203. He identified appellant on seeing a photo lineup showing him in profile. R 2203-04.

Appellant waived counsel, did not cross-examine the officer, and presented no evidence or argument to the jury.

C. Pages 7-8 of the pre-sentence investigation report shows the following (S 49, 52):[5]

Appellant's parents were divorced when he was a small child and the family was supported by his mother's live-in boyfriends. At age 2, he had open-heart surgery. His family was unstable and he recalled his mother saying she did not love him. He and his mother's common-law husband, Scott Pomeranz, often fought. Appellant said that he had quit school in the eighth grade because he did not like getting up mornings. School records show that he was a good student, but was suspended three times in the 1987-88 year for disturbing class and "fighting for no reason". That year, his mother transferred him to three different middle schools because his mother withdrew him due to change of residence. (He later obtained a GED.)

On April 1, 1988, when appellant was 14, there was a report that he was abused by Pomeranz. An investigation did not reveal "any concrete physical evidence of abuse", and appellant's mother had him Baker acted. On his release, his mother refused to take him back into the house, and he did not see her again after that. On May 13, 1998, he was adjudicated dependent and ordered into foster care because he was neglected by his mother. He has been in several foster homes including two delinquency programs. On May 5,

[5] The pages of the PSI are out of order in the supplemental record.

1989, when he was 15, he was admitted to Coral Reef Hospital because he refused HRS placements. During his stay "it was alleged that he tried to incite a riot, tried to attack staff members, and it was believed that it was his intentions [sic] to rape a female." His diagnosis was depression neurosis, conduct disorder, and borderline personality disorder. He was placed in the home of Maple McCoy from January 1990, where he adjusted well and was stable. From June through November 1990, he worked as a dishwasher at Ponderosa. The General Manager reported that he was moody "but worked very well for her, however, other managers had problems with him, which led to his dismissal."

On March 14, 1991 he was removed from Ms. McCoy's care and "was placed in the Sunrise Reintegration Program in Kansas because he was being threatened by a Jamaican gang in Ft. Lauderdale." But on March 27, 1991, he was placed back in McCoy's home, and ran away on April 26, 1991. During July and August 1991, he worked as a cleaning company at the airport, where he "was a good worker, but he was terminated due to transportation problems." The PSI recommended a life sentence. S 54.

SUMMARY OF THE ARGUMENT

1. The court erred in conducting a hearing in chambers without appellant present. The hearing concerned witness Aftab Katia, who had said he did not want to testify because of perceived threats. The court interrogated Katia and exhorted him to testify, saying that he and his family would be in peril if he did not testify and appellant was not convicted.

2. The court erred in permitting testimony of Sandra DeShields that appellant had threatened her and her child. The evidence was irrelevant to the question of whether appellant committed the premeditated murder of Jimmy Lee Swanson -- the evidence did not even show that appellant knew of any connection between DeShields and Swanson. Further, the prejudicial impact of the testimony outweighed its probative value.

3. The court should not have allowed Mattie Swanson's testimony that Jimmy Lee Swanson intended to obtain a business license. This evidence served only to create sympathy for the victim.

4. The trial court erred in questioning various prospective jurors at the bench without appellant's presence. Appellant had the constitutional right to be present at the questioning of jurors.

5. The court should not have granted the state's cause challenge to juror Ranieri. Her answers showed that she could

perform her duties in accordance with the court's instructions and the juror's oath.

6. The state's final argument to the jury was improper. The state urged jurors to imagine the fear of the victim and told jurors that the photo lineup was prepared properly. Also, the state said that there was additional evidence of guilt not disclosed at trial.

7. The trial court erred in using the aggravating circumstance that the defendant knowingly created a grave risk to one or more persons under section 941.121(6)(c), Florida Statutes. Section 921.142 does not apply to the case at bar. Insofar as the court sought to apply the section 921.141(5)(c) circumstance of great risk of death to many persons, its findings were contrary to the record. There was no evidence that Katia was endangered. The state did not show that any person on the street where the murder occurred was in the line of fire. The statement of Curtis Ream, assuming arguendo that it was properly admitted, did not show that anyone other than himself was endangered.

8. It was fundamental error to admit the transcript of Curtis Ream's statement. Appellant had no opportunity to confront or question Ream.

9. The court erred in failing to consider mitigation contained in the pre-sentence investigation report.

10. This Court should recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The absence of mitigation at bar renders the death sentence unreliable and unconstitutional.

11. The trial court erred in denying the motion to compel that the state disclose mitigating evidence. The state has a duty to disclose all evidence favorable to the defense that is in the possession of the state or its agents, including evidence relevant to capital sentencing.

12. Appellant's death sentence is disproportionate.

13. The court abused its discretion in conducting jury sentencing proceedings over appellant's objection. Under the facts at bar, the jury's sentencing recommendation was the product of a meaningless proceeding in which the jury heard no mitigating evidence or argument, the state relied on aggravators which the trial court did not find, the state relied on another aggravator not supported by the evidence, and the state presented improper argument. It was error for the court to conduct this husk of a proceeding and place "great weight" on its result.

14. Fundamental error occurred when the prosecutor improperly told the jury at penalty that he believed in the veracity of Ream's statement and the state's case.

15. The court erred in sua sponte giving the jury an unauthorized instruction emphasizing appellant's discharge of penalty counsel.

16. The court employed an incorrect standard, placing “great weight” on the jury’s penalty recommendation of death and employing an illegal presumption in favor of the death penalty upon the finding of one or more aggravating circumstances.

ARGUMENT

1. WHETHER THE COURT ERRED IN CONDUCTING A HEARING RESPECTING WITNESS KATIA OUT OF THE PRESENCE OF APPELLANT.

During the trial, the state said that witness Katia (the manager of the convenience store) wanted to talk to the court "on the record outside the presence of the Jury and outside the presence of the Defendant with opposing Counsel present, of course, to discuss some matters with you in chambers", because he did not want to testify. R 1677-78. The judge complied: "THE COURT: Okay then. Gentlemen, let's go then into my chambers with both of our attorneys and our court reporter, so please retire into my office me and my court reporter here." R 1678. The court reporter's transcript of the ensuing chambers hearing begins: "(Thereupon, the following proceedings were had in camera in chambers outside the hearing of the Defendant and the Jury:)" R 1678 (e.s.).

At the hearing, Katia gave a somewhat confusing account. He said he had gotten messages from someone not to become a witness. R 1679. The messages were in writing, but he no longer had them; this had occurred one time 3-5 months ago; the message was in his mailbox, not signed. R 1680. It said: "Be careful, do not go to witness." or "Be careful not to go to the witness stand." R 1681. Also, his nephew told him at some time that someone had stopped by the store and told him to tell his uncle to be careful. R 1682.

Katia was afraid; he wanted to work here and live here without problems. R 1683.

Told by court that appellant was in jail and could not harm him, he replied: "I don't know, maybe he find a way or his friends, you know, his neighbors there, they all know me and I don't need no problem." R 1684. The court said that "If you and others who are threatened, do not testify, none of us would be protected and we'll have terrorists out there and eventually they will take over the states ... ." R 1686. It also said that, since Katia was under subpoena he had to testify, and "we can protect your family and they could certainly make calls and I could ask the State Attorney's Office to contact the appropriate Law enforcement agency to give you protection". Id. The state noted the possibility of jail for Katia, and the judge noted that "whoever gave you that note would be actually winning because then you could be in a dangerous environment if you think about it. It's a dangerous environment in the jail and you will be depressed because you won't be around your family to protect them because you would be locked up. And they would be deprived of the ability to be protected, do you understand?" R 1688. The judge said the system depends "upon [the] courage of all of us". R 1689. If he did not testify and appellant was freed, "then you might be in a bigger trouble because he would be out there with you and I want you to think about that. Of course, I don't know. I don't know if he is

guilty or not guilty." R 1691. The judge continued (R 1693) (e.s.):

> [THE COURT]: Now, is the time [to] share your courage. Now is the time to do the right thing here. Right now.
>
> A But --
>
> [THE COURT]: And that is what you have to understand. You have to understand what I'm saying. If you fear that Mr. Muhammad is behind this, if that is really your fear and if you were right, it's even more important that you testify and tell the truth because if you are right, and he is set free, then you very well could be in danger, understand? But if the truth of the matter is, if it's the truth that he is guilty of First Degree Murder, and if the jury finds him guilty, then, his friends will probably just go away because anybody out there will know that there is nothing they could do for him, the trial will be over and that is it, people know that and there is no way that he could hurt you.

