IN THE SUPREME COURT OF FLORIDA

CASE NO.: 90,952

JOAQUIN J. MARTINEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR HILLSBOROUGH COUNTY

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

RULES AND INSTRUCTIONS

INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death entered following a jury trial before the Honorable J. Rogers Padgett of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. In this brief the clerk's record will be designated by letter "R.", the trial transcript by the letter "T.", followed by the appropriate volume and page number, and the supplemental record will be designated with the letters "S.R.". The parties will be referred to as they stood in the lower court, and all emphasis is supplied unless otherwise indicated.

CERTIFICATE OF TYPESET

Counsel would certify that the typeset utilized in the printing of this brief is Proportional Times New Roman 14 pitch.

STATEMENT OF THE CASE

On October 31, 1995, the bodies of Douglas Lawson and Sherrie McCoy-Ward were discovered in their residence in Tampa, Florida. Appellant Joaquin Martinez was arrested on January 28, 1996, and he retained private counsel. (R.21-24). An indictment was returned on February 14, 1996 charging Mr. Martinez with two counts of premeditated murder and one count of armed burglary. (R.45-47).

A jury trial before the Honorable J. Rogers Padgett commenced on April 9, 1997.

He was convicted as charged on April 15th. (R.192-194). The penalty phase of the trial commenced the next morning. That afternoon, the jury recommended life imprisonment without parole for the murder of Lawson, and death (by a vote of nine to three) for the murder of McCoy. (R.228-245). Following an allocution hearing on May 19th, (R.272), the trial judge sentenced Mr. Martinez on May 27th to death for the murder of Ms. McCoy, a consecutive life term for the death of Mr. Lawson, and a concurrent life term for the burglary. (R.331-336; T.12:1245). This appeal follows.

STATEMENT OF THE FACTS

Douglas Lawson and Sherrie McCoy-Ward lived together in a Tampa neighborhood for almost a year. He was an unemployed musician, and she worked as an exotic dancer with her sister, Tina Jones. Ms. Jones became concerned when McCoy did not answer her telephone calls, so she went to her house just after midnight on Tuesday, October 31, 1995. When no one responded to her knock, she opened the door a crack and saw McCoy's foot; she immediately went to a public phone and called the police. (T.7:649-651).

A. The Investigation. The police investigation was led by Detective Michael Conigliaro of the Hillsborough County Sheriff's Office. He was dispatched around 2:00 a.m. on October 31st to a residence located on several acres in a Tampa suburb and met Tina Jones on arrival. (T.5:342-346).

There were no signs of forced entry, and the windows were all locked. (T.5:352, 372). The front door was obstructed by the body of Ms. McCoy; she was lying clothed on the floor in several pools of blood, and bloody hand prints and smears were on the front door. Across the room was the body of Lawson. Both bodies were in a state of decomposition. (T.5:352-357). Investigators retrieved shell casings and projectiles from the floor. A search of the residence revealed that no personal items seemed missing (a wallet and jewelry were in view on a coffee table in the living room). Two Rottweilers had been put away in an upstairs bedroom, and a substantial amount of hidden money and expensive musical equipment were found. (T.5:353-366).

McCoy had been repeatedly stabbed, yet police did not find a knife linked to the murder. Lawson had been shot, but no gun was found. (T.5:363-366). In the kitchen, it appeared as if the couple were interrupted preparing dinner. The police found a calendar with progressive hash marks; the last day crossed-off was October 26th. (T.5:361-363).

The police found little in the way of clues. A medical examiner testified at trial that the couple had died between 24 and 72 hours from the time of his arrival at the scene at 4:00 a.m. on October 31st. Lawson was shot three times in the trunk and the neck, and McCoy was shot once, then stabbed repeatedly in the neck area with a small knife. She also had defensive wounds to her hands. (T.5:387-412).

The investigation revealed that Lawson did not work, and both used and sold marijuana, while McCoy was employed at the Mons Venus. Forensic experts combed the residence, lifting latent fingerprints, and collecting hair, clothing, nail, blood, and fiber samples for examination. No evidence of value was obtained as a result of this collection. (T.6:429-458). At the conclusion of the crime scene investigation, police had no leads. However, a list of names and telephone numbers on a piece of paper was found in the kitchen. One name was "Joe", with a pager number. (T.5:355, 377-379). Police began contacting the names on the list.

The crime scene investigation, area canvas, and family interviews left police with no leads, no suspects, no clues, and no physical evidence. Police theorized that the perpetrator(s) was invited into the home, as there was no forced entry, the two dogs had been put away, and nothing of value seemed missing. Based upon Tina Jones' recollection that she had last spoken to her sister on Saturday, police believed the crimes were committed sometime on or after that day. (T.5:377, 383). The investigation was dormant until Sloane Martinez called the police three months later. (T.6:509; 7:585).

B. The Arrest. Sloane Amber Martinez was married to Joaquin Martinez for three years, and they had two children together. They began dating in February of 1992, and married in April. They separated after three years, and the divorce was finalized on June 20, 1995. She then went home to New York, but later returned to Brandon, Florida a

month later and moved into an apartment with her daughters. Sloane and Joaquin remained intimate and lived together after the divorce. Throughout the summer and early fall of 1995, they lived together intermittently. They separated again in October when Sloane learned that he had a girlfriend. (T.6:474-476). Sloane went to court in mid-October to obtain a restraining order (although they still slept together) and those documents were served on Joaquin on October 27th. (T.6:485). A week later, Sloane went to court and had the order vacated; they moved in together once again, and stayed together through Thanksgiving. (T.6:485-489).

In early November, Sloane believed that Joaquin began acting unusually, and seemed to have changed his appearance. (T.6:490). She helped him wash his car on one occasion, and heard him mumble about his involvement in a death of a drug dealer. (T.6:491). On another occasion, Sloane recalled that Joaquin called her late at night crying, saying that he had a nightmare, telling her about the blood, and asking her to move to Miami with him, and eventually to Spain. (T.6:496-499).

While married, Joaquin had worked for AT&T. He told Sloane that he helped a fellow he knew, Doug Lawson, get a job with the company. Sloane visited her husband at the job site, and learned that Joaquin and Lawson had become friendly through working together. (T.6:470-472). Sloane herself spoke with Lawson on a few occasions. Before January 27, 1996, Sloane did not know that Lawson and McCoy had been killed in

October of 1995. (T.6:770-772).

Joaquin promised to visit Sloane and his daughters on January 27th, but failed to show. Sloane became upset regarding Joaquin's unfulfilled promise when she learned that Joaquin was in Orlando with his new fiancé, Laura Babcock, celebrating her birthday. Sloane was very hurt, and testified that she began cleaning out her apartment. She found an old address book of Joaquin's and called a mutual friend, Janice Menendez. Janice Menendez asked Sloane if she knew that Doug Lawson and his girlfriend had been killed. Sloane testified that this news triggered a connection in her mind between Joaquin's rambling comments, telephone pages she had received from police, his changed appearance, and the deaths of Lawson and McCoy. She immediately called her sister regarding her suspicions, and her sister told her that she must call the police. (T.6:504-508).

Det. Conigliaro testified at the trial that the break in this case came on January 27, 1996 with this phone call from Sloane Martinez. During the three month investigation, police had called the various people listed on the note pad they found in Lawson's kitchen. (T.5:313). One name and number was a beeper in Mr. Martinez' name which Sloane had kept after their divorce. (T.6:491). The police had been paging this number, and Sloane had not returned the calls. (T. 6:510).

Det. Conigliaro testified that Sloane Martinez called the police on January 27th,

and he was dispatched to her home. Sloane told him about Joaquin and her suspicions regarding his involvement in the homicides. While Conigliaro was at the home, Sloane received a telephone call from her ex-husband; Sloane invited the detective to listen in on the conversation. (T.7:585-587). Detective Conigliaro told the jury he overheard Sloane telling Joaquin that a homicide detective had been paging her. The detective claimed that Joaquin told Sloane "that this is something that I explained to you before, and that I am going to get the death penalty for what I did." Sloane asked if the incident involved the Lawson case, and Joaquin said "no, I can't talk to you about it on the phone right now." (T.7:587, 588). During the conversation, Joaquin said that he would visit Sloane the next day to see his daughters. The detectives convinced Sloane to allow them to wire the house for audio and video recording, and persuaded Sloane to engage Joaquin in conversation the next day regarding the homicides. (T.6:514, 515; 7:590).

Mr. Martinez arrived the next day, January 28th, unaware the home had been wired for audio and video interception, and unaware that the police were in covert surveillance throughout the neighborhood. (T.6:516; 7:594). Joaquin spent an hour talking to his wife (and the eavesdropping police) while their two minor children were heard screaming, crying, and playing in the background.[1] Based upon what the police overheard from their

[1] Joaquin became curious when Sloane kept prodding him to talk about what he had done, and he became curious about the camcorder and telephones. (T.6:516).

surveillance positions, they arrested Mr. Martinez for the homicides when he exited the residence. (T.7:590-596).

C. Pre-trial. Mr. Martinez retained Tom Fox, Esquire. (R.24). Counsel filed a demand for discovery and moved for a statement of particulars, requesting, inter alia, the exact date and time of the offense. (R.28). A formal indictment was returned on February 14, 1996, charging Mr. Martinez with the premeditated murders of Doug Lawson and Sherrie McCoy-Ward, and one count of armed burglary with a battery. The indictment averred that the crime occurred between the 27th and 31st of October, 1995. (R.45-47).

A discovery conference was held on March 25th. The court granted the motion for particulars, and ordered the State to narrow the time-frame as best it could. (T.13:1389). The State promised that "counsel will have the full benefit of discovery and. . . [E]very bit of information that we have will be in Mr. Fox' hands." (T.13:1389). The State filed a Demand for Notice of Alibi in response to the demand for particulars, stating the crime occurred "between the hours of 12:00 a.m. on October 29, 1995, [and] 3:50 a.m. on October 31, 1995. . ." (S.R.2:4). This certified the crimes occurred after midnight on Saturday; the significance of this statement is pertinent, as the prosecution's theory at trial was that the crimes were committed on Friday afternoon.

Discovery disclosures revealed that the evidence against Mr. Martinez was limited.

He had been arrested based upon his ex-wife's statement attributing to him suspicious remarks and references the police overheard during the audio interception of the conversation in her home on January 28th. (R.22). That recording was to be the State's critical evidence at trial. The defense moved pre-trial to exclude that recording alleging that "the recording is to a large extent unintelligible and therefore incomplete and any transcript thereof is largely represented by inaudible portions and therefore rendering any transcript thereof incomplete." (R.65, 66). Indeed, the transcript contains the word "inaudible" over 450 times in its thirty-three pages.

The court heard from Ms. Martinez and Det. Conigliaro at the hearing on the motion to exclude the tape and transcript. Ms. Martinez established consent for the surreptitious recording. She testified that she reviewed the tape and assisted in the development of a transcript of that recording, in conjunction with the detective, the prosecutor, and the prosecutor's secretary. Ms. Martinez testified that, based upon her memory, the transcript was accurate in its depiction of the intercepted conversation. (T.13:1291-1299). Yet the prosecutor and Ms. Martinez conceded that between a quarter and one-third of the intercepted conversation was inaudible, and a significant part of the tape was about Joaquin's girlfriend, and screaming interruptions by the two children. (T.13:1299-1306, 1324).

The parties argued the tape's inadmissibility, and the proper use of the transcript

at trial. The Hon. Barbara Fleisher stated that she had listened to the tape herself, and although "I -- I tried to repeat some areas, but I could get very little, if anything, out of them." (T.13:1322). Given the inaudibility of the tape, the State concentrated its efforts on the use of the transcripts; the prosecutor argued "we find these transcripts -- transcripts to be critical to the State's case. Um, um, as you've heard from the, um, audio and video tapes that we have, it is excessively -- excessively hard to make anything out due to the, um, poor quality of these tapes." (T.13:1323). The inaudibility of the tape recording made the use of the transcript critical to the prosecution.

The court reconvened on July 1st and ruled that the tapes could be played for the jury with the enhanced use of headphones; the State also could utilize its transcript while the tape was being played, but the transcript would not be admitted into evidence. (T.13:1347-135).