The court continued on the next page (e.s.):

> [THE COURT]: All right. So we all have to do what the Law requires us to do. That is one of the things we have to do if we all decide to live in this county, we have to follow the Laws, follow the rules so we could live in freedom.
>
> And people who do not obey the Laws are asked to either leave the country or [are] put in prison and that is the requirement that all of us have to live under.
>
> That is the price of citizen ship [sic] and I am not saying it's easy and I'm not saying that we're not going to do something for you, it's tough, but we will do everything we can to protect you and your family, okay? But you are going to be called upon in just a few minutes to testify.

Immediately thereafter, Mr. Katia took the witness stand and identified appellant as the person who had accosted Swanson, although he had not previously identified appellant. R 1713.

A. Due process requires the presence of a defendant whenever his presence has a reasonably substantial relation to the fulness of his opportunity to defend against the charge. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) In United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), the trial court and Gagnon's counsel had a brief discussion in chambers with a juror who had expressed concern about the defendant's sketching pictures of jurors. The judge told the juror that Gagnon was an artist, and determined that the sketching would not affect on the juror. The Court rejected Gagnon's claim that his absence from this discussion violated due process. The Court wrote that there was nothing Gagnon could have done at the conference and nothing he would have gained by attending. 470 U.S. at 527.

In Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), the defendant was not at a hearing at which the two juvenile witnesses were examined for competency. Rejecting the defendant's due process claim, the Court wrote:

> We conclude that respondent's due process rights were not violated by his exclusion from the competency hearing in this case. We emphasize, again, the particular nature of the competency hearing. No question regarding the substantive testimony that the two girls would have given during trial was asked at that hearing. All the questions, instead, were directed solely to each child's ability to recollect and narrate facts, to her ability to distinguish between truth and falsehood, and to her sense of moral obligation to tell the truth. Thus, although a competency hearing in which a witness is asked to discuss

> upcoming substantive testimony might bear a substantial relationship to a defendant's opportunity better to defend himself at trial, that kind of inquiry is not before us in this case.
>
> Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He has presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency. On the record of this case, therefore, we cannot say that respondent's rights under the Due Process Clause of the Fourteenth Amendment were violated by his exclusion from the competency hearing. As was said in United States v. Gagnon, 470 U.S. 522, 527, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (per curiam), there is no indication that respondent "could have done [anything] had [he] been at the [hearing] nor would [he] have gained anything by attending."

482 U.S. at 746-47 (footnotes omitted).

The Court noted at footnote 20 that the result might have been different if there had been questioning at the hearing related to substantive testimony, or if it had born a substantial relationship to the defendant’s opportunity to defend. At footnote 21 it noted that he had failed to establish that his presence at the competency hearing would have contributed to the fairness of the proceeding.

At bar, on the other hand, appellant’s presence at the hearing would have contributed to the fairness of the proceeding, and he could have had input. Unlike Stincer, appellant could have suggested questions for counsel to ask, and could have given testimony that he had never threatened the witness, and bore him no

will -- that, contrary to what the judge said, the witness was in no peril from him regardless if he was acquitted.

The hearing bore directly on a major witness's relationship to appellant and whether appellant had threatened the witness. Unlike the judge in Gagnon, the judge did not allay the witness's concerns -- he told the witness that he and his family were in peril unless he gave testimony against appellant. There was a violation of due process at bar requiring reversal of appellant's conviction.

B. Additionally, appellant's absence from the hearing denied him his state and federal constitutional right to consult with counsel.[6] This right was well established by the time of Powell v. Alabama, 287 U.S. 45, 56-57, 53 S.Ct. 55, 77 L.Ed. 158 (1932). In Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), the Court ruled that the trial court had denied the defendant's right to consult with counsel by ordering that he not speak with counsel during an overnight recess during his testimony. In Perry v. Leeke, 488 U.S. 272, 278-79, 109 S.Ct. 594, 599, 102 L.Ed.2d 624 (1989), the Court ruled that "a showing of prejudice is not an essential component of a violation of the rule announced in Geders", although the Court also ruled that there was no violation of Geders when the trial court had barred the defendant from speaking with counsel during a brief recess in his testimony. In

[6] Footnote 22 of Kentucky v. Stincer left this issue open.

Holland v. State, 636 So. 2d 1289 (Fla. 1994), this Court ruled, pursuant to Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989), that mental examination of a defendant without notice to counsel denied him the state and federal constitutional right to consult with counsel. At bar, there was a violation of the right to consult. Appellant was unable to consult with counsel at any point relevant to the in camera hearing. Since the hearing bore directly on appellant and since the judge made statements likely to put the witness in fear of appellant, constitutional error occurred requiring reversal of appellant's conviction.

C. Further, the conduct of the hearing violated due process because the trial court abandoned the role of an impartial magistrate and became an advocate telling the witness (with no basis in fact) that he was in danger if he did not testify against appellant and unless appellant were convicted. Due process guarantees the right to an impartial judge. Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 267 (1972).

As a trial court may not attempt to coerce a witness not to testify, Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), so may it not try to coerce a witness to give testimony against the defense, except by enforcement of its subpoena. In Webb, the court told the only defense witness that he did not have to testify, but if he did testify and lie under oath the court would see that he would be charged with perjury and might be sent

to prison. After hearing this, the witness refused to testify. The Supreme Court held that this went well beyond warning the witness of his right to refuse to testify and of the necessity to tell the truth, and amounted to a violation of due process.

At bar, the court also went beyond simply advising the witness of his duty under the subpoena. In addition to creating visions of "terrorists", the court told Katia that, although he would be protected if he testified, but if he did not, he would be put in "a dangerous environment in the jail" and unable to protect his family. The court said that someone who did not testify would be deported or sent to prison. Katia's only hope for his and his family's safety lay in the conviction of appellant -- an acquittal could have dire consequences. These remarks coerced the witness to identify appellant as the man in the store. This amounted to a violation of due process requiring reversal of the conviction.

The error was prejudicial as to penalty as well as to guilt -- Katia's testimony was part of the state's case for application of the "great risk of death to many persons" aggravating circumstance.

2. WHETHER THE COURT ERRED IN ALLOWING THE TESTIMONY OF SANDRA DESHIELDS AS TO THREATS TO HER AND HER CHILD.

Immediately before Sandra DeShields took the stand, the court heard a proffer of her testimony and argument as to its admissibility. R 1827-33. After the judge overruled the defense's hearsay objection, the following occurred (R 1830-32):

> MR. HAMMER: Judge, except that the comments number 1, go towards non-relevant issues in this case and the victim in this case, is Jimmie Lee Swanson not Sandra DeShields. "My friend Maybel" and Judge, it's irrelevant to the killing of Jimmie Lee Swanson. Judge, this threat does not include Jimmie Lee Swanson clearly and it has been established that --
>
> THE COURT: I am going to assume that there is a connection here that Mr. Morton is making sure that he can tie it up where this woman may have committed something totally isolated from the victim, Jimmie Lee Swanson? Mr. Morton, am I correct? It's not, right?
>
> MR. MORTON: Yes, sir, it goes directly to the theft itself.
>
> THE COURT: You would be right then if he is offering this witness which it's something totally unrelated where somehow the prejudice would outweigh the probative value. And I am assuming that there is a nexus shown by the State. I am assuming that his threats inculpate that the statements was an umbrella [sic] thought out of the subject matter --
>
> MR. MORTON: What I would proffer to the Court is basically that Ms. DeShields knew the victim in this case, Mr. Swanson, and after the money was stolen, he was aware that the money was stolen money and he received some of the stolen money from her in order for him to help her go to North Carolina and this is the girl that she was looking for according to the testimony of Aftab Katia and you will hear from the mother who was on the phone with him saying, "where is the girl" and Mr.

> Muhammad was looking for Sandra and out of the Defendant's anger, he was hoping to find her.
>
> THE COURT: With that kind of proffer -- certainly the probative value outweighs the prejudice value and the Jury needs to hear that and the State always has a right to demonstrate a motive for the alleged criminal activity.
>
> And based upon the State's proffer, over the Defense's objection, I'm permitting this testimony.
>
> And it's clearly an exception to the Hearsay Rule anyway.
>
> All right. Now based upon that, I will permit it assuming of course, that the State will tie this all up and of course, if they do not do that, I'm sure I will hear from you, Mr. Hammer.

The trial court erred. Ms. DeShields' testimony was not relevant and its prejudicial impact outweighed its probative value. Relevant evidence "is evidence tending to prove of disprove a material fact." § 90.401, Fla.Stat. Neither the state's proffer nor its evidence showed that appellant knew of any relationship between Swanson and DeShields, much less that he purposely shot Swanson in order to get at DeShields in some way. The material facts were whether appellant unlawfully and with a premeditated design murdered Swanson. The fact that he had threatened DeShields had no bearing on those issues, and was therefore irrelevant. Threats to another person are irrelevant and prejudicial unless the state can show relevance to the offense charged. See Escobar v. State, 699 So. 2d 988, 998 (Fla. 1997) (error to admit evidence

that defendant had at some time held pistol to third party's chest and had threatened to kill him).

Even if the evidence were relevant, it was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice or confusion of issues. § 90.403, Fla. Stat.; Sexton v. State, 697 So. 2d 833 (Fla. 1997). Given the lack of evidence that appellant knew of any connection between Swanson and the theft or that he knew that Swanson knew the whereabouts of DeShields, the evidence lacked probative value. On the other hand, it was prejudicial for the jury to hear that he had threatened to kill a teenage mother and her child, and the evidence would confuse the jury's consideration of the issues before it. This Court should order a new trial.

This error was also independently prejudicial as to penalty, constituting evidence of an improper and invalid aggravating circumstance. Use of an improper aggravating circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

3. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE HEARSAY OBJECTION TO MATTIE SWANSON'S TESTIMONY AS TO HER SON'S PLAN TO GET A LICENSE FOR HIS CAR WASH.

Mattie Swanson testified for the state that her son, Jimmy Lee Swanson, told her over the telephone that he intended to go to the courthouse. When the state asked why he was going to the courthouse, the defense posed a hearsay objection. R 1870. The state argued: "Based upon 90.803, sub-3 it's an exception to hearsay where it states future plans or intents.", and the court overruled the defense objection. R 1870-71. Ms. Swanson then testified that he said he was going to the courthouse "to go get licensed for his car wash", and that he was "getting excited and talking about his life", at which point some one came up and asked him about a girl. R 1871.

The court erred in overruling the defense objection. Under section 90.803(3), Florida Statutes, a statement of intent or plan is admissible as an exception to hearsay only to where the declarant's state of mind is in issue or to prove or explain the declarant's subsequent conduct. E.g. Kelley v. State, 543 So. 2d 286, 288 (Fla. 1st DCA 1989); Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982). At bar, Mr. Swanson's state of mind was not in issue and the challenged statements did not prove or explain anything about his subsequent conduct. Hence, the court should have sustained the defense objection. Since the court acted on a

misunderstanding of the law, it committed an abuse of discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) (abuse of discretion standard does not apply to incorrect application of existing rule of law). "We find abuse of discretion when a court 'improperly applies the law or uses an erroneous legal standard.'" U.S. v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992) (citing cases). "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)." Schlup v. Delo, 115 S.Ct. 851, 870 (1995) (O'Connor, J., concurring).

The erroneous admission of this evidence was prejudicial. Its only purpose could be to create sympathy for the deceased. Evidence tending to create sympathy for the deceased is improper unless there is some legitimate purpose for its admission. See Welty v. State, 402 So.2d 1159 (Fla.1981). There is no such purpose at here. This court should order a new trial.

Further, admission of this evidence was independently prejudicial as to penalty, as it consisted of improper victim impact evidence. See Burns v. State, 609 So. 2d 600 (Fla. 1992) (admission of evidence about victim harmless as to guilt but prejudicial as to penalty).

4. WHETHER THE COURT ERRED IN CONDUCTING PORTIONS OF THE VOIR DIRE EXAMINATION AT THE BENCH WITHOUT APPELLANT'S PRESENCE.

At the start of voir dire, the court told jurors that if they felt that they wanted to keep private any matters that arose during questioning, they could "request that we have a side bar conference ... so we'll have a side bar conference right over here in private and in a little whisper, you can answer the question and at the same time, you maintain your privacy and yet at the same time, the attorney's [sic] are making their assessments and getting a little more from you to see if you are fit to sit on this case." R 155-56. Accordingly, various jurors had bench discussions with the court and counsel. R 184-86 (Lawson questioned and excused for cause); 232-35 (unnamed juror questioned and excused for cause); 240-49 (Kelly questioned about car accident involving drunk driver); 308-10 (Voss questioned about views on death penalty); 329-36 (Martin questioned about experiences as police officer); 392-94 (Hinkle questioned and excused for cause); 1048-59 (Lapinskas questioned about sons' legal problems); 1065-70 (Driskell questioned about prior arrest).

Because Ms. Lapinskas was part of a group brought in after the beginning of voir dire, the court repeated its policy (R 1048-49):

> MS. LAPINSKAS: Uhm, could I speak to you and the Lawyers in private?
>
> THE COURT: Yes, ma'am. Certainly. Do you want to step down?

PROSPECTIVE JUROR: Okay.

THE COURT: By the way, I forgot to mention that to you all. If I or the lawyers when they talk to you, if there is anything that you wish to keep private, we will accommodate you. And we do it all the time. Do not hesitate to ask.

Florida Criminal Rule 3.180(1)(5) provides that the defendant "shall" be present "at all proceedings before the court when the jury is present". Further, a defendant has the due process right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982). "[C]ounsel's waiver of a defendant's absence at a crucial stage of a trial, without acquiescence or ratification by the defendant, is error. State v. Melendez, 244 So. 2d 137 (Fla. 1971)." Garcia v. State, 492 So. 2d 360, 363 (Fla. 1986).

At bar, fundamental fairness was thwarted by appellant's absence from the questioning of the jurors at the bench. He had a fundamental right to hear what the jurors said in order to know how to exercise challenges. In view of the constitutional error, this Court should order a new trial.

In making this argument, appellant is aware of Carmichael v. State, 1998 WL 378121 (Fla. July 9, 1998), in which this Court held that counsel had waived the defendant's right to be present at a bench conference at which peremptory challenges were exercised.

Carmichael, however, did not involve the constitutional right to be present for the questioning of jurors. Further, it established a new rule which should not be applied retroactively at bar. This Court should order a new trial for appellant.

5. WHETHER THE COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE TO JUROR RANIERI.

Prospective juror Ranieri told the state that she did not believe in the death penalty. R 534. She had no problems with the criminal justice system. R 537-38. She did not favor the death penalty. R 538-39. The state asked "if there is a certain scenario where you would only impose the death penalty", and she replied: "yes." R 539-40. Asked for a hypothetical which would warrant the death penalty, she said: "I myself said like if he was a serial murderer or like the Oklahoma Bomber, yes." R 541.[7] The questioning continued (R 541-42):

> MR. MORTON: And my question to you is that: Do you have such reservations that even if these aggravating circumstances were to exist or be present beyond a reasonable doubt and if you were satisfied about the witnesses, the Court will tell you that it doesn't necessarily have to do with serial murders and that type of thing, but would you still be opposed to the death penalty under those circumstances?
>
> PROSPECTIVE JUROR: I would not be able to sign the paper if it was any other circumstance other than a serial murderer.
>
> MR. MORTON: Or make the recommendation?
>
> PROSPECTIVE JUROR: Or make the recommendation.
>
> MR. MORTON: See, that is the standard.
>
> PROSPECTIVE JUROR: Right.