The State certified in writing its intent to seek the death penalty. (R.52). Various defense motions were filed to oppose that request, directed to the constitutionality of the substantive and procedural means the State utilizes to effectuate a death sentence. (R.75-154). While arguing those motions on November 21, 1996, an interesting dialogue occurred regarding which aggravators the State intended to prove; this foreshadows an issue on this appeal. The prosecutor proffered, "there is an argument that a burglary was occurring here at the time he began to shoot these people and even assuming he was

allowed in with their consent and he knew them and they were glad to have him in there." The defense advised the court that there was no evidence remotely suggesting a burglary, notwithstanding thousand of pages of evidence and discovery. (T.13:1259). The defense reminded the court that there was "no evidence of forced entry, there is no evidence of anything pertaining to a burglary or robbery for that matter, nothing was taken, nothing demanded, no witnesses to these murders." (T.13:1260). The prosecutor agreed that there was nothing as far as a pecuniary gain aspect, and he conceded the State did not anticipate raising that issue. The prosecution's theory was that once the Defendant produced a gun and began shooting, "these victims the law presumes that consent has been withdrawn and at that point it becomes a burglary." (T.13:1260).

The trial was scheduled to commence on April 7, 1997. As late as the weekend before trial, the gist of the prosecution was to be the testimony of the ex-wife, the mostly inaudible tape, indirect circumstantial evidence, and jail-house felons willing to testify against Mr. Martinez. The State had no concrete theory of how or why the homicides were committed. That changed when the prosecutor announced Monday morning (April 7th) that he had met with two defense witnesses over the weekend.[2]

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[2] The events which occurred on April 7th regarding that meeting were elicited in a hearing conducted in the lower court on July 13, 1998. This Court granted the Defendant's motion for a remand for an evidentiary hearing to recreate a record as to what happened on Monday April 7th which resulted in the two day continuance of the trial. (S.R.1:1). (See Order of March 11, 1998).

D. The April 7th Continuance. Joaquin Martinez and Laura Babcock were engaged to be married and were to move in together the last weekend of October, 1995. Ms. Babcock remained his fiancé after the arrest and was deposed by the State as a listed defense witness. (S.R.2:11-23). The prosecutor, Nicholas Cox, testified at the reconstruction hearing (re-creating the April 7th continuance request) that another witness, Eden Dominick, called him on the Saturday before trial to recommend that he speak with Laura Babcock "to straighten some things out in her testimony." (S.R.2:36). Cox and an investigator immediately visited with Ms. Dominick and Ms. Babcock, and interviewed both women. They learned that both women had substantially different testimony to offer the prosecution; both women disclosed highly incriminating observations made of Mr. Martinez just after the homicides, testimony that neither women had offered in various police interviews or depositions. On the eve of trial, the two defense witness became important prosecution witnesses. (S.R.2:41-59).

Cox testified that after the interview, he left a note for defense counsel that weekend at his residence advising "about the change of Ms. Babcock's testimony." (S.R.2:23). The lawyers went into chambers Monday morning and Cox "put on the record just how about the situation with Ms. Babcock -- the Court -- I think Mr. Fox explained to the Court that he wanted to have another chance to depose Ms. Babcock because she had already been deposed by me, but it was obviously very different

testimony." (S.R.2:23). The case was reset to commence April 9th (Wednesday) to allow the defense to depose Ms. Babcock.

The prosecutor conceded at the reconstruction hearing that he did not recall advising the defense on Monday morning about Ms. Dominick's new testimony. (S.R.2:59).[3] Cox did admit that the new testimony offered by Eden Dominick "was important . . . it became a lot more relevant to the issues then" as she offered independent and substantial corroboration of two incriminating observations that Laura Babcock was now prepared to testify to at trial.[4] (S.R.2:41,61).

Defense counsel also testified at the reconstruction hearing. Mr. Fox and penalty phase attorney Robert Fraser clearly remembered they were only told of Laura Babcock's new recollection. The defense was not told that Eden Dominick had been interviewed and was changing her testimony regarding previously unstated observations which

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[3] It is highly unlikely that he did. The defense only asked to depose Ms. Dominick; Cox admitted that he would not have opposed a request to depose Dominick had the defense asked; they did not, as they were not aware of her new testimony. Also, the defense told the jury in opening statement that Ms. Dominick saw Mr. Martinez on October 27th and suggested that her testimony would contradict Laura Babcock. (T.5:337). He obviously was unaware of Ms. Dominick's new testimony.

[4] Babcock told the prosecutor that on that Saturday evening of October 27th, Joaquin Martinez came home with a swollen lip, as if he had been in a fight, and a briefcase full of marijuana. Both factors were critical to the State's theory of prosecution. (S.R.2:61).

incriminated the Defendant and corroborated the testimony of Laura Babcock. (S.R.2:69-84). Defense counsel also testified that the new testimony offered by Ms. Dominick at the trial was highly detrimental to their case. (S.R.2:79).

E. The Trial. Trial commenced before the Honorable J. Rogers Padgett on Wednesday, April 9, 1997. (R.16;T.3:1-139) The theory of prosecution laid out in opening statement was that Lawson and McCoy were killed for money and marijuana. (T.5:314). The State had no physical evidence tying the Defendant to the crime. Rather, it relied on the testimony of his ex-wife, his ex-fiancé and her best friend, jailhouse convicts, and a "difficult to hear . . . very inaudible" audio-tape where it is alleged that Mr. Martinez confessed to the crime. (T.5:314-335).

The prosecution proceeded chronologically. Detective Conigliaro described the crime scene: the absence of a forced entry, no evidence of a theft, the failure to find any murder weapon, and the absence of other clues. Time of death was difficult to establish. The medical examiner believed the decomposition of the bodies suggested they died within 24 to 72 hours before 4:00 a.m. Tuesday, October 31st. The police interviewed McCoy's sister, Tina Jones; because Ms. Jones told the police that she had last seen her sister on Saturday (October 28th), time of death was established to be after midnight on

October 29th.[5] The medical examiner confirmed that Lawson had been shot several times, and McCoy had been repeatedly stabbed to death. (T.5:387-412). Crime scene technicians also confirmed that no physical evidence was recovered from the crime scene linking Mr. Martinez to the homicides. (T.5:429-458). Conigliaro also told the jury the investigation floundered for months until Sloane Martinez called on January 27, 1996. (T.6:585).

F. Sloane Martinez' Trial Testimony. Sloane and Joaquin were divorced in June of 1995, but they lived together until October, when Sloane learned he had a girlfriend and in anger, obtained a restraining order. (T.6:474). Nevertheless, she invited him over on Friday, October 27th, to visit his daughters. Sloane testified that he spent time with his daughters, they had sexual intercourse, and then he showered and left around 4:00 p.m. (T.6:476-478). He said he was going to his brothers, Ronnie Sabando, as they had a big business deal that would take him out of debt. (T.6:479). Afterwards, Sloane realized that the restraining order had not yet been served. She drove over to Sabando's

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[5] This time of death was set out in the State's answer to the defense demand for a statement of particulars. (S.R.2:4). The prosecutor asked Conigliaro at trial if Ms. Jones was actually unsure of when she had last seen her sister alive. (T.5:386). The State knew -- and had not told the defense -- that Tina Jones had told the prosecutor, and later would testify at the trial, that she was mistaken; that she had actually last seen her sister alive on Friday, not Saturday. (T.7:651). The non-disclosure by the prosecution, and Ms. Jones' change in testimony, was critical. See Point I, infra.

house to see if he was there; if so, she would call the police to have the papers served. She saw Joaquin around 6:00 p.m. in front of his brother's house. He and his brother were cleaning his car with a garden hose. (T.6:480-482). Sloane told the jury that Joaquin appeared to be wearing his brother's clothing. She returned home, got the injunction papers, and called the police. (T.6:484). Deputy Richard Shannon of the Hillsborough County Sheriff's Office later confirmed this testimony; he testified that he met Sloane Martinez around 6:30 p.m. on October 27th, and served the papers on Joaquin Martinez at 6:50 p.m.[6] (T.7:640-645).

Sloane testified that she met Joaquin again on November 2nd in court to remove the injunction. She believed that Joaquin had lightened and changed his hair, grew a goatee and his lip seemed swollen. (T.6:488- 490). She testified that sometime that November Joaquin once "mumbled about doing something really bad, that he had crossed over a line, that he had killed someone, and that he was afraid." Sloane asked who, and "he changed the story. . . it was just a drug dealer. . . it wasn't suppose to be that way or go that way." (T.6:492). He never said who he had killed; only that he was afraid and in danger. (T.6:491). Sloane connected these statements to Joaquin once asking her to

[6] However, Deputy Shannon testified that there appeared nothing unusual about Mr. Martinez in the course of the interaction. (T.7:648). This is in contrast to subsequent testimony by Ms. Martinez, Eden Dominick and Laura Babcock about a swollen lip, and that Joaquin looked like if he had been in a fight.

help him clean his car that Thanksgiving, saying "that would link him, DNA testing and things like that." (T.6:492). She helped him clean the car, and threw away the floor mats, although she could only recall seeing one small brown spot on the passenger side of the car. (T.6:492).

They separated again after Thanksgiving; he said "it wasn't safe". In reality, he was living with his fiancé, Laura Babcock, and lying to Sloane about that relationship. Sloane testified he told her about pressure he was under, and once he called after a nightmare and told her it was about "the blood". (T.6:498-500). Yet the only reference he made to Sloane concerning what happened was, "it was a friend. . . (T)hat something went wrong; it wasn't suppose to be that way, and he doesn't know how it happened."[7] (T.6: 499). Sloane also related to the jury other incidents which led to her to connect his comments to the Lawson-McCoy homicides. They were together once in January and Sloane saw a flyer posted by police alerting the public to the crime, and seeking information. Sloane said Joaquin put his hand over the pamphlet and told her "you don't need to read that garbage." (T.6:501). Another time, he called while drunk to ask if she ever got "rid of that thing [trunk mat] for DNA testing?" (T.6:503). She had not; it was later tested by police with negative results for DNA matter.

[7] It is assumed this reference was to Doug Lawson; surprisingly, Mr. Martinez never mentioned a second victim, or a female.

These incidents and comments culminated on January 27,1996 with a phone call between Janice Menendez and Sloane. When Ms. Menendez, an employee at AT&T with Lawson and Mr. Martinez, mentioned to Sloane that Lawson and his girlfriend had been killed, Ms. Menendez heard Sloane scream into the phone, "Joe did it." (T.7:625-630). This conversation resulted in Sloane calling Det. Conigliaro, which led to the audio-video surveillance of the Joaquin-Sloane meeting on January 28th, and the ultimate arrest and prosecution.

The key evidence at trial was the intercepted conversation of January 28th. The audio-video tape was admitted into evidence, although the Court and the prosecutor agreed that "the tape is mostly inaudible. . . it is really difficult to hear." (T.7:520, 521). To bolster the tape, a thirty-three page transcript was submitted as a court exhibit which the jury was allowed to read as the inaudible tape was played.[8] (R.215-247 T.6:521). As the tape was played, the court reporter was directed to transcribe what she could decipher. (T.7:523-546). This procedure illustrates the legal issue created: the audible portions of the tape contain less than 100 transcribed remarks by the Defendant, and no portion of the tape audible to the court reporter directly incriminated Mr. Martinez.

[8] Ms. Martinez established the predicate for the transcript; she testified that the prosecutor and his secretary, and she and the detective created the transcript while listening to the tape, in partial reliance upon their earlier recollection. (T.6:520-527). The defense objected to the use of the transcript and its accuracy.

(T.7:527-546). The transcript submitted to the jury, however, attributed over 300 statements to Mr. Martinez, including a direct admission of responsibility in a crime, (R.221), a statement that he would be going to hell, or would get the chair, (R.222, 245), that there was no witness, (R.227), and that he needed Sloane to be an alibi witness during a certain time frame. (R.232, 237). We refer to Mr. Martinez' admission to his responsibility in a crime, because of vagaries in the transcript. Indeed, Joaquin and Sloane may not have been talking in the tape about the same incident. When she asked him about Doug Lawson, Mr. Martinez simply said, "Doug Lawson was a big drug dealer. Dealt a lot of things. . . he was coverin' up by workin' for AT&T. He um. . . his main thing was pot and followed by coke. . . followed by ecstasy. Could do for em . . .?" (R.217). As Sloane directed her comments to Joaquin regarding Lawson in the tape, Joaquin was heard to say, "I don't know, if we're talkin' about the same case here or not." (R.218). None of these incriminating references were audible to the jury. Yet the jury was privy to these remarks through the transcript. See Point II, infra.