[7] She made similar statements to the court. R 303-304.

MR. MORTON: And the Law does have some circumstances other than serial murders where you could consider the death penalty, does everybody understand that?

PROSPECTIVE JUROR: Right.

MR. MORTON: And that is where we are getting at. And so you are right there on the 10 yard line?

PROSPECTIVE JUROR: (Prospective juror nods head.)

Later, defense counsel was questioning another juror who had expressed problems with the death penalty. He asked if she could follow the law, and the court told him at the bench that he was "going in circles." R 746. The court elaborated:

... You have to get blunt with them. In other words, ask them how they feel. And tell them it's the instructions but you -- they are saying, yeah, I could follow the instructions that the Judge gives me, but you are saying nothing more than that. And all they are saying to you is yes, I could understand what the Judge instructs me on but as far following the Law on this subject, <u>you are going to have to ask them the following question: You are going to have to pose it to them like this</u>: The Judge is going to give you instructions about aggravators and mitigating factors, and if the State was able to prove to you beyond a reasonable doubt that the aggravating circumstances in [sic] somehow outweighed the mitigating factors, in that hypothetical right there, would you be willing to make a recommendation of death pursuant to the instructions of the Court? And sir, you did not ask that question to them.

MR. COLLINS: I do not agree with Your Honor respectfully.

THE COURT: Sir, right now they are under the impression that yeah, I understand what it is and in any situation would they ever vote for the death penalty and --

MR. COLLINS: I don't think that is what they are thinking, Your Honor, they did not say that.

> THE COURT: Look, I know what you are trying to do and I commend you on doing it but, however, they are still working under an illusion here and you have not asked them that blunt question. I haven't heard it yet.
>
> MR. COLLINS: I am getting to it.

R 746-48. Counsel later asked Ms. Ranieri if she could follow the law, and she replied: "I could follow the Law, yeah." R 762.

When the state moved to challenge her for cause "[b]ased upon her position about the death penalty, R 795-96, the court said:

> THE COURT: Yeah. Yeah, she has not been rehabilitated. She said that she could not recommend a death sentence and it would be only for a serial killer which she could not follow the Court's instructions on aggravators if the aggravators outweigh the mitigators and if they were proven, she could not make a recommendation for death. The only way she would do it is for a serial killer.
>
> MR. HAMMER: Well, the only problem here is she said that, yes, but she said she could follow the Law.
>
> MR. COLLINS: Right.
>
> MR. HAMMER: And Mr. Collins went into that with her with a series of examples so -- I think what Mr. Collins did was --
>
> THE COURT: No. No. He could have easily said to her, you are talking about a serial killer but if it warranted any other case if the aggravators were proven, could you then recommend death as the Law requires. And she can't do it. Even if the aggravators outweighed the mitigating factors, based upon that, ma'am, would you follow the Law and make a recommendation of death? And that's what we have.
>
> MR. HAMMER: He did that with the entire panel in his voir dire.
>
> THE COURT: That question that way was never posed and I was waiting for that question. And I will not allow this Juror on the Jury based upon her answers here on the

> record. And by the way, she couldn't follow the Law because she could not give her recommendation of death and the only way she could do it is if it was a serial killer, that's the only exception. She has not been rehabilitated.

R 796-97 (e.s.). The court granted the cause challenge. R 798.

The trial court erred. Ranieri was not unalterably opposed to the death penalty. She said to the court and the prosecutor that she would vote for the death penalty depending on the circumstances -- specifically in cases involving serial or mass murderers. Upon further questioning, having heard the court, the state, and the defense repeatedly say that the law required that jurors would have to determine if the aggravators were sufficient to justify the death penalty and if the mitigation outweighed the aggravators, she unequivocally said that she could follow the law.

In Farina v. State, 680 So. 2d 392 (Fla. 1996), this Court found error in similar circumstances. There a juror said that she had mixed feelings and that her decision "would depend on the circumstances", but that she would "try" to give the state a fair shake respecting the death penalty, and she "would try to do what's right." Id. 396-97. The trial court sustained the state's cause challenge to her. In reversing, this Court wrote: "The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath." Id. 396. At footnote 4, it noted that the issue "cannot be reduced

to question-and-answer sessions which obtain results in the manner of a catechism".

Here, the judge reduced the determination to a catechismal exercise. In his view, there was one and only specific question ("that blunt question") that could determine the matter. He simply pushed aside the juror's unequivocal statement that she could follow the law -- a statement much stronger than the juror's in Farina. The record does not show that she could not perform "her duties in accordance with the court's instructions and the juror's oath." The judge erred in granting the cause challenge. "In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty." Farina, 680 So. 2d at 396.

It is a violation of the Sixth and Fourteenth Amendments to exclude a person from the jury because of general beliefs against the death penalty. Gray v. Mississippi, 481 U.S. 648, 665, 107 S.Ct. 2045, 2055, 95 L.Ed.2d 622 (1987). Further, the error here also violated the Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should reverse and remand for new jury proceedings.

6. WHETHER THE COURT ERRED IN OVERRULING DEFENSE OBJECTIONS AND WHETHER FUNDAMENTAL ERROR OCCURRED DURING THE STATE'S GUILT-PHASE FINAL ARGUMENT.

In final argument, the state discussed the discrepancies in the eyewitness testimony, and said (R 1968-69):

> And there are some issues here when we talk about eye witness's testimony that you need to understand. First of all, remember talking about perception? Obviously, one could perceive things against a different backdrop and often times in crimes for example: The victim of the crime which was obviously Mr. Swanson is not here to speak because he is dead but had he survived and if he was asked to come in and tell you his perception of what happened to him and what he saw and who did it to him against the back drop of the fear and the anger and the terror of --
>
> MR. HAMMER: Objection Judge, this is improper.
>
> THE COURT: Overruled.

The court erred in overruling the objection. In Garron v. State, 528 So. 2d 353 (Fla. 1988), this Court disapproved of argument focussing on the pain of the victim and urging jurors to imagine her screams and desires for punishment. If "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." King v. State, 623 So. 2d 486, 488-89 (Fla. 1993) (quoting from Garron); Urbin v. State, 23 Fla. L. Weekly S 257, 259-60 (Fla. May 7, 1998) (quoting from King and Garron).

Regarding defense argument that appellant did not resemble the other persons in the photo line-up, the state argued (R 1982-83):

> We saw the identification line-up and I believe it is right here. (indicating) Well, you could go back and decide amongst yourselves as Mr. Hammer says this is scary. This should scare you. Well, I would submit to you first of all, what would be really scary is if you put 4 or 5 people who looked closely or fairly close to each other and then if 1 is picked out who really was not the person because they look just alike or exactly the same. That's scary. Well, this is the way that you do a police line-up. (indicating) And when you do one, I would submit to you, ladies and gentlemen, even if done by computer, you just do not pick out people who look exactly the same or almost the same.
>
> MR. HAMMER: Objection Judge, it was not the testimony. The testimony is contrary to that.
>
> THE COURT: Overruled. Remember, member's [sic] of the Jury, this is closing argument.
>
> MR. MORTON: The testimony of Detective Walley. Well, he said it was not fair to do that. ... .

Again, the court erred. Det. Walley testified that in assembling the photo array "I was trying to find 5 different individuals basically with close characteristics", R 1663, and "I did it as best that I can to where they were all similar". R 1671. Hence, there was no record basis for the state's assertion that "the way that you do a police line-up" is to <u>avoid</u> picking out "people who look exactly the same or almost the same." In effect, the prosecutor was offering his own expert view that the photo line-up (which formed the basis of the state's case for identification) had been properly assembled.