The jury's access to this transcript was critical to the State's prosecution. What is critical to this appeal, however, is the transcript was not introduced into evidence. (T.7:634) It was a collaborative effort of the detective, the prosecutor, his secretary, and Sloane Martinez. Sloane did elucidate for the jury certain portions of the transcript. She opined that Mr. Martinez' reference to "he wanted to switch, he wanted to trade",

(R.221), was "whatever the deal was, merchandise or dope, I didn't exactly know." (T.6:548). When Joaquin said in the tape, "he threatened me", (R.223), Sloane said Joaquin meant Doug Lawson; that Lawson "was going to physically hurt him." (T.6:548). Also, the prosecution elicited from Sloane its new theory: that the homicide occurred on October 27th (Friday), as Joaquin asked her (in the transcript, not the tape) to be his alibi until 6:00 p.m. on that day; this new theory was a full thirty hours before the time alleged in the State's answer to the Defendant's Demand for Particulars. (T.6:551; S.R.23:4).

The cross-examination of Sloane elicited two facts central to the defense. First, she and Joaquin had sex around 4:00 p.m. on Friday, and he was served with legal papers at 6:55 p.m. Second, while married, Joaquin would often lie to her about where he was and with whom he was meeting. Because of these common deceptions, Sloane still was not sure whether Joaquin ever killed anyone; she testified:

> I didn't know what killings and I wasn't sure. When he talked about it, he wasn't specific as to who he killed. So I had no idea. I thought he could be telling a story. I wasn't sure. He gave bits and pieces. It was like a puzzle that was missing a lot of pieces. I wasn't sure.

(T.7:579, 580). So ended the testimony of Sloane Martinez.

Following the introduction of the tape, Detective Conigliaro was re-called to continue the thread of his investigation after the arrest. He confirmed that the Defendant and Lawson had once worked together at AT&T, and that Sloane turned down a reward for her information. To negate an alibi, he testified that it was five miles from the Lawson

house to Ms. Martinez', and Ronnie Sabando lived a mile away. (T.7:597-605). He also did a jail sweep:

> Once a defendant is in jail, I'll go through there and pull the defendant out of that particular floor and put him in another location, with cooperation of the commander of the jail, and I'll go in there with a team of detectives. We'll actually start at the beginning of the cells and go all the way down and interview every single one of them and the premise is this, is 'tell us what you know about the case.'

(T.7:589). This odious practice foreshadows the inmate testimony which followed.

Cross-examination of the detective revealed the reward was contingent upon arrest and conviction; that Sloane gave police material from the Defendant's car that he had asked her to destroy, yet scientific analysis revealed the absence of any blood on that material; and finally, the transcript is "not the result of one person's independent recollection but rather a cooperative effort." (T.7:6-609). The State must have felt this examination undid its case, as on re-direct, over a defense objection, (T.7:612), the following occurred:

> PROSECUTOR: Was there any doubt in your mind based upon what he [Mr. Martinez] said there [in the January 28 tape] that he was responsible for the murder of Doug Lawson?
> DETECTIVE: **There was no doubt he did it.**

(T.7:613).

After the arrest, and three months after the homicide, a search warrant was issued for Mr. Martinez' car. (R.31-40). No direct evidence was recovered; a Hemastix test to

discern the presence of blood (of unknown time or origin) revealed traces on the steering wheel, beneath the emergency brake, and around the center console. The trunk mat received from Sloane tested negative for blood. (T.7:615-621).

G. Time Frames. The State's Demand for Notice of Alibi alleged that the crime was committed after midnight on Saturday. This claim was based upon Ms. Jones' recollection that she had last seen her sister on Saturday. Ms. Jones now said she had been hysterical when she said that; that she had actually last seen her sister on Friday. (T.7:651). This revelation was a surprise to the defense; this cross-examination occurred:

> Q: Ms. McCoy, you did tell the police on the night that you discovered your sister that you last talked to her on the 28th; is that correct?
> A: Yes.
> Q: Now, you subsequently came to the belief that you were incorrect?
> A: Yes.
> Q: Okay. Can you tell about when that occurred?
> A: The first time that I thought that I was incorrect was several months ago, and this past week on Monday it came to be true that I was incorrect.
> Q: Okay. So you were finally -- you finally decided in your mind that you were incorrect for sure this week?
> A: Monday.
>
> * * * *
>
> Q: You are somewhat familiar with the evidence in this case?
> A: Yes.
> Q: Okay. And you are somewhat familiar as to why you are being called about the time of death?
> A. Yes.
> Q: Okay. And so it was only this Monday that you became convinced you were incorrect from what you previously said?
> A: In my own mind. Everybody else knew it wasn't.

(T.7:654, 655).

The new time of death was a day and half earlier than previously stated by the State in its alibi demand.[9] Telephone logs were introduced which also narrow the time-frame. Records show that Ms. McCoy's mother last spoke with her on Friday afternoon. (T.7:659). The last telephone call from the Lawson residence was at 5:01 p.m. on Friday to Ms. McCoy's mother. (T.7:661). This further narrowed the window of opportunity; Ms. McCoy was alive at 5:01 p.m.; Sloane Martinez saw Joaquin at his brother's house at 6:00 p.m. This one hour of opportunity was later closed.

H. Jail House Snitches. The next phase in the trial was the parade of convicts dredged up by Det. Conigliaro in his jail sweep. Five felons stepped to the plate. The first was Mark Richey. In jail on a felony charge in early 1996, he testified that he had asked the Defendant if he did it, and Mr. Martinez said yes. No further elaboration was set forth. Richey, a young man with five felony convictions, swore he received no promises nor rewards for his testimony. He was subsequently placed on probation on a plea to the court. (T.8:677-687).

Another inmate, Neil Ebling, offered a different and confusing story. Ebling

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[9] At the reconstruction hearing on July 13, 1998, defense counsel tried to explore this discovery violation. The lower court precluded the inquiry, but the witnesses all agreed that the State failed to advise defense counsel prior to trial that Ms. Jones had changed her testimony regarding the time of death. (S.R.2:15-33). This Court denied a request for further inquiry, and suggested the matter appropriate for direct appeal. See Order of September 23, 1998. We have done so in Point I, infra.

received a three year sentence, reduced from a six year offer, when he agreed to be a witness against Mr. Martinez. (T.8:688:696). Yet his version contradicted the State's theory. Ebling claimed that Mr. Martinez told him he was having an affair with Sherrie McCoy (T.8:699); that he went to see her, accompanied by a girl named Maria and a fellow named Juan. When they arrived at the house, Lawson was home, a fight broke out between Maria and Sherrie with a knife, and Joaquin just started shooting and blacked out. (T.8:689-692). This spin by Ebling was quite a contrast to the State's theory of a deal gone bad between the Defendant and Lawson.

The next two witnesses, Larry Merritt and Gerrard Jones, testified to a purported scheme they had entered with Mr. Martinez to falsely accuse another man of the crime. Merritt, a 22 year old man with six prior felony convictions serving a life sentence, said he was offered a lawyer to handle his appeal if he would testify that a drug dealer from the street, Allie Bissett, had told him that he had done the homicides. (T.8:700-705). Merritt said that Gerrard Jones was his testimony "coach";[10] Merritt gave a defense deposition on Martinez' behalf, but made several mistakes. When an arrest warrant was issued for Bissett, Merrit advised Jones to admit to the prosecutor his role in the fabrication, and as a result they both became state witnesses. (T.8:705-715). Merritt also

[10] Merritt even produced "coach notes" from Jones. See State's Exhibit 39 (R.14-117).

admitted that during the trial, he and all the other inmates/witnesses called by both the State and defense were together in a holding cell, talking about the case and their testimony. (T.8:715-717). Merritt gave four statements in all; he said two were lies and two were true. Merritt said he received no deals or promises for his testimony, but he also conceded that he was a liar, and he would lie if it was convenient. (T.8:722).

Gerrard Jones confirmed his role in what he called the Defendant's jailhouse conspiracy to falsely implicate Allie Bissett for the homicides. He, too, claimed he received no promises from the State for his testimony; he had 15 prior convictions and was serving a 30 year term. (T.8:723-725). Jones said Mr. Martinez needed him to "coach" Merritt in implicating Bissett; he agreed to do so for $400.00. (T.8:727-732).[11] He later changed his mind and contacted the prosecutor.[12]

Finally, inmate Kevin Hall told of his role in the Bissett scheme. A five time felon, he had agreed to testify on behalf of Mr. Martinez, but changed his mind as well. (T.9:827-831). Hall did concede that the Defendant never confessed to him; he also

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[11] The State introduced a Western Union payment to Mr. Jones' sister sent from Joaquin Martinez' father. (T.R.14:48-54). Mr. Martinez, Sr. testified that his son asked him to send this money for paralegal work Jones had done for Joaquin. (T.9:892). Jones admitted that he was the jail paralegal. (T.7:738).

[12] Jones has recanted twice. He sent letters to the prosecutor after the trial, demanding a reward for his testimony, and threatening to recant. He also filed letters recanting his testimony, which were submitted to this Court in October and November of 1998.

admitted that inmates have access to each others case files. (T.9:837).

The last piece in the State's mosaic was testimony from the two women who, until the weekend before trial, were defense witnesses. This metamorphosis requires some elaboration.

I. The Eve of Trial Recantations. Laura and Joaquin planned to marry and were about to move in together when he began having financial problems. (T.8:768-770). Eden Dominick and Laura Babcock were best friends. Eden was having a Halloween party on October 28th, and Joaquin and Laura were invited. The night before, Friday, Eden recalled Joaquin came over to her house on the beach around 8:00 p.m. (T.8:771). At this point, her trial testimony and her police statements diverge.

Eden Dominick was interviewed by the police on February 1, 1996, just days after the arrest. Throughout two paragraphs of narrative summary, Ms. Dominick did not mention Joaquin visiting on October 27th; in fact, she offered no incriminating evidence at all.[13] (S.R.2:42-46). Indeed, defense counsel listed her as a witness as late as April 8, the day before trial. (TS.R.2:11).

Yet at trial, Eden told the jury that when Joaquin arrived on October 27th at 8:00

[13] Eden testified that she told the police that Joaquin had been to her apartment on October 27. (T.8:777). If that is so, that statement did not appear in the police reports, which were read into the record at the reconstruction hearing. (S.R.2:42-46).

p.m., he looked like if he'd been in a fight. (T.8:780). He was upset and quiet, claimed he was intoxicated, and not wanting to drive home, asked Eden's husband Tom for a ride (leaving his car there). Eden also recalled that Joaquin had a briefcase he wanted to leave with her, but she insisted he take it with him. (T.8:771-774). She said two days later he returned with Leah Thomas, Laura's step-sister, to get his car. On cross, Eden did not recall ever telling the police any of this information. (T.8:778). In fact, she never told anyone until telling the prosecutor the weekend before trial. (T.8:782).

The weight of Ms. Dominick's new evidence crystallized with the testimony of Laura Babcock. She and Joaquin were engaged in 1995, and she remained his girlfriend after his arrest and until the time of trial. She was a listed defense witness, and was deposed by the State. (T.8:784-789). She told the jury that the Saturday before trial, she had Eden call the prosecutor to provide a different version about October 27, 1995. (T.8:790).

Ms. Babcock testified that on Friday morning, October 27th, Joaquin and she were packing up to move in together. He left around 10:00 a.m. and said he was going to see his brother and his friend 'Michael' who "owed him some money." (T.8:791). Laura knew a Michael, and had been to his house once. Joaquin was gone all day. That night, around 8:00 p.m., Eden called her to say Joaquin was with her. Eden called her again after Joaquin left and told Laura that Joaquin had wanted to leave a briefcase at her

apartment, but Eden refused. Laura told the jury that when Joaquin arrived home, they argued over the briefcase. He eventually opened it; there was a large plastic bag with marijuana inside, and Ms. Babcock testified that Joaquin told her "he grabbed it off the table from 'Michael's' house when he walked out the door, that he didn't have the money he owed him." (T.8:793-796). Laura also recalled that Joaquin was wearing his brother's clothes and his knuckles were scraped, and he told her that he had been in a fight with 'Michael'. (T.8:798).