Further, the state, without objection, argued to the jury facts which were not in evidence. A significant part of the state's case turned on the claim that the car and driver stopped by Officer Russell were the same car and driver seen leaving the scene of the murder. In this regard, defense cross-examination of Russell established that he was surprised that appellant's car was in such good condition because the first description that he got of the car "was a beat-up car". R 1793. On redirect by the state, he testified that the first BOLO was "about a rusty car", and that detectives "were constantly updating the BOLO's because [they] were talking to people that had described the vehicle and so they were giving updates of the vehicle later on that day." R 1798.

After defense counsel referred to this matter in final argument, R 1949-50, the prosecutor said without objection in his argument (R 1985-86):

> ... Katia testified that he took off in a reddish car and you saw the Defendant's car and this is the Defendant's car (indicating) and Mr. Hammer says, oh, well, someone said that it was a totally beaten up car and we did not get into all the testimony because you could only speculate what the BOLO contained and Officer Russell testified to you that there was additional information given to him that he used as far as the car was concerned to go ahead and stop that car and to detain that car, but it was not all beaten up. Tags. There was additional information that he used to do that this [sic] which was given to him in this particular case.

It is constitutional error for a prosecutor to assert to the jury that there is additional evidence of the defendant's guilt.

A prosecutor may not directly refer to or even allude to evidence not adduced at trial. U.S. v. Murrah, 888 F.2d 24 (5th Cir. 1989). See also U.S. v. Novak, 918 F.2d 107 (10th Cir. 1990). "In short, the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury." U.S. v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991).

Notwithstanding the lack of an objection, this Court should consider this improper argument for two reasons:

First, this Court will examine both preserved and unpreserved errors in determining whether an error is harmless. Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994) (“Although Whitton did not object to the first two alleged comments on Whitton's post arrest silence, he argues that the cumulative impact of all three comments requires reversal. We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record. The reviewing court must examine both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict. DiGuilio, 491 So. 2d at 1135.”).

Second, the prosecutor’s improper was so egregious as to amount to fundamental error. The argument went directly to the theory of defense, assuring jurors that there was additional

evidence to rebut the defense claim that he was not involved in the shooting. Further, it was directly contrary to the trial court's order that the state could not present evidence that it had the tag number of appellant's car because the information was hearsay and violated the Confrontation Clause. R 1393-1409. For the state to assure the jury in final argument that the police used "tags" to track appellant down, R 1985-86, flouted the court's order and violated the Confrontation Clause. Thus, the improper argument amounted to a violation of due process, and this Court should order a new trial.

7. WHETHER THE COURT ERRED IN FINDING THE "GRAVE RISK" AGGRAVATING CIRCUMSTANCE.

The sentencing order states (R 2717-18):

> 2. The Defendant knowingly created grave risk of death to one or more persons such that participation in the offense constituted reckless indifference or disregard for human life. § 941.121(5)(c) [sic].
>
> To find that this aggravating circumstance exists, the Court must determine whether the Defendant's actions created a likelihood or high probability of death to at least three other people besides the victim. The evidence showed that after tracking the victim to a convenience store, the Defendant demanded information from him concerning the whereabouts of a particular female. After being shot by the defendant, the victim tried to flee. The Defendant followed him into a well traveled road while firing multiple gunshots at him. The victim fell after jumping over a car as he ran into the street. While he was down, the Defendant shot him twice in the head. A witness riding a motorcycle began to chase the suspect, who had gotten into a car and sped away. When the witness approached the defendant, the latter shot at him twice then threw the gun out the car window.
>
> As a result of the foregoing, the Defendant endangered the life of Aftab Katia, the clerk in the store where the shooting began. In addition, he endangered the lives of at least three motorists and three passengers who were on the roadway where the Defendant was firing at the victim. Finally, the life of the motorcyclist was endangered by the shots aimed at him by the Defendant as he fled.
>
> It is, therefore, the finding of this Court that this aggravating circumstance was established beyond and too the exclusion of every reasonable doubt.

A. The court erred in applying the 921.142(6)(c) "grave risk" circumstance to appellant. Section 921.142 governs sentencing in drug trafficking cases, and does not apply to sentencing in cases such as the case at bar. The use of an authorized aggravating

circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. E.g. Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

B. Insofar as the court sought to apply the section 921.141(5)(c) aggravating circumstance ("The defendant knowingly created a great risk of death to many persons."), it also erred. The record does not support the court's factual findings. Katia did not testify that appellant ever pointed a gun at him, much less that he was in the line of fire. No shot was fired in the store, and Katia did not leave the store until after the shooting was over. There was no eyewitness to the shooting immediately outside the store. There was no likelihood or high probability of death to Katia.

The record also does not show a likelihood or high probability of death to persons in the cars. None of them testified that any shot was fired in their direction or that appellant even pointed the guns at them. While not dispositive, it is significant that the state did not charge appellant with assault on any of these persons. Debbie Holdren only saw appellant walk up and shoot Swanson as he stood over him. R 1565-67. Melissa Herndon testified that "while he was running towards the car, he was shooting because I heard the 'popping sounds'", R 1604, but did not say the direction in which they were directed. She testified that

he lowered the gun when Swanson jumped on the car. R 1603. She then saw appellant stand over Swanson and shoot him. R 1605. Randy Sharf saw "a black male come running around the corner of the building and believe behind him was a white male with a gun in each hand firing at him." R 1648.

Robert Graham, the corrections officer, saw a white man chasing a black man in Ivory's parking lot, and "in each one of his hands, there was a gun and he was firing at the black man as he was running." R 1773. The black man crossed the street and was hit by a car and fell to the ground or he jumped on the hood and then hit the ground. R 1774. The white man pointed a hand "at the black man lying on the ground and he then fired at least 3 or 4 rounds at him." R 1775. He then turned around and ran. R 1775.

As for Curtis Ream, the motorcyclist, his statement, if admissible, showed only that appellant fired at Swanson and Ream himself. He did not say anyone else in the road was endangered.

In Hallman v. State, 560 So. 2d 223, 225-26 (Fla. 1990), which involved a bank robbery and shootout in the street, this Court rejected use of the "great risk" circumstance, writing:

> Next Hallman attacks the finding that he knowingly created a great risk of death to many persons. The trial court listed ten persons who were in the area of the shoot-out and could have been struck and remarked that the shoot-out occurred near a busy thoroughfare. Hallman argues that he and Hunick fired at each other from close range and that none of the bullets was aimed in the direction of a large number of people. At most, he maintains, there was only the chance that a bystander

would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance.

Again, we agree with Hallman. We set out the standard for this aggravating circumstance in Kampff v. State, 371 So. 2d 1007 (Fla. 1979). We said:

> "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the words "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.

Id. at 1009-10. We have held that great risk of death to three people was insufficient. Bello v. State, 547 So. 2d 914 (Fla. 1989). The state's reliance on Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986), is misplaced. In that case the defendant fired more than a dozen shots in the area of a migrant labor camp, three persons other than the victim were in the line of fire, and his four nearby accomplices ran the risk of death from return fire.

The trial judge referred to the presence of numerous people in the bank, five bystanders outside the bank, and passersby on busy U.S. 98 to support his finding. The evidence showed, however, that the seven persons in the bank ran almost no risk of being struck, as they were behind partitions and away from doors or windows and not in the line of fire. Five of the witnesses outside the bank either saw or heard the shooting, but only one of them was ever in the line of fire. It is true that there were a number of passersby on U.S. 98, but of the eight shots only one was definitely aimed in the direction of the highway and only two others could have been. [FN2] We do not believe that the possibility that no more than three gunshots could have been fired toward a busy highway is proof beyond a reasonable doubt that Hallman knowingly created a great risk of death to many persons.

FN2. One shot hit Hallman, one hit Hunick, and at least three others lodged in the taxi.

As in Hallman, the state failed to prove the circumstance beyond a reasonable doubt at bar.[8] Like the bank tellers there, Katia was not put at risk by the shooting outside the store. Although there were people in the street, they did not testify to being in the line of fire. Although Ream said that appellant later shot at him in the road (and assuming, arguendo that Ream's statement was admissible), the record does not show that other persons were put at great risk of death.