Ms. Babcock explained why she was coming forward with this evidence the weekend before trial. In January of 1996, she saw a picture of the Lawson residence on television; she immediately recognized it as 'Michael's' house, and realized that 'Michael' was really Doug Lawson. (T.8:797). Although she had made this connection 16 months ago, she did not come forward as a State's witness until the weekend before trial. (T.8:805). The explanation for this change of heart can be gleaned from cross-examination. Laura was told recently that Joaquin and her step-sister may have slept together, and that Joaquin had also been lying to her about his relationship with his ex-wife. (T.8:810-813). The following colloquy occurred with Laura:

> Q: And it's a fact that Saturday, April 5, 1997, was the first time after all this time that you mentioned anything about Joe's clothing, Joe having been in a fight, Joe having marijuana, Joe being upset, Joe having marks on him, Joe having taken you to "Michael's" house, and all these other things you testified to today?
> A: (Nodding head affirmatively.)

Q: And that was the first time after all this time, after you found out about Sloane and Leah; is that correct?
A. Yes, sir.

(T.8:814).

The final prosecution witness summarized the State's physical evidence. FDLE Criminalist Theodore Yeshin testified as a DNA expert. He analyzed all the physical evidence in the case in conjunction with blood samples from Allie Bissett, the two victims, and Mr. Martinez. (T.9:838-843). He examined fingernail scrapings, hair samples, cigarette butts and car parts. He found no evidence of blood on any car part submitted for his analysis, (T.9:859), and he found nothing on the hundreds of samples submitted to him linking Joaquin Martinez to the crime. (T.8:860). The State rested on this exculpatory testimony. (T.9:861).

The defense called several witnesses to establish an alibi and to contradict the State's jailhouse testimony. The Defendant's father, Joaquin Martinez, Sr., testified that his son came to Miami around midnight on October 30th for an anticipated visit, and stayed until November 2nd. (T.9:888-891). He admitted sending money to a family member of a man (Gerrard Jones) who claimed to know who was responsible for the homicides. (T.9:897). Another witness testified that he cleaned Mr. Martinez' car that week and found no blood stains. (T.9:864-869). A third witness, John McClamma, was a neighbor of Doug Lawson; he testified that he told the police that he saw a silver sports

car leave the Lawson home on Monday afternoon, October 30th, driving at a high rate of speed, and he saw the car side swipe the front gate. (T.9:871-874).

Regarding the events on October 27-29, the defense called three witnesses. The most critical was the Defendant's brother, as he established an alibi for Mr. Martinez.

Ronnie Sabando, Joaquin's half-brother, lives in Brandon. He left work around 4:00 p.m. on Friday, October 27th, and was mowing his lawn around 5:00 p.m. when Joaquin pulled up to visit. Ronnie said Joaquin and he talked outside until a deputy arrived and served legal papers on Joaquin. (T.9:875-877). He said they did not wash the car together, Joaquin did not look like he had been in a fight, and he did not give his brother clothes to wear. (T.9:878-879).

This testimony was critical. Sherrie McCoy was alive at 5:01; a telephone call was made to her mother from her house at that time. Mr. Sabando established that Joaquin with him from 5:00 until the deputy served him at 6:50 p.m. Even Sloane saw Joaquin at Ronnie's house at 6:00 p.m. The hour of opportunity for Joaquin to commit the crimes was now closed. A private investigator was also called as a defense witness to disprove the State's theory. Karen Kaiser, a private investigator, testified that the Lawson residence and Sabando residence are 10 miles and 23 minutes apart. (T.9:901-910). The only time period when Joaquin was alone was from 4:00 until 5:00 -- and Sherrie McCoy was still alive at 5:01. A clear alibi was established by Sabando, Sloane Martinez, and

telephone records.

The last fact witness concerning that weekend was Leah Thomas. Her step-sister, Laura Babcock, was moving in with Joaquin, and she offered to help. She spent that weekend with Joaquin and Laura. She drove Joaquin to pick up his car at Eden Dominick's house Sunday evening, and testified that he had no injuries to his face, had not dyed his hair, had no scrapes to his knuckles, but she did recall a small superficial cut on his hand like one would get from packing and moving, and they did not sleep together. (T.9:912-919).

The defense also called four inmates to enlighten the jury about jailhouse snitches. Roger Wallace confirmed that inmates have access to each others files. (T.9:923-925). Another inmate, Humberto Garcia, testified that he knew Gerrard Jones and Larry Merritt set Joaquin up so they could become state witnesses. (T.9:926-932). Richard Wallace testified that he was approached by Gerrard Jones and told that Jones could get him a sentence reduction if he agreed to become a State witness against Mr. Martinez. He declined the offer. (T.9:938-946). Finally, Jose Castell testified that he went to Gerrard Jones to get legal help; however, when he heard Jones say that he was working with Mr. Martinez, and he and Merritt were going to use what he learned and become witnesses against Martinez to get a sentence reduction, he decided not to ask Jones for help.

(T.10:955-960).

The defense rested on this testimony. A brief charge conference was held, with little conversation of record. (T.9:945). No defense objections were lodged before or after the instructions. (T.10:952, 1049). This, too, is problematic. The State conceded in its closing argument that the defense was "he didn't do it", and he was elsewhere at the time. (T.10:974). The State's closing argument included prejudicial attacks on the Defendant, false misrepresentations concerning the evidence to establish motive, and a change in the time of death to avoid the alibi evidence, issues we address in Point III of the Argument. The defense argued alibi as well: that Joaquin left Sloane at 4:00 p.m., and was at his brother's before 5:00 p.m. and until served by the deputy at 6:50 p.m. Defense counsel argued that Ms. McCoy was alive at 5:01 p.m., so Joaquin had no opportunity to commit the crimes. (T.10:977-987). Yet for some unexplicable reason, no alibi instruction was requested or given by the trial court. (R.2:199-224; T.10:1025-1049). This oversight by all the parties left the jury uninstructed on the low burden a defendant must carry to establish the defense of alibi.

Mr. Martinez was convicted as charged on April 15th. (R.225-227). The penalty phase commenced the following morning. The State rested without calling any witnesses. (T.11:1071). The defense presented six penalty phase witnesses.

A custodian of records from the county jail established that Mr. Martinez had been

incarcerated for sixteen months without a single disciplinary report. (T.11:1072-1076). Joaquin's mother testified that he is an obedient, loving son who has helped her care for her husband, who is legally blind. (T.11:1078-1083). A teacher at the jail testified that Mr. Martinez is intelligent, is enrolled in GED classes, and attends school regularly. (T.11:1085-1087). Laura Babcock retook the stand to testify that Joaquin helped her raise her child and that he is a wonderful father and provider. (T.11:1093-1096). Sloane Martinez, Joaquin's ex-wife, also took the stand to plead for his life. She confirmed that he is a good provider for their family, a helpful husband and son to his blind father and her blind mother. (T.11:1100-1102). She also related how Joaquin's easy manner changed in 1994; they were involved in a car accident, where one person died and another was crippled. Joaquin became depressed and needed professional counseling. (T.11:1102-1105). Sloane recalled that Joaquin began drinking, was often disoriented and lost interest in his family. (T.11:1105, 1106).

The last witness was a clinical forensic psychologist, Dr. Michael Gamashe, who was declared an expert without State objection. He testified to his various psychological examinations of the Defendant, and offered the opinion that Joaquin was not mentally ill, did not suffer from any disturbances which would need treatment, would not need extraordinary care while incarcerated, and was a below-average risk for disciplinary problems. (T.11:1110-1119). He tested remorseful, pathetic, and with a close loving

family, posed no future risk while in prison. (T.11:1132, 33).

The parties argued the jury instructions in the penalty phase. Defense objections to the capital HAC aggravator were overruled. (T.11:1149). More interesting was the argument objecting to "pecuniary gain". As the only evidence on the issue was Mr. Martinez either went to Lawson's to collect a debt, or to arrange a business deal, and may have grabbed a bag of pot on leaving, the Court ruled "pecuniary gain" unavailable as an aggravator. Indeed, the court remarked, "Okay, I'm going to take it out. I think we'll be asking the jury to speculate on what the reasons for this killing was. I think its [pecuniary gain] a stretch. So I'll take it out." (T.11:1053).

Although it called no witnesses, the State argued strenuously for death, calling Mr. Martinez "a butcher" who deserved to die. (T.11:1154). It argued the murders were heinous and cruel, were committed during a burglary, and each killing aggravated the other under the law. The jury was instructed on these three aggravators, as well as the mitigating circumstances elicited by the defense. (T.11:1182-1189). The jury posed one question during deliberations; it asked the Court for a definition of "wicked". (R.243). The parties agreed on the dictionary definition: "vicious and depraved". (T.11:1190). That afternoon, the jury voted for a life recommendation for the murder of Mr. Lawson, and by a vote of 9 to 3, death for the murder of Ms. McCoy. (R.244, 245; T.11:1192).

Memoranda were submitted by each party regarding the issue of sentencing and

preserving the issues raised at trial. (R.250-267; 286-291). An allocution hearing was held on May 19, 1997 to allow the families to be heard. (T.12:1200-1214). On May 27th, the Court denied the Defendant's motion for a new trial, and also declined to accept the (first) recantation by Gerrard Jones as grounds to overturn the verdict. (R.12:1219-1244).

The Court filed its Sentencing Order on May 27, 1997. (R.331). It found three aggravating factors: (1) two contemporaneous first degree murder convictions; (2) the contemporaneous conviction of burglary, and (3) the capital felony was heinous, atrocious or cruel. (R.331, 332). The court found that the defense established nine mitigating factors. (R.334-336). Nevertheless, the Court accepted the jury recommendation and imposed the death penalty for the murder of Ms. McCoy. (R.336). This appeal follows.

SUMMARY OF THE ARGUMENTS

The trial of Joaquin Martinez was fundamentally flawed. The prosecution, the defense and the trial judge each contributed to the lack of confidence which permeates the verdicts in this case.

I. The ability of Mr. Martinez to present a cognizable defense to the jury was eviscerated by misconduct and omissions. The defense was alibi, and witnesses were called to prove that Mr. Martinez could not have been culpable. The State thwarted this defense by (1) failing to advise the defense pre-trial that its witness on time of death had changed her testimony; and (2) changing (twice) its time of death theory to avoid the

evidence of alibi. Defense counsel contributed to the crippling of the defense by failing to request a Richardson hearing, and failing to object to the State's two new times of death after having secured a time/date certain in a statement of particulars. Finally, and most fundamentally, both parties and the trial court completely overlooked the jury's need to be instructed on the burden of proof for the affirmative defense of alibi -- especially where both parties argued alibi in summation.

II. The critical piece of evidence against the Defendant was a surreptitiously recorded audio-video tape wherein Mr. Martinez is alleged to have admitted his guilt. This tape was the centerpiece of the prosecution, as no physical evidence nor eye witnesses linked him to the crimes. Because the tape was virtually inaudible, the prosecutor, his secretary, the police and an ex-wife cumulatively prepared a thirty-three page version of what they believed was said on the tape. It was error to furnish this transcript to the jury, over a defense objection, when the transcript -- which was not introduced into evidence -- contained significant incriminating remarks which were not audible in the admitted tape. This error as compounded by the absence of the standard instruction to the jury that the words in the transcript were not to be considered in deliberations unless also heard on the tape.

III. The verdicts were tainted by inflammatory prosecutorial misconduct. Over defense objections, the State attacked the character of Mr. Martinez, introduced autopsy

photos deemed gruesome by the judge which were also irrelevant to any material trial issue, and introduced testimony (and argued in summation) that the lead detective and the consulting assistant State attorney at the crime scene had no doubt about Mr. Martinez' guilt, and knowingly argued a false premise to establish a motive for the homicides.

IV. The State's theory was that Mr. Martinez, while an invited guest in the victim's residence, began a fight which led to the homicides. The State charged that his committing the homicides, in and of itself, resulted in the additional crime of burglary. But this Court held in Miller v. State, 713 So.2d. 1008 (Fla. 1998), that something more than a guest committing a crime is necessary to establish the independent crime of burglary. Otherwise, a party guest slapping the face of a rude host commits not only the misdemeanor of battery, but the life felony of burglary.