Reliance on an invalid circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions, so that the state must show that the error was harmless beyond a reasonable doubt. Clemons. At bar, use of this circumstance was highly prejudicial: without it, there is only one aggravating circumstance, and the record discloses substantial mitigation. This Court should vacate the death sentence and remand with instructions to sentence appellant to life imprisonment under Songer v. State, 544 So. 2d 1010 (Fla. 1989), or alternatively should instruct the trial court to conduct de novo sentencing proceedings. See Miller v. State, No. 85,744 (Fla. July 16, 1998)

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[8] The state must prove aggravating circumstances beyond a reasonable doubt, and the sentencer "may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

(use of invalid aggravator required new jury sentencing proceedings).

8. WHETHER FUNDAMENTAL ERROR OCCURRED WHEN THE STATE READ TO THE JURY A TRANSCRIPT OF CURTIS REAM'S TAPED STATEMENT AT PENALTY.

At penalty, without objection, the prosecutor and Det. Walley read a transcript of the taped statement of Curtis Ream, who had committed suicide before the trial. R 2186-2203. The state introduced this evidence in support of the "great risk of death to many persons" circumstance. R 2105-07 (discussion of circumstance at start of penalty phase), 2211 (argument to jury), 2212 (same).[9] Ream's statement was not taken in appellant's presence, and it does not appear that it was under oath.

In Brown v. State, 471 So. 2d 6 (Fla. 1985), this Court held that it is fundamental error to use a deposition as substantive evidence of guilt where the defendant was not present at the deposition. The Court wrote: "The state now argues that Brown waived his right to be present at the deposition because he failed to object to using the deposition at trial on the basis of his absence at its taking. We find, however, that the state's failure to follow Rule 3.190(j)(3) created fundamental error by depriving Brown of his constitutional right to confront and cross-examine the witnesses against him. There is no way to correct this error, and

[9] The state also discussed Ream's statement at R 2209, concluding: "that is the truth."

we must grant Brown a new trial."[10] Accord Walls v. State, 615 So. 2d 822 (Fla. 4th DCA 1993).

Use of deposition testimony at the penalty phase of a capital case violates the Due Process and Confrontation Clauses. Donaldson v. State, 23 Fla. L. Weekly S 245 (Fla. Apr. 30, 1998). See also Rhodes v. State, 547 So. 2d 1201, 1204 (1989). In Rhodes, this Court found a violation of the Confrontation Clause where, at penalty, a detective played the taped statement of the victim of a prior crime of the defendant. This Court further held that there was no Confrontation Clause violation in permitting the officer to testify to the victim's statements because the defendant was able to confront and cross-examine the officer.

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[10] Rule 3.190 (j) (Motion to Take Deposition to Perpetuate Testimony) states in pertinent part (emphasis supplied):

> (3) If the deposition is taken on the application of the state, the defendant and the defendant's attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep the defendant in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but the failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present. The state shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The state shall make available to the defendant for examination and use at the deposition any statement of the witness being deposed that is in the possession of the state and that the state would be required to make available to the defendant if the witness were testifying at trial.

Fundamental error occurred at bar where the court admitted and considered Mr. Ream's statement. The statement is even less reliable than a deposition, which involves questioning by defense counsel. Appellant was unable to confront and cross-examine Ream. This Court should reverse and remand for resentencing.

9. WHETHER THE COURT ERRED IN FAILING TO CONSIDER MITIGATING EVIDENCE WHICH WAS APPARENT ON THE RECORD.

In Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), this Court wrote:

> Second, Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So. 2d 160 (Fla. 1991); Campbell v. State, 571 So. 2d 415 (Fla.1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Accord Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996). See also Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992) ("every mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process"). Failure to consider mitigation violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (sentencer may not refuse to consider any relevant mitigating evidence).

At bar, while the court did consider some of the mitigation apparent on the record, it ignored other mitigating facts, such as:

Appellant's diagnosis of depression neurosis, conduct disorder and borderline personality disorder. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (mental health disorders (organic personality syndrome and organic mood disturbance, psychotic disorders, bipolar disorder) sufficient to reduce sentence to life where only one aggravator); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (error not to consider defendant's learning disorder); Marquard v. State, 641 So. 2d 54 (Fla. 1994) (mitigation included personality disorder or antisocial personality), Wuornos v. State, 676 So. 2d 966 (Fla. 1995) (error not to consider defendant's personality disorder), Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (mitigation included borderline personality disorder), Strausser v. State, 682 So. 2d 539 (Fla. 1996) (mitigation justifying reduction of sentence to life included depression and personality disorder).

Appellant's intelligence. McCrae v. State, 582 So. 2d 613 (Fla. 1991) (evidence supporting life sentence included above average intelligence); Taylor v. State, 638 So. 2d 30 (Fla. 1994); Torres-Arboleda v. State, 636 So. 2d 1321 (Fla. 1994) (evidence requiring resentencing included defendant's intelligence).

Appellant's self-rehabilitation by obtaining a GED. Green v. State, 688 So. 2d 301 (Fla. 1996) (mitigation included defendant's self-rehabilitation); Turner v. State, 645 So. 2d 444 (Fla. 1994) (mitigation supporting life sentence included that defendant

overcame obstacles during difficult childhood to obtain high school degree).

Appellant's strong religiosity. Songer v. State, 544 So. 2d 1010 (Fla. 1989) (mitigation supporting life sentence included strong spiritual and religious standards); McCrae, (same); Barrett v. State, 649 So. 2d 219 (Fla. 1994) (mitigation included conversion of Christianity); Henry v. State, 649 So. 2d 1361 (Fla. 1994).

The absence of a strong male role model in appellant's life. Pangburn v. State, 661 So. 2d 1182 (Fla. 1995) (factor given "some weight" by trial court).

The close relationship of the mother's neglect to appellant's juvenile court record and disruptive behavior. Cf. Savage v. State, 588 So. 2d 975, 979 (Fla. 1991) (evidence supporting life verdict included "a considerable adult and juvenile record dating back to his early teens").

The lack of parental guidance when appellant was a teenager. Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993).

Appellant's emotional rage at the time of the crime. Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994) (evidence supporting life verdict included "the possibility that he acted in an emotional rage").

Appellant is not eligible for parole. Turner (mitigation supporting life sentence included that defendant not eligible for parole for 50 years).

This Court should reverse and remand with instructions to resentence appellant, or to reduce his sentence to one of life imprisonment.

10. WHETHER THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE, 572 So. 2d 800 (Fla. 1988).

This case demonstrates that the rule of Hamblen v. State, 527 So. 2d 800 (Fla. 1988) is unworkable. In Hamblen, this Court ruled that a capital defendant may waive mitigation. The dissenters wrote that the waiver of mitigation rendered the operation of the death penalty proceeding arbitrary and capricious. Justice Ehrlich wrote:

> As I view it, we cannot perform our review function without an adequate record of facts which may tell whether death is the appropriate penalty. If a defendant is charged with premeditated murder or felony murder and wishes to plead guilty, the state can have no objection so long as the plea is freely and voluntarily made. But where the penalty may be death, I do not believe the state can permit the death penalty to be imposed by default, and that is the factual scenario at hand.

Id. 805-06 (Fla.1988) (Ehrlich, J., dissenting as to penalty). Justice Barkett wrote that the court should have remanded for a new sentencing proceeding before a jury with instructions that the trial court appoint public counsel to advocate mitigation.

The case at bar is hardly among the most aggravated which this Court has seen. Further, the record shows substantial mitigation which could have been placed by the jury by public counsel. The Cruel or Unusual Punishment Clause of article I, section 17 of our constitution, and the Cruel and Unusual Punishment Clause of the federal constitution, as well as the Due Process Clauses of both constitutions, require an individualized sentencing decision based

on evaluation of aggravating and mitigating circumstances. That did not occur here. Appellant submits that this Court should recede from Hamblen, vacate the death sentence, and remand this cause for resentencing.

11. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION THAT THE STATE DISCLOSE MITIGATING EVIDENCE.