V. Two defense witnesses notified the prosecutor the weekend before trial that they had highly incriminating information about Mr. Martinez' conduct the day of the homicides. The prosecutor alerted the defense concerning one, and failed to disclose the second. This witness, Eden Dominick, surprised the defense at trial in violation of the rules of discovery. Notwithstanding the absence of an objection, fundamental error was shown on this record.

VI. The Sixth and Fourteenth Amendments to the United States Constitution

and the Florida Constitution ensure effective assistance of counsel. This Court has carved out an exception to the general rule that this issue is only cognizable collaterally - when apparent on the face of the record. The inventory of counsel's errors are both voluminous and individually egregious: he argued and proved an alibi, but did not request an alibi instruction; he argued and proved that the transcript should not be admitted, but did not request an instruction to the jury which limited its use; he failed to object to numerous discovery violations which changed the face of the trial; and he allowed the prosecutor to falsely present to the jury a motive Mr. Martinez had to commit the crime, knowing that the prosecutor was misconstruing and falsely representing evidence. This Court should acknowledge the ineffective assistance of counsel on this record, and set the verdicts and sentences aside.

VII. Florida's capital sentencing scheme maintains components which the Defendant contends fall below constitutional standards. It allows imposition of death by a bare majority vote, by an unguided jury not required to make written findings, and its weighing process creates a presumption in favor of death, all in violation of the United States and Florida Constitutions.

VIII. The penalty phase was encumbered by errors regarding the inappropriate application of two aggravating circumstances. The use of the burglary conviction to invoke the "in the commission of a felony" circumstance relied on a legal fiction, see

Point IV, and was erroneous. Application of the HAC circumstance was also erroneous under the facts of this case.

IX. The proportionality review this Court must undertake should result in a vacating of the death sentence. Because the facts surrounding this case remain in doubt, where the homicides may have been a debt collection gone bad, or an escalating mutual fight, and substantial mitigation was undisputedly shown, death is disproportionate.

ARGUMENT

I.

AN ACCUMULATION OF DISCOVERY VIOLATIONS, PROSECUTORIAL MISCONDUCT, INEFFECTIVE LAWYERING, AND INCOMPLETE LEGAL INSTRUCTIONS FUNDAMENTALLY FLAWED THIS TRIAL AND VITIATED THE RELIABILITY OF THE PROCEEDINGS IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND UNITED STATES CONSTITUTION, AMENDMENTS V, VI, AND XIV.

Every criminal defendant relies on the integrity of the process. Our system of adjudication does not function properly unless three essential components are successfully joined: a vigilant judge, a fair prosecutor and a competent defense attorney. Mr. Martinez was denied due process and a fair trial, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I , Section 9 of the Florida Constitution, when the court, the State and defense counsel failed to perform their unique functions concerning the sole issue raised: whether the Defendant was present at

the crime scene. The fact that no physical evidence linked him to the murders, no eye witnesses came forward, and an alibi was proven made the malfunction in the system of adjudication more egregious.

The defense was alibi. A year before trial, the State pled a time of death of after midnight on Saturday, October 28th. In its case in chief, the State proved the murders occurred between 4:00 p.m. and 6:50 p.m. on Friday, October 27th. After the Defendant conclusively proved an alibi for the new time frame, the State argued in its final summation a third time-frame -- Friday evening between 7:00 p.m. and 8:00 p.m. Finally, although the proof and argument distilled the sole issue for the jury to be identity/alibi, neither party requested and the trial court failed to sua sponte deliver an alibi instruction to advise the jury that the legal standard a defendant need prove for an alibi is simply raising a doubt.

The outcome of this proceeding was fundamentally flawed, and both lawyers and the judge bear equal responsibility. First, the prosecutor knew its key witness on time of death changed her testimony prior to trial yet neglected to inform the defense. Also, the State argued a third time frame in final summation by submitting an argument it knew to be false. This discovery violation and other prosecutorial misconduct was the foundation to the trial's unreliability.

Second, defense counsel took ineffectiveness to a new level. He listed alibi

witnesses in three separate pleadings, yet failed to file a notice of alibi despite a State demand. When a State witness, Tina Jones, provided a new time of death at trial, and testified that she changed her testimony in a meeting with the prosecutor earlier that week, he failed to raise a Richardson request. When the prosecutor made a false representation to the jury in summation to establish a new time-frame for when the crimes occurred, he did not object again. Finally, after proving an alibi, and arguing alibi in closing, he did not request an alibi instruction. This failure, in particular, is inexplicable.

Third, the trial judge should have realized what the combatants overlooked. Indeed, a court has a duty to ensure fairness where the parties are not so driven. Cuyler v. Sullivan, 446 U.S. 335 (1980). The failure of the court to sua sponte perceive the jury's need to be properly instructed on the only issue raised at the guilt phase of the trial was fundamental error.

A. Prosecutorial misconduct in summation, and the failure of the State to advise the defense that its witness establishing time of death had changed her testimony on the eve of trial, violated Rule 3.220(j), Fla.R.Crim.P. and the Defendant's right to due process and to present a defense.

The Indictment averred the deaths occurred between October 27 and October 31; between Friday and Tuesday. (T.1:45-47). The defense moved for a better statement of date and time, (T.1:28), and at a hearing on the motion the prosecutor promised full and

complete discovery. (T.13:1388). After the police had completed all interviews and field investigations, the State further narrowed the time of death in a Demand for Notice of Alibi, filed on April 12, 1996, to after midnight on Saturday, October 28, 1995. (S.R.2:4-5).

The exact time of death was difficult to establish due to the decompensation of the bodies. Ms. McCoy's sister, Tina Jones, discovered the bodies on Tuesday morning. She told the police on Tuesday she had last seen her sister on Saturday. (T.5:383). This statement caused the State and the medical examiner to believe, up until the time of trial, that the victims were killed after Saturday the 28th. (T.5:418, 422). Although the defense did not file a notice of alibi, it did list as defense witnesses two women who could establish Mr. Martinez was with them that entire weekend. (S.R.2:10,11).

On the second day of trial, the State unveiled its new time of death. Det. Conigliaro confirmed that Ms. Jones had told him that her sister was alive Saturday, but he said that she telephoned him the next day to say that she was unsure.[14] (T.5:383-386). The medical examiner testified that his opinion of time of death (he said October 28th in deposition) was really dependent on when Ms. Jones last saw her sister. (T.5:418, 422). Ms. Jones then testified that she had been mistaken; that she had last seen her

[14] This is unlikely; the State professed no uncertainty in its alibi demand of April 12th filed two months after Ms. Jones was interviewed.

sister on Friday, not Saturday. (T.7:651). This time shift was well known to the State prior to the trial commencing. Trial began on April 9th (Wednesday); Ms. Jones testified on Thursday; when asked on cross when this movement in re-collection occurred, she said on Monday, earlier that week. (T.7:655).

This was a blatant discovery violation. The State had a duty to supplement discovery with Ms. Jones' new testimony. Rule 3.220(j) Fla.R.Crim.P. Ms. Jones told the prosecutor she was changing her testimony on a critical element, yet the prosecutor failed to alert defense counsel.[15] (S.R.2:27-33). This Court held in Cooper v. State, 336 So.2d. 1133 (Fla. 1976), that a prosecutor's duty to promptly disclose new evidence is manifest, and "where a complex trial involving a human's life is scheduled to begin in one week, immediate disclosure is dictated by the Rule."

Although the defense did not request a hearing under Richardson v. State, 246 So.2d. 771 (Fla. 1971), this discovery violation must not go unrecognized for several reasons. First, at a hearing on March 25, 1996, the State promised full and supplemental discovery in response to a Motion for Statement of Particulars. (T.13:1388). The defense had a right to rely on that promise. Also, the general rule that time of death is not a

[15] This discovery violation was elucidated in a remand to the trial court pursuant to this Court's order of March 11, 1998. It was established at that hearing that Ms. Jones changed her testimony at trial, and defense counsel was not apprised. This Court denied a request for further hearings on the violation, without prejudice to raise the issue on appeal. Order of September 23, 1998. (S.R.3:106).

substantive element of proof only applies where "the defendant has been neither surprised nor hampered in preparing his defense." Tingley v. State, 549 So.2d. 649, 651 (Fla.1989). That is not the case here. Were this a case of self defense, or insanity, our claim would be meritless. Here, however, time-frame was essential. With the discovery violation the State created a moving target for the Defendant's alibi defense. See Neimeyer v. State, 378 So.2d. 818 (Fla. 2nd DCA 1979) (failure of State to supplement new opinion of medical examiner negating self defense was reversible error). Curtailment of the right to present a defense is of constitutional magnitude, see Pointer v. Texas, 380 U.S. 400 (1965), and must override the failure of the defense to timely complain. Third, the violation was apparent on its face. The witness acknowledged on the witness stand a material changing of her testimony. Rule 3.220(n)(1) empowers a trial court to recognize this error on its own, and our constitutions empower a court to ensure that a state criminal trial comports with constitutional standards. See Cuyler v. Sullivan, supra. This discovery violation alone created fundamental error, but more was to come.

The State established in its case in chief that the victims were killed around dinner time on Friday. Sloane Martinez said Joaquin left her home around 4:00 p.m. She went looking for him at his brother's house and saw him there around 6:30 p.m. She claimed that he had changed into clothing that did not fit, and was suspiciously washing his car. A deputy served Mr. Martinez with legal papers at 6:55 p.m. at his brother's house. Mr.

Martinez left immediately, and arrived at the Dominick home on Indian Rocks Beach one hour later. Also, Mr. Martinez was alleged to have asked Sloane to be his alibi for 6:00-6:30 p.m. that evening. Clearly, the State's evidence established that if Mr. Martinez committed the crime, it was between 4:00 p.m. and 6:30 p.m. on October 27th.

When the defense began its case, its burden was to establish an alibi for that time frame. First, the defense established on cross-examination that a toll call had been placed at 5:01 p.m. on Friday from the McCoy-Lawson residence to Ms. McCoy's mother's home. (T.7:661). Ms. McCoy was presumptively alive when this call was placed at 5:01. Then, defense witness Sabando testified that Joaquin Martinez arrived at his house that Friday around 5:00 p.m., and stayed until served by the deputy at 6:55 p.m. (T.9:875-877). This testimony was not challenged. Thus, the evidence clearly established an alibi for the Defendant for the time frame within the State's theory of prosecution: between 4:00 p.m. and 6:50 p.m.

When closing began, the State did not broach the subject of alibi or time frames in its opening. The defense hammered this evidence in its middle summation, arguing that the testimony established it was impossible for the Defendant to have been the perpetrator, (T.10:981-987), as the telephone records, his brother's uncontradicted testimony, and Sloane's evidence precluded him having the time to do so. In response, the State moved the target again; this time, with a deliberate falsehood.

The State rose in final summation with a need to rebut the alibi argument. The prosecutor now moved the time frame to between 7:00-8:00 p.m. -- after being served by the deputy and before arriving at Indian Rocks Beach. He told the jury:

> You know, does the defendant after he leaves Sabando's house, it could have happened this way, too, the defendant has those court papers. He needs more money. Maybe he's not real happy about those court papers he just got. So he goes over to 'Michael's' house to collect. It could of happened before. It could have happened after.

(T.10:1018). [emphasis supplied].

Moving the time again, after the defense had rested, was fundamental prosecutorial misconduct and the absence of an objection can be overlooked. See Cochran v. State, 711 So.2d. 1162 (Fla.4th DCA 1998); DeFreitas v. State 701 So.2d. 593 (Fla. 4th DCA 1997). What elevates the error to fundamental is the falsity aspect; the prosecutor argued that Mr. Martinez left Sabando's to collect from Lawson, as he needed money because of the "court papers" served by Deputy Shannon. (T.10:1018). That was false, and the prosecutor knew so. See also Point III, infra. The "court papers" was a restraining order that Ms. Martinez withdrew days later. (T.5:409). The injunction had nothing to do with alimony, child support, or any other financial issue. The prosecutor telling the jury that the "papers" created a motive for Mr. Martinez to rob Lawson is clearly fundamental error when the prosecutor knew that the argument was false. Where motive was lacking, and evidence slim, the argument was plain error.

The first line of defense to ensure the guilty are convicted and the innocent are freed is a prosecutor striking hard but fair blows. Berger v. United States, 295 U.S. 78 (1935). That did not happen here.

B. Where the defense argued and proved an alibi, the Defendant received ineffective assistance of counsel, cognizable on this record, when counsel did not file a notice of alibi, failed to object to the State changing the time of death twice at trial, and failed to request an alibi instruction.

Our complaints regarding the State obstructing the fairness of the trial pale against the incompetent representation of guilt-phase counsel. This Court can not have sufficient confidence in the reliability in the outcome of this proceeding to allow these verdicts to stand. Strickland v. Washington, 466 U.S. 668 (1984). The nature of the evidence against the Defendant, coupled with the omissions of counsel, invalidate the reliability of the trial.

Mr. Martinez was arrested on January 28, 1996, based upon vaguely incriminating remarks he made in a virtually inaudible conversation surreptitiously recorded by the police. No physical evidence tied him to the crime; no eye witness linked him either. The only additional evidence police garnered over the next 14 months were jailhouse snitches. Then, on the eve of trial, the Defendant's girlfriend supplied additional incriminating evidence -- although she conceded she only came forward with this testimony fourteen months later when she learned that Mr. Martinez had been unfaithful

to her by sleeping with his ex-wife, and, perhaps, her half-sister. The State's case was rife with defects.

In contrast, the defense had an alibi. The State originally pled the crime as having been committed after Saturday. Tina Jones first reported to police she last saw her sister on Saturday.[16] The defense filed a witness list prior to trial, including the names of Laura Babcock and Leah Thomas -- both women had spent Saturday and Sunday with the Defendant, so the Defendant had an alibi for the time pled. Notwithstanding a State Demand for Notice of Alibi, no alibi notice was filed; the first error by counsel.

When Tina Jones first revealed at trial that she saw her sister on Friday -- that she had been mistaken -- a prompt objection and a request for a Richardson hearing would have revealed that the prosecutor knew prior to trial that Ms. Jones would be changing her testimony, yet he failed to supplement the discovery. A Richardson hearing, we submit, would have resulted in the court finding a material, deliberate violation which affected the defense, and would yield a mistrial. Yet no defense objection was lodged; the second error by counsel.

A new time of death was proven at trial -- Friday afternoon, between 4:00 and 6:30 p.m. The defense rebounded well, and established an alibi nevertheless, weaving together the testimony of Ms. Martinez, Mr. Sabando, and telephone records. Counsel

[16] Ms. Jones was not deposed; the defense relied upon this police report.

ably and forcibly argued in closing that this testimony precluded a finding that Mr. Martinez had the time or opportunity to commit the crime. This time, the State outmaneuvered the alibi by moving the target/time again, to later on Friday evening. Again, there was no objection from the defense, notwithstanding the holding from Tingley, supra, that time is an essential element when so framed by the defense; the third error.

But the coup de grace to ineffectiveness was at the charge conference. The defense established that Mr. Martinez could not have been at the Lawson/McCoy residence when the crimes occurred -- the sin qua non of an alibi. An instruction to the jury, requiring that it acquit Mr. Martinez if the evidence raised a doubt, and telling the jury that a defendant need not prove his alibi beyond a reasonable doubt, would have been required on this testimony. Bryant v. State, 412 So.2d. 347 (Fla. 1992); Robinson v. State, 574 So.2d. 108 (Fla. 1991). But no alibi instruction was requested. (T.10:1025-1049). This fourth error was devastating. There was no strategy behind this omission. The instruction lessened the defense burden. Cf. Muteei v State, 708 So.2d. 626 (Fla. 3rd DCA 1998) (failure to instruct on self defense not fundamental where "if given, would have made his acquittal even more difficult to obtain.").

We have found one case which supports the proposition that a failure to request an alibi instruction in this situation constitutes ineffective assistance of counsel. In

Commonwealth v. Brunner, 341 Pa. Super. 64, 69-70, 491 A.2d. 150, 152-153 (1985), the Superior Court for the Commonwealth of Pennsylvania held that the failure of trial counsel to request an alibi instruction, after introducing an alibi defense, was constitutionally ineffective assistance of counsel. But for counsel's omission, an alibi instruction would have been read. The "omission" prong of Strickland v. Washington is easily shown. The "prejudice" prong is also met, as the outcome of the proceedings is no longer reliable. See Mitchell v. State, 595 So.2d. 938 (Fla. 1992). A properly instructed jury, one not required to hold the defense to a standard of beyond a reasonable doubt, may not have convicted. This Court is empowered to so find on this record.

As a general rule, ineffectiveness claims are not cognizable on direct appeal; the exception is where "the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue." Blanco v. Wainwright, 507 So.2d. 1377 (Fla. 1987); Stewart v. State, 420 So.2d. 862 (Fla. 1982); Ross v. State, Case No. 96-04094, Op. Filed Dec. 11, 1998 (Fla. 2nd DCA 1998) (failure of the defense to object to prejudicial argument of prosecutor was ineffective assistance of counsel cognizable on direct appeal); see also Mizell v. State, 716 So.2d. 829 (Fla. 3rd DCA 1998) (conviction vacated notwithstanding unpreserved error "to avoid the legal churning -- which would be required if we made the parties in the lower court do the long way what we ourselves should do the short."). Ineffectiveness is apparent on the face of

this record, and this Court can so find. This omission, alone or in conjunction with the numerous other errors of counsel (see Point II: failure to request transcript instruction; Point III: failure to object to prosecutorial misconduct; Point IV: failure to object to burglary sufficiency; Point V: failure to request Richardson hearing) are so egregious and cumulative that ineffective assistance of counsel is apparent on this record. See Henry v. Dugger, 656 So.2d. 1253 (Fla. 1995); Cherry v. State, 659 So.2d. 1069 (Fla. 1995); State v. Gunsby, 670 So.2d. 920 (Fla. 1996). (confidence in outcome of trial undermined by cumulative effect of deficiencies); see also Point VI, infra (cumulative errors of counsel).

C. Where both parties agreed the issue was whether the Defendant committed the acts, and the defense established an unrebutted alibi, failure of the parties to request or the court to sua sponte deliver an alibi instruction was fundamental error.

The Florida Standard Jury Instruction on alibi is deceptively simple. When the issue is raised as to whether a defendant was present at the scene of the crime, a judge must tell the jury that "[I]f you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty." Florida Standard Jury Instruction 3.04(a). While the State must prove the actors identity beyond a reasonable doubt, the burden to prove an alibi is considerably less. See Ramsaran v. State, 664 So.2d. 1106 (Fla. 4th DCA 1995). This jury needed that instruction to

properly evaluate the evidence. Two alternative theories allow for retrial: the error was fundamental, and/or the trial judge erred in failing to deliver the instruction sua sponte.

1. Fundamental Error

Fundamental error is error which goes to the foundation of the case. Sanford v. Rubin, 237 So.2d. 134 (Fla. 1970). Before 1993, the failure of a court to sua sponte instruct on the heart of a defendant's claim was fundamental error. See Thomas v. State, 526 So.2d. 113 (Fla. 3rd DCA 1988), and cases cited therein. This Court clarified that line of cases in Sochor v. State, 619 So.2d. 285 (Fla. 1993), where the defendant claimed fundamental error by the trial court failing to instruct on voluntary intoxication and the statute of limitations. This Court observed that failure to provide an instruction unrelated to an essential element of a crime is not fundamental, but left room for such error to be found in two circumstances: "where the interests of justice present a compelling demand for its application." id. 619 So.2d. at 290, quoting Ray v. State, 403 So.2d. 956 (Fla. 1981); or where error amounts to a denial of due process. Castor v. State, 365 So.2d. 701 (Fla. 1978).

This Court later elaborated in Archer v. State, 673 So.2d. 17 (Fla. 1996), reaffirming its earlier holding in Delva v. State, 575 So.2d. 643 (Fla. 1991), and held that fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the

alleged error." Id. 673 So.2d. at 20. Under this standard, fundamental error can be found. The jury was left uninstructed on how to weigh the evidence of alibi. It did not know the low burden a defendant may carry; the jury may have thought it must convict if it did not believe the alibi beyond a reasonable doubt. No confidence in the verdict exists, especially in a case where both life and liberty were at stake.

2. Sua Sponte Duty

While the contemporaneous objection rule applies to jury instructions, Florida law also places a duty on the trial judge to ensure a properly instructed jury. Foster v. State, 603 So.2d. 1312 (Fla. 1st DCA 1992); Huber v. State, 669 So.2d. 1079 (Fla. 4th DCA 1990). This duty applies to an alibi instruction, where evidence suggests the defendant was elsewhere when the crime occurred. Rostano v. State, 678 So.2d. 1371 (Fla. 4th DCA 1996). Such evidence existed here.

No Florida cases have spoken to this issue; two other jurisdictions have. First, in Gardner v. State, 397 A.2d. 1372 (Del. 1979), the Supreme Court of Delaware held:

> The more difficult question is whether a trial judge must instruct on alibi, when there has been no specific request for such an instruction. See Annotation, "Duty of Court, in Absence of Specific Request, to Instruct on Subject of Alibi," 72A.L.R.3rd 547-607. Although there is generally no duty to charge upon alibi in the absence of a specific request, it is recognized that in certain circumstances [e.g., where alibi is the defendant's main and sole defense, the proffered evidence against the defendant is all or mostly circumstantial, the possible punishment is severe, or a case is so complex that an instruction is necessary in the interest of justice] * a duty to instruct the jury upon alibi may arise, so that the failure to do so would

> amount to a manifest defect affecting the defendant's substantial rights and thus constitute plain error. Thus, where a defendant offers an alibi defense by introducing substantial evidence showing that he was elsewhere when the crime was committed, the Trial Judge should give an alibi instruction, and the failure to do so in those circumstances, even without a request from the defendant will be deemed plained error.

Id., 397 A.2d. at 1374.

Nine years later in Commonwealth v. Roxberry, 553 A.2d. 986, affd. at 602 A.2d. 826 (Pa. 1992), the Pennsylvania Supreme Court held:

> Appellant was entitled to an alibi instruction. The decided cases uniformly require a trial judge to give such an instruction. The instruction is necessary so that a failure of a jury to believe the alibi testimony will not be translated into a finding of guilt. When the trial court failed to give the required instruction, defense counsel had a duty to call the omission to the court's attention. By remaining silent and failing to request an instruction on this basic principle, counsel deprived appellant of an important right. His omission, as all the decided cases recognize, was a fundamental error which may have influenced the juries verdict to appellants prejudice.

Id., 553 A.2d. at 990.

It is critical that the decision to present alibi evidence is not a double-edged sword. If a jury is misled into believing that it must convict if the alibi witnesses are not credible, an unconstitutional chill on the right to present a defense is created. No other jury instruction sufficed, which renders the omission by counsel, and the court's failure to sua sponte deliver a jury instruction, fundamental error. Both due process, and the Defendant's right to have his defense fully presented to the jury, were violated.

II.

THE PROSECUTION'S USE OF A TRANSCRIPT TO SUPPLEMENT AN INAUDIBLE TAPE WHICH CONVEYED INADMISSIBLE AND HARMFUL INFORMATION TO THE JURY WITHOUT AN INSTRUCTION THAT THE TRANSCRIPT WAS NOT EVIDENCE WHICH DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV

The center piece of the prosecution was the audio-video tape of the intercepted conversation on January 28th. Mr. Martinez was arrested as a result of his purported statements, (T.7:596); indeed, Det. Conigliaro told the jury he had no doubt about the Defendant's guilt after listening to the conversation. (T.7:613). See Point III, infra. The problem with the tape, however, is that it was virtually inaudible. The defense moved pre-trial to suppress the tape due to inaudibility. (R.1:65,66). A judge listened to the hour and a half tape and remarked "I could get very little, if anything, out of them." (T.13:1322). The prosecutor agreed; he said "the, um, audio and video tapes that we have, it is excessively -- excessively hard to make anything out due to the, um, poor quality of these tapes." (T.13:1323). The State even told the jury the tapes were mostly inaudible, (T.5:322); regarding the court reporter's duty to transcribe what she heard on the tape as it played, the prosecutor observed "she might take down three words. This thing is really difficult to hear." (T.6:521).