The defense moved that the court compel the state to disclose information concerning mitigating circumstances. R 2582. The motion sought disclosure of "all favorable evidence including mitigating circumstances which may be used in the penalty phase." R 2584. When the motion came up for hearing, the court summarily stated: "That's denied." R 976. As defense counsel began to argue the matter, the court said to the prosecutor: "If you accidentally trip over a mitigator, sir, you are under some obligation to reveal that to the Defense." R 976-77. The prosecutor replied: "Only to the extent under Brady versus Maryland as it requires." R 977. As argument continued, the court said:

> But here is the problem with that, now that I think about it. You are asking the State to make an assessment of whether or not it's a mitigator to give it to you about your guy, but my question is, is the State duty bound to make that assessment as far as what is a mitigator to what they may or may not think is a mitigator?
>
> And can they be held accountable for that? I mean do they have a continuing duty to make a mental inventory of a possible mitigator and convey them to you and if they are and if those are wrong, can they be held accountable for that?

R 978. The court then denied the motion. R 979.

The court erred. The answers to its questions are: yes, yes, and yes.

In fact, the state has a duty to disclose all information possessed by the state or any of its agents which is helpful to the defense, including information relevant to capital sentencing.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the state did not disclose a co-defendant's statement that, although Brady participated in a murder, the co-defendant was the actual killer. The Supreme Court wrote: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (e.s.).

This rule applies regardless whether the state attorney himself has the information, or it is possessed by other law enforcement authorities. Antone v. State, 355 So. 2d 777, 778 (Fla. 1978) (matter known to state department of law enforcement attributable to prosecution); Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (rejecting claim that trial prosecutor was unaware of impeachment evidence, where evidence was available to other prosecutors); Smith v. Secretary of New Mexico Dept. Of Corr., 50 F.3d 801, 824-25 (10th Cir. 1995)(surveying cases regarding "constructive knowledge doctrine in the Brady context"); U.S. v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) (government has duty, under Brady, to **search files of police agency for exculpatory information**).

In view of the foregoing, the court's ruling was erroneous: the prosecutor had a greater duty than merely to watch his step should be "trip over" evidence favorable to the defense, and "good faith" is not the relevant issue: the prosecution had an affirmative duty to determine whether the state possessed evidence favorable to the defense and to disclose such information. The PSI reveals in summary form that there was ample mitigation in the state's possession -- indeed appellant was effectively a ward of the state during much of his troubled adolescence.

Constitutional error occurred in the court's refusal to grant the motion. Accordingly, the state must show that the error was harmless beyond a reasonable doubt. This the state cannot do, because it refused to disclose evidence favorable to the defense. This Court should order new sentencing proceedings.

12. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). It is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

As explained above, the "great risk" aggravator does not legitimately apply at bar. This leaves only one aggravating circumstance -- that appellant was previously convicted of violent felonies. As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will only be affirmed in cases supported by one aggravating circumstance only in cases where there is "either nothing or very little in mitigation". Accord Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988). As explained above, the record at bar shows substantial mitigation. Hence, this is not an appropriate case for the death penalty.

Assuming arguendo that the "great risk" aggravator is valid in this case, the death sentence would still be disproportional. Proportionality analysis is not based solely on the number of

aggravating factors. See Fitzpatrick, (although five aggravating factors, including prior violent felony but excluding HAC and CCP, existed -- death was not proportionally warranted); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate where two aggravating factors, including a prior violent felony, in view of mitigating factors of low intelligence, cocaine and marijuana abuse, and abusive childhood). Rather, proportionality review is also based on the quantity and quality of the mitigating evidence.

There was substantial mitigation present to make death disproportional. See Nibert, 574 So. 2d at 1063. As in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved. Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death not proportional where two aggravators (prior violent felony and HAC) and mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison, were present); Livingston; Fitzpatrick; Jackson v. State, 575 So. 2d 181 (Fla. 1991) (death not proportional despite two aggravators including prior violent felony). The death sentence in this case violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

13. WHETHER THE COURT ERRED IN DENYING THE WAIVER OF JURY SENTENCING PROCEEDINGS.

A trial judge "upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation." State v. Carr, 336 So. 2d 358, 359 (Fla. 1976). At bar, the court abused its discretion in conducting jury sentencing proceedings over appellant's objection. Upon receipt of the guilty verdict, appellant moved to waive jury sentencing proceedings, but the court denied the request. R 2076-77. Appellant filed a written motion to waive jury sentencing phase and a written waiver of right to jury sentencing phase. R 2671-72. At a later hearing, the court again denied the motion, S 28-29, announcing: "I want the recommendation from the community on this." S 29.

In Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980), in discussing the standard for review of allocation of property in divorce proceedings, this Court wrote:

> Judicial discretion is defined as:
>
> > The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.
>
> 1 Bouvier's Law Dictionary and Concise Encyclopedia 804 (8th ed. 1914). Our trial judges are granted this discretionary power because it is impossible to establish strict rules of law for every conceivable situation which

could arise in the course of a domestic relation proceeding. The trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial.

We cite with favor the following statement of the test for review of a judge's discretionary power:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

The discretionary power that is exercised by a trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an

> inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
>
> > The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
>
> B. Cardozo, The Nature of the Judicial Process 141 (1921).

At bar, the court abused its discretion. The jury's recommendation, on which the court placed "great weight", R 2722, was based on a proceeding at which the state relied on unconstitutional evidence (Mr. Ream's statement), engaged in improper argument (assuring the jury of the veracity of the state's case), relied on aggravators not found by the judge (heinousness and coldness) and on another aggravator (great risk) not supported by the evidence, and at which there was no defense evidence or argument. Thus the resulting recommendation was not reliable. Since the court improperly placed great weight on this unreliable recommendation, it abused its discretion in conducting the jury sentencing proceeding.

Reliance on an invalid jury recommendation violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Cf. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (sentencing decision made in reliance on constitutionally defective jury sentencing recommendation). This Court should order new sentencing proceedings.

14. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S PENALTY PHASE ARGUMENT TO THE JURY.

In his penalty argument to the jury, the prosecutor injected his own views of the credibility of the case for death. He told the jury in the first paragraph of his argument that "mixed with everything of what we're seeking the truth as to what happened in this case and I do believe that the evidence established the truth." R 2208. On the next page, he discussed Curtis Ream's testimony, concluding: "And that is the truth." R 2209.

The prosecution may not in argument express belief in the guilt of the defendant. Grant v. State, 171 So. 2d 361, 365 (Fla. 1965). It may not vouch for the credibility of a witness or the truth of testimony. See Cisneros v. State, 678 So. 2d 888 (Fla. 4th DCA 1996) (discussing issue at length and citing cases); U.S. v. Kerr, 981 F.2d 1050 (9th Cir.1992).

Improper prosecutorial arguments will amount to constitutional error if they render the defendant's sentencing proceeding "fundamentally unfair." Cargill v. Turpin, 120 F.3d 1366, 1379 (11th Cir. 1997). Arguments meet this standard if they are "so egregious as to create a reasonable probability that the outcome was changed because of them." Id.

At bar, there is a reasonable probability that the outcome was changed because of the state's improper argument. This is a very

doubtful case for death, and the state felt it necessary to emphasize to the jury its belief in the credibility of its case. This Court should order resentencing.

15. WHETHER THE COURT ERRED DURING JURY SELECTION IN SUA SPONTE INSTRUCTING THE JURY CONCERNING THE DEFENDANT'S EXERCISE OF HIS RIGHT OF SELF-REPRESENTATION AS TO PENALTY.

During jury selection, appellant discharged his penalty-phase counsel, Bradley Collins. Then the court then decided sua sponte that it had to instruct jurors on this matter, because the jurors had a "right" to know about it: "I'm going to have to explain to the panel where Bradley Collins is and why he is not here now. I mean, it will be a mystery to them. They have a right to know where Brad Collins is and that he is no longer representing you at a possible penalty phase and something has to be said to the panel to them [sic]." R 1010. The court produced an instruction that it "should read to them", id., which it read into the record. R 1012-13. Defense counsel Hammer said the instruction suggested that there would be a penalty phase, and he did not know if the instruction needed to be given before the penalty phase. R 1015-16. When appellant himself said that he did not want anything read, R 1016, the court replied: "Well, I've got to read something to them. I've got to explain to them why Mr. Collins is no longer there." R 1016-17. Defense counsel asked that the court "make it as simple as possible." R 1017.