The State's solution to this defect in its centerpiece was a collaborative transcript reflecting the opinions of four people of what they deciphered from the tape. Pre-trial,

the State sought leave to allow the jury to read this 33 page transcript while the tape was being played. The State told the court that use of the transcript was "critical to the State's case [due to] . . . the poor quality of the tape." (T.13:1323). Over defense objections concerning inaudibility, incompleteness, undue reliance by the jury on the transcript, privacy, and the transcript's accuracy, (T.6:522), the court admitted the tape and allowed jurors to read the transcript as an unadmitted court exhibit while the tape was played. (T.13:1326-36).

The tape was played at trial -- an hour and a half of virtual inaudibility -- while jurors sat and read this 33 page transcript. Authentication for the transcript was established by Ms. Martinez pre-trial. (T.13:1291-1306). However, testimony at trial undid its reliability.

According to Sloane, the transcript was a collaborative effort with the detective, the prosecutor and his secretary. (T.13:1299, 1302). The four listened to the tape, over and over, and produced this joint effort. (T.13:1313). A first draft was prepared by the State without Ms. Martinez. A second version was prepared six months later through the corroborative effort of the group. (T.13:1315-1319). A final version, deemed acceptable by the four, was offered at trial with this observation by the court to the jury:

> Okay. I have had lots of representations from counsel from both sides that the tape is mostly inaudible and the only way you are able to put any type of transcript [together] was one person was listening and one person was present and they got together and collaborated on putting together a

transcript which results in nevertheless, lots of inaudibility.

(T.6:520).

Notwithstanding this cumulative effort, the transcript was still rife with incompleteness. The word "inaudible" is utilized four hundred and fifty times. Even more significant, the transcript, although not admitted into evidence, contained considerable portions -- highly incriminating portions -- which are not heard on the inaudible tape.

The trial judge directed the court reporter to transcribe the tape for the record; presumably, she transcribed what the jury was able to comprehend. (T.7:523-546). The reporter attributed less than 100 remarks to Mr. Martinez; in contrast, the transcript attributed over 300 statements to Mr. Martinez. The magnitude of the difference between the tape and the transcript is best understood by a demonstration. We have submitted an Appendix contemporaneously with the filing of this brief which contains a version of the transcript which delineates the audible parts of the tape from the portions the jury could read but not hear. We have interlineated those portions transcribed by the court reporter; the balance, over half which is not interlineated, was unadmitted evidence against the Defendant which was read by the jury. See Appendix at 1-33.

The results are shocking. The jury read highly incriminating references which were not audible on the tape, which were not admitted into evidence, and were not

testified to by any witness. The jury read the following un-admitted conversations between Sloane and Joaquin:

HER: Was it a mistake? You said it was a mistake?
HIM: No mistake (A.4).

* * * *

HER: How the hell did I read that flyer. I'm reading it to you . . . and you knew who it is all along.
HER: And let me tell you truthfully, you look guilty as anything to me. (A.4).

* * * *

HIM: It was the day I spoke to you. I told you about this.
HER: It wasn't Doug, was it?
HIM: I already talked to you about it. (A.5).

* * * *

HER: What I want to know, do you . . . did you have anything to do with that Joe?
HIM: Yes. (Nodded head). (A.6)

* * * *

HER: They were brutally beaten to death. How could you do such a thing? Not you, what are you?
HIM: . . . I wanted to try to take care of you and the girls. (A.7).

* * * *

HER: Did you know that as a far as your soul is doomed to hell. . . It's no wonder you don't sleep.
HIM: I know. (A.8).

* * * *

HER: Would you like it if it were your kids that were done that way?
HIM: That ain't right.
HER: Now I'll have to go to hell with you.
HIM: I know, I know.
HER: I'm not the only (inaudible) there is someone else that knows, I'm sure of it.
HIM: No one knows but you. (A.8).

* * * *

HER: They said they have a witness.

HIM: There was no witness. (A.13).

* * * *

HER: Joe, you made me an accomplice.
HIM: You are not an accomplice. (A.18).
HIM: Please don't tell anyone that I talk to you. You shouldn't know about it. Cause you are my alibi! . . . Please be my alibi. (A.18).
HER: You are not Joe anymore. You're a monster.
HIM: Alright, so fuck it, if you want to see me dead. (A.21).

* * * *

HIM: Say the truth. . . I was with you till 6:00 . . . 6:00 - 6:30.
HER: I don't want to go to jail, please don't put me into this. . . I don't remember the time, I have no idea, I didn't look at the watch, you (inaudible) did it. (A.23).

* * * *

HER: God will punish you.
HIM: He's already punishing me. (A.32).

The jurors sat for over an hour reading this transcript while the inaudible tape was played. Access to this transcript was improper because (1) the transcript was improperly authenticated; (2) the transcript was the focal point of the trial and added references not heard on the tape, and (3) most egregiously, the jurors were not instructed that that transcript was not evidence.

A. The Transcript was Improperly Used.

Utilization of transcripts is disfavored in Florida. See Stanley v. State, 451 So.2d. 897 (Fla. 4th DCA 1984) (trial courts cautioned not to use transcripts where contents disputed. . . "it should be left to the jury to determine what is contained in the tapes without the intervention of a translator."); accord, Uliano v. State, 536 So.2d. 393 (Fla. 4th DCA 1989) (error to allow officer to narrate inaudible portions of tape); Wells v.

State, 540 So.2d. 250 (Fla. 4th DCA 1989). The seminal case which allows use of transcripts is Hill v. State, 549 So.2d. 179 (Fla. 1989). Indeed, the State argued Hill in the trial court to support use of its transcript. This Court held in Hill:

> [4] Appellant next argues that the trial court erred in permitting the jury to use a transcript of his inculpating statement to the police as an aid in understanding the taped statement played to the jury. Appellant does not challenge the accuracy of the transcript but argues that we overrule *Golden v. State*, 429 So.d. 45 (Fla.1983), on the ground that the tape itself was the best evidence. We see no error. The transcript was used as an aid to understanding. There is no suggestion that the transcript conflicted with or added information to the tape itself. The transcript was not carried into the jury room and there is no suggestion it became the focal point of inquiry. Finding no reversible error in the guilt phase, we affirm the conviction.

Id. 549 So.2d. at 182. [emphasis supplied].

Hill requires a new trial. First, the contents of the transcript were in dispute. The defense specifically objected to its accuracy. (T.6:522). Cross-examination of Ms. Martinez and the detective was designed to explore the disputed contents of remarks in the transcript. (T.7:575-79;609-612). Second, the transcript was more than "an aid to understanding." It carried to the jury the imprimatur of what the prosecution believed the tape reflected, although the tape itself was inaudible. Third, the transcript "added information to the tape itself." We have earmarked for this Court the highly prejudicial and incriminating portions of the transcript which were inaudible, were not introduced into evidence, yet were conveyed to the jury. These included admissions of guilt, a knowledge of when the crime occurred, and various acknowledgments of responsibility.

The tape itself was innocuous; the transcript was a smoking gun. Fourth, the transcript "became the focal point of the inquiry." The highlight of the prosecutor's summation dealt with references, not in the tape, but in the transcript; i.e., Mr. Martinez' claim about witnesses; his need for an alibi until 6:00 or 6:30; his indirect admissions to her. (T.10:1011).

Hill offered four reasons why the transcript was permitted in that case. It is those four reasons which compel the opposite finding here. The transcript was distributed to the jury during Ms. Martinez' direct examination. (T.6:527). Jurors held them throughout the afternoon, left them on their seats during the evening recess, (T.6:557), then had them again the next morning during the testimony of three other witnesses. (T.7:634). The transcript superseded the tape and the trial testimony in its impact. Because the transcript lent an aura of correctness to an otherwise inaudible tape, it was a manifest abuse of discretion to permit its access to the jury. United States v. Robinson, 707 F.2d. 872 (6th Cir. 1983) (error to permit jury access to transcript); United States v. Segines, 17 F.3d. 847 (6th Cir. 1994) (accord).

B. The Transcript was Improperly Authenticated.

The transcript was authenticated by Ms. Martinez and Det. Conigliaro. She testified prior to trial that it accurately reflected what she recalled from the January 28th conversation. However, the first draft was prepared by the prosecutor. Ms. Martinez did

not even begin working on a version of a transcript until June, 1996 -- six months after the conversation. (T.13:1297-1320). It was conceded that the transcript presented to the jury was a pooled effort compiled by her, the detective, the prosecutor, and his secretary. This collaborative effort ran afoul of Florida law.

A transcript is only authenticated when prepared by a professional expert or a person with personal knowledge that it is an accurate rendition of the tape. Henry v. State, 629 So.2d. 1058 (Fla. 5th DCA 1994); Harris v. State, 619 So.2d. 340 (Fla. 1st DCA 1993). A transcriber's version (i.e., the prosecutor and his secretary) is not permitted; see Henry supra. An officer who listened to the tape as it was being made (i.e., Det. Conigliaro) is also not allowed to authenticate a tape. See Harris; supra.

While Ms. Martinez could authenticate the transcript, she admitted that its preparation was not by her alone. This mongrel document was molded by counsel for the State -- a suspect undertaking. Its reliability was subject to challenge, and its preparation undercut its validity. The defense objection to authentication should have been sustained.

C. The Absence of an Explanatory Instruction.

Transcripts are discouraged; see Lawrence v. State, 632 So.2d. 1099, 1100 (Fla. 1st DCA 1994) (improper to have jurors read transcript while listening to tape). They are only permitted when the jury is carefully instructed that the transcript is not evidence. See Macht v. State, 642 So.2d. 1133 (Fla. 4th DCA 1994) (jury advised "this transcript is not

admitted and won't be admitted into evidence. The evidence is what's on the tape recording. If there is a conflict between what the transcript says and what you hear the tape says [,] the evidence is the tape, not the transcript and if you're - if you hear a conflict [,] what's on the tape is what the evidence is."). A similar admonition is found in the Eleventh Circuit Standard Instruction:

> Members of the Jury:
>
> > As you have heard, Exhibit ___ has been identified as a typewritten transcript [and partial translation from Spanish into English of the oral conversation which can be heard on the tape recording received in evidence as Exhibit __. [The transcript also purports to identify the speakers engaged in such conversation.]
> >
> > I have admitted the transcript for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the tape recording, [particularly those portions spoken in Spanish,] [and also to aid you in identifying the speakers.]
> >
> > However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation [or the identity of the speakers] is entirely for you to determine based upon your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Eleventh Circuit Standard Trial Instruction 5 at page 261.

This jury was not imbued with this important information. They were not told that the tape controls over the transcript; that their interpretation controls over the transcript; that what they read in the transcript was only to be considered in their deliberations if

they also heard that testimony or those words on the tape. Rather, the court simply and cavalierly told the jury to hand the transcripts back to the bailiff: "those aren't going back during deliberations; the tape is admitted, but the transcript is not." (T.7:634).

No objection being raised, this error must be deemed fundamental (or ineffective representation). It was the court's duty to advise the jury regarding the substantial portions of the transcript which were inaudible on the tape; it did not. Allowing the jury to spend two days with an inadmissible document (which was a smoking gun for the prosecution) without an appropriate admonishment regarding its valid purpose undermined the integrity of the process. See Robinson v. State, 702 So.2d. 213 (Fla. 1997) (nature of defense and conduct of defense attorney undermined integrity of trial).

III.

THE PROSECUTOR ENGAGED IN PREJUDICIAL ARGUMENT ATTACKING THE CHARACTER OF THE DEFENDANT, UTILIZED GRUESOME PHOTOGRAPHS, OFFERED OPINIONS OF GUILT, AND KNOWINGLY ARGUED FALSE MISREPRESENTATIONS OF THE EVIDENCE WHICH DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV

The essential fairness of the trial was undermined by prosecutorial misconduct in closing argument and by the eliciting of opinion of guilt testimony. The cumulative nature of these improprieties included attacks on the Defendant's character, assertions of opinions of guilt, and knowingly false misstatements of the evidence designed to

establish motive for the homicides to overcome the absence of such evidence. The fairness of this trial was destroyed by this impermissible conduct. Rhodes v. State, 547 So.2d. 1201 (Fla. 1989); Gore v. State, 23 Fla. L. Weekly S518 (Fla. 1998) (prejudicial attacks on defendant reversible error).