The judge reiterated that he had "a duty to the Jury so that the Jury understands what is going on so they don't think that I am

depriving you of a Lawyer and I need to give both sides a fair trial."

He did not want the jury to think that he had stripped appellant of a lawyer, and appellant did "not have any extra right than the State does because you made the demand to represent yourself and they are not to give you any special consideration for this if there is a possible penalty phase and if it's a good objection just because you are not represented by a Lawyer you do not get any special treatment, sir." Id.

The judge said, "They have a right to know. Both sides will get a fair trial and nobody has put your back against the wall because this is something that you want to do and I have a duty of explaining that and I am going to do that." R 1017-18.

Defense counsel requested that the court "keep it as simple as possible whereby say that Mr. Collins has been excused and that Akeem Muhammad is going to now take over and he is not requesting anything to be read further than that." R 1018. Counsel suggested: "Mr. Collins has been excused and that Akeem Muhammad will be going on his own should a penalty phase arise", but the court said, "that is a vague statement. The Jury -- the panel has a right to know that he has not been stripped of a lawyer and that he has voluntarily decided to represent himself if a penalty phase arises and therefore, at the request of the Defendant, Mr. Collins

has been discharged from any further duties in this case." R 1019.

The judge added:

> I think it's fair to both sides. And my duty is to ensure that both sides receive a fair trial. And my duty is not to mislead the Jury and it's to speak the truth and therefore, over the Defense's objection, I'm going to read all 7 paragraphs here and I've modified it so that it gives both sides a fair trial. And it also explains to the Jury that the Jury has some rights and the Jury has a right to know what is going on in this courtroom and they have a right to understand this is the Law here and it's my duty to explain the Law to them and part of my duty is to explain to them that you are entitled to represent yourself which is fine and that you will have to abide by the rules and that the Jury panel should not be influenced by one way or the other by your voluntary decision and that is what I am going to explain to them. Let the truth set us all free.

R 1019-20.

The court then instructed the panel (R 1028):[11]

> ... Mr. Bradley Collins has been discharged by this Court and is no longer representing this Defendant, Mr. Muhammad. And Mr. Hammer, of course, will represent the Defendant during the trial. The Defendant has voluntarily requested this Court to represent himself at a penalty phase if one ever arises. By doing so, he has knowingly given up or waived his right to be represented by Mr. Collins who is a trained lawyer and by choosing to represent himself at a penalty phase if one ever arises.

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[11] A number of new members of the venire had just entered the room, R 1026, and did not even know the offense with which appellant was charged. Hence, as soon as the judge finished this instruction, one juror asked: "Why do you mean by penalty phase?" R 1030. The court then read the indictment and discussed the trial process with the panel. R 1030 ff. Thus, the first thing these persons knew about the case was that the defendant had waived his right to be represented by "a trained lawyer" and chosen to represent himself at penalty, and deserved no "extra sympathy or credit", and that the jury was "not to feel sorry for him in any way."

> The Defendant is not to be awarded extra sympathy or credit in any way. You are not to feel sorry for him in any way. The Defendant should be judged by the same Laws that effect us all by choosing to represent himself at a penalty phase if one ever arises. The Defendant knowingly elected to abide by the Florida Rules of Evidence and by the Florida Rules of Criminal Procedure during the course of a penalty phase if one ever arises. This Court must and will enforce the Rules of Evidence and Procedure throughout the course of a penalty phase if one should ever arise, no special exceptions should be made by this Court on behalf of the Defendant. Please remember, it is not necessary for the Defendant to disprove anything, nor is it right for the Defendant to prove his innocence, therefore, the Jury should not be upset with the Defendant by his decision to represent himself at a penalty phase if one should ever arise. Since your verdict must be based on your views of the evidence and on the Law contained in the Court's instructions, the Defendant's decision to represent himself at a penalty phase should one ever arise, should not be viewed as an admission of guilt, nor should it be influenced in any way by his decision not to be represented by an attorney at a penalty phase should one ever arise.

The court erred. Although jurors certainly have the right not to be abused or harassed or discriminated against, they do not have a "right" to find out about the whereabouts of attorneys. The court does not have a "duty" to inform them about such matters. Since the court acted on a misunderstanding of the law, it committed an abuse of discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) (abuse of discretion standard does not apply to incorrect application of existing rule of law). "We find abuse of discretion when a court 'improperly applies the law or uses an erroneous legal standard.'" U.S. v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992) (citing cases). "It is a paradigmatic abuse

of discretion for a court to base its judgment on an erroneous view of the law. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)." Schlup v. Delo, 115 S.Ct. 851, 870 (1995) (O'Connor, J., concurring).

Any comment on the defendant's exercise of a constitutional right is highly suspect, although it is not constitutional error for the court to give a cautionary instruction devised solely to prevent the jury from drawing adverse inferences from the exercise of a constitutional right. Compare Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) with Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 12 L.Ed.2d 653 (1965). Here, the court went well beyond giving the sort of simple cautionary instruction approved in Lakeside. The judge's unwarranted instruction would have a coercive effect on any subsequent decision of appellant as to penalty proceedings. The error was prejudicial both as to guilt and penalty. Even before the trial had begun, the court's instruction improperly referred to appellant's exercise of his right to self-representation as to penalty, so that the jury would anticipate that there would be penalty proceedings. The jurors were told not to feel sorry for appellant in any way. The court's instruction was not designed to protect appellant -- it was designed to protect the state. This Court should reverse for a new trial or for new penalty proceedings.

16. WHETHER THE COURT EMPLOYED AN INCORRECT STANDARD IN IMPOSING THE DEATH SENTENCE.

The judge employed an incorrect standard in imposing the death sentence. The sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and Article I, Sections 2, 9, 16 and 17 of the state constitution.

In the sentencing order, the court wrote (R 2722):

> The jury recommended that this Court impose the death penalty upon AKEEM MUHAMMAD by a majority of seven 10 to 2. This Court must give great weight to the jury's sentencing recommendation. The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. Upon carefully evaluating all of the evidence resented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

The court erred. In Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) this Court ordered a resentencing because the trial court gave undue weight to a death recommendation by applying a Tedder standard to a death recommendation and had thus failed to make the type of independent judgment that was required:

> It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence. Citing this Court's decisions in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and Thompson v. State, 328 So. 2d 1 (Fla. 1976), which held that the trial court should give great

> weight and serious consideration to a jury's recommendation of life, the trial court reasoned that it was bound by the jury's recommendation of death. As appears from its "Findings of Aggravating and Mitigating Circumstances" the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. It expressly stated, "[T]his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

This Court reversed as the judge's statements that he found no "reason" to override the jury indicated that he did not perform the independent weighing of circumstances under section 921.141 and State v. Dixon. Here, the comments were stronger, stating that the death recommendation "should not be overruled unless no reasonable basis exists for the recommendation" R 293. It also employed a presumption of death upon the proof of a single aggravating circumstance. These statements are stronger than in Ross and indicate a lack of the independent judgment.

"[E]ven though a jury determination is entitled to great weight, 'the judge is required to make an independent determination, based on the aggravating and mitigating factors.'" King v. State, 623 So. 2d 486, 489 (Fla. 1993). "The trial judge has the single most important responsibility in the death penalty process." Corbett v. State, 602 So. 2d 1240, 1243 (Fla. 1992). See also Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993) ("It is the circuit judge who has the principal responsibility for determining

whether a death sentence should be imposed.”) Resentencing is required.

CONCLUSION

Based on the foregoing argument and authorities, appellant respectfully submits this Court should vacate the conviction and/or sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401 by courier this _____ day of July, 1998.

Of Counsel.