A. Opinion of Guilt Testimony and Argument

The determination of guilt or innocence is within the province of the jury, and an opinion as to the guilt of an accused is not admissible. Lambrix v. State, 494 So.2d. 1143 (Fla. 1986); Glendenning v. State, 536 So.2d. 212 (Fla. 1988). An opinion of guilt, either in testimony or closing argument, whether from a lay witness, an expert or a prosecutor, is precluded under Section 90.403, Fla. R. Evid. Zecchino v. State, 691 So.2d. 1197 (Fla. 4th DCA 1997); Pacifico v. State, 642 So.2d. 1178 (Fla. 1st DCA 1994). See DR. 7-106(c)(4), Code of Professional Responsibility.

The State violated this prohibition twice. The first occasion occurred on re-direct examination of Det. Conigliaro. The defense cross-examined the detective regarding the audibility and context of the January 28th audio-video tape between the Defendant and Sloane which led to his arrest. The State overreacted to the detective's concession that he did not hear everything by eliciting:

> Q: Corporal, when you were listening to that tape live, when you were listening to what was going on live on January 28th, right after that you said that you were authorized to arrest?
> A: Absolutely.

Q: Was there any question, not based on your memory, not based on the transcript, was there any question in your mind at that time that the Defendant had murdered Douglas Lawson?
MR. FOX: Objection. That is not a proper question.
MR. COX: He is asking about taking things out of context.
THE COURT: Overruled
BY MR. COX:
Q: Was there any doubt in your mind based on what he said then that he was responsible for the murder of Douglas Lawson?
A: **There was no doubt that he did it.**

(T.7:612,613).

This error was exacerbated in closing argument. The jury had heard that the police officers (Conigliaro and Baker) and Assistant State Attorney Karen Cox (the prosecutor's wife) were listening to the conversation by audio transmission from a van outside the Martinez house on January 28th. The prosecutor made this reference to that testimony in closing argument:

> You see, after the video tape was done, as Corporal Conigliaro told you, and as he told you, Baker and another Assistant State Attorney, Ms. Cox, no one had a doubt. **He was arrested because nobody had a doubt that he was guilty**.

(T.10:1012).

The testimony was inadmissible, and the error was preserved by objection. The second comment in summation did not provoke an objection, but was so invidious by itself, or in conjunction with the preserved error, that a new trial is warranted. Street v. State, 636 So.2d. 1297 (Fla. 1994); Ross v. State, supra (ineffective assistance to fail to

object to prejudicial comments).

B. Deliberate False Misrepresentations in Summation by the Prosecutor

Although the State told the jury in opening the murders were for money and marijuana, its evidence was lacking regarding motive. Police found thousands of dollars and expensive musical and stereo equipment in the house. Only Laura Babcock's testimony that Mr. Martinez told her that he grabbed a bag of marijuana off a table when he left because "Michael" did not have the money he owed him established a financial motive. See Clark v. State, 609 So.2d. 573 (Fla. 1992) (incidental taking after homicide not pecuniary gain). Indeed, the court declined to instruct on the pecuniary gain aggravator, stating "I think we'll be asking the jury to speculate on what the reasons for this killing was." (T.11:1053).

The prosecutor opted to fill in this testimonial absence of motive by submitting a knowingly false scenario to the jury to create the notion that Mr. Martinez killed for money. This argument was fundamentally wrong, and notwithstanding the absence of a defense objection, affected the outcome of the trial. Cochran v. State, 711 So.2d. 1162 (Fla. 4th DCA 1998); Ryan v. State, 457 So.2d. 1084 (Fla. 4th DCA 1984) (errors reviewable absent an objection).

Sloane Martinez obtained a domestic injunction against her ex-husband in mid-

October, 1995 because of his affair with Ms. Babcock. Nevertheless, she continued to invite his visits, they remained intimate, and she withdrew the injunction on November 2nd, less than a week after it was served. More importantly, the injunction was unrelated to alimony or child support arrearages. Knowing the injunction was unrelated to any financial issue, and seeking to rebut the defense claim that Mr. Martinez had no reason to kill Lawson or McCoy, the prosecutor argued in his final summation:

> You know, does the defendant after he leaves Sabando's house, it could of happened this way, too, the defendant has those court papers. He needs more money. Maybe he is not real happy about those court papers he just got. So he goes over to "Michaels" house to collect. It could have happened before. It could have happened after.

(T.10:1018).

This argument was knowingly false. The "court papers" had nothing to do with money, and the prosecutor knew it. The prosecutor intended to mislead the jury into believing that the "court papers" created a need for money, which is not true.[17] Even the court recognized the intended confusion created by the summation, stating the prosecutor "so intermingled comments to legal papers and child support that it could well be the jurors opinion that this injunction has something to do with child support as opposed to domestic violence. . .". (T.10:1025).

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[17] This misrepresentation was repeated in the penalty phase summation, where the prosecutor argued that Mr. Martinez was desperate for money because of the court papers he received. (T.11:1156,1157).

The State is forbidden from arguing false and misleading facts. Garcia v. State, 622 So.2d. 1325 (Fla. 1993); Nowitzke v. State, 572 So.2d. 1346 (Fla. 1990). The absence of an objection should not excuse this gross misconduct. The argument was false, the prosecutor knew it was false, and the argument was material. See Routly v. State, 590 So.2d. 397 (Fla. 1991) (standard for relief in post-conviction proceedings).

C. Improper Character Attacks Upon the Defendant

The prosecutor leveled a two-prong assault against the Defendant's character as a husband and father to inflame the jurors. Character attacks are impermissible, see Section 90.404 Fla. Evid. Code, and objections by the defense preserved these issues for appellate review. (T.10:1025) (motion for mistrial).

Prior to trial, the defense and State agreed not to mention the word "injunction", due to the likely inference jurors may draw to spousal abuse or stalking. (T.12:1223). Twice during the testimony, and once in summation, this pejorative term was used despite a defense objection. (T.6:484,519; T.10:1013). These references, in conjunction with testimony from Sloane that she stayed at The Spring (a home reknown as a shelter for battered women) created the impression of spousal abuse, and was error.

Having suggested spousal abuse, the prosecutor next moved to Mr. Martinez' role as a father. The jury had heard that the Defendant had his father send $400.00 to Gerrard Jones' sister for jailhouse legal assistance. The prosecutor capitalized on this by

improperly attacking the failure of Mr. Martinez to remain current in his child support payments. He asked Mr. Martinez, Sr. on cross-examination:

> Q: Okay. Have you ever since your son was arrested, have you sent your granddaughters any money, Catherine and Jordan.
> A: No.
> MR. FOX: Your Honor, I believe that this prejudicial and argumentative.
> THE COURT: We'll see. Go ahead.
> THE WITNESS: No.

(T.9:899).

Salt was rubbed in this wound by the prosecutor in summation, when he reminded the jury:

> But you know what is interesting, and all the time since the defendant's arrest, the defendant has never asked his father to send his grand kids money, Catherine or Jordan, never done that. But will send $400.00 to Gerrard Jones while [my] son has an attorney.

(T.10:1002).

These attacks on Mr. Martinez went to his character as a husband and father. Further comments in summation that the Defendant is the kind of man who lies to women, cheats on them, and had an extra marital affair while his wife was pregnant, were inflammatory attacks designed to argue bad character and were inadmissible. Czubak v. State, 570 So.2d. 925 (Fla. 1990); Castro v. State, 547 So.2d. 111 (Fla. 1989).

D. The Inflammatory Use of Gruesome Photographs

The prosecutor acknowledged in closing argument during the trial phase that "the

defense is he didn't do it". (T.10:974). How the victims were killed was simply not relevant to a determination of guilt or innocence. Yet the State persuaded the trial judge to allow it to use autopsy photographs of the badly decomposed bodies. These photographs, State Exhibits 34A-H and 35 A-G, see (T.14:55-83), were abhorrent and gruesome. Indeed, when offered into evidence over a defense objection, the trial court affirmed, "they're prejudicial and gruesome. That's for sure." (T.5:387).

The proffered relevancy of these pictures was to demonstrate premeditation, but testimony would have sufficed. See Hoffert v. State, 559 So.2d. 1246, 1249 (Fla. 4th DCA 1990) (use of autopsy photographs was prejudicial far beyond probative value where testimony of medical examiner would have sufficed). The balancing test of Rule 403 of the Florida Evidence Code should have resulted in the exclusion of these photographs in the trial phase; use in the penalty phase may have been appropriate, but that is not at issue here. The use of these grotesque photos crossed the line, especially when the prosecutor displayed the pictures of the decomposed bodies in his summation and urged the jury to consider them in their verdict. (T.10:99). The use of these photographs in this case is analogous to the facts in Thompson v. State, 619 So.2d. 261 (Fla. 1992) and Czubak v. State, 570 So.2d. 925 (Fla. 1990), although the error here was not harmless.

This Court must find that these character attacks and the use of gruesome pictures

vitiated the fairness of the proceeding, see Kilgore v. State, 688 So.2d. 896 (Fla. 1996), and the cumulation of the preserved and unpreserved errors should be recognized. Knight v. State, 672 So.2d. 596 (Fla. 4th DCA 1996). The lower court clearly abused its discretion by allowing these photographs. Pangburn v. State, 661 So.2d. 1182 (Fla. 1995).

IV.

THIS COURT'S RULING IN MILLER v. STATE, 713 So.2d. 1008 (FLA. 1998), WHERE IT WAS HELD THAT AN INVITEE TO A STRUCTURE OPEN TO THE PUBLIC CAN NOT BE CONVICTED OF BURGLARY BY SIMPLY REMAINING INSIDE TO COMMIT A ROBBERY OR MURDER, MUST APPLY TO A RESIDENCE IN THIS CASE, WHERE THE STATE PROVED A CONSENSUAL AND INVITED ENTRY.

The evidence established that whoever committed these homicides was an invited guest. There were no signs of forced entry. (T.5:351). Also, a significant amount of money, expensive stereo equipment, a wallet, and car keys, were all left undisturbed in plain view after the events; nothing appeared taken.[18] (T.5:359). More significantly, two large dogs had been put away in a bedroom (T.5:360); Janice Menendez testified that Lawson once told her "I always put my dogs in the bedroom when someone I know

[18] The incidental taking of a bag of marijuana is insufficient and was not utilized by the parties or the court in reference to the burglary. See Knowles v. State, 632 So.2d. 62 (Fla. 1993) (incidental taking of property after homicide is not pecuniary gain).

comes up." (T.7:627). The evidence was thus undisputed that the perpetrator entered the home with the consent of the occupants. Because no murder weapons were ever found, there is no evidence that the killer came armed, or armed himself when a fight began.

At issue here is whether every homicide in Florida, wherein the victim is killed by a guest in a residence, building, automobile, or curtilage, automatically becomes a first degree felony murder, with an automatic aggravating death factor, because of this legal presumption that consent is withdrawn when a guest begins to commit a crime. If every such spontaneous act necessarily creates a burglary, then most other degrees of homicide will become obsolete, limited to deaths which occur out from under a roof.

In Robertson v. State, 699 So.2d. 1343 (Fla. 1997), the evidence indicated that the defendant, while a guest inside an apartment, killed a woman. This Court requested supplemental briefing on the issue of whether the burglary conviction and the "committed during the course of a burglary" aggravator could stand, where the initial entry was consensual. This Court held:

> From our reading of the record, Robertson met his initial burden establishing that he entered Ms. Fuce's apartment with her consent. [citation omitted]. However, on this record a rational trier of fact could have found proof of withdrawal of consent beyond a reasonable doubt. [citation omitted]. There was ample circumstantial evidence from which the jury could conclude that the victim of this brutal strangulation-suffixation murder withdrew whatever consent she may have given Robertson to be in her apartment. [citation omitted]. The jury reasonably could have concluded that Ms. Fuce withdrew consent for Robertson to remain when he bound her, blindfolded her, and stuffed her brassiere down her throat

> with such force that according to the medical examiner she likely would have suffocated from the gag if she had not been strangled first.

Id., 699 So.2d. at 1346,1347.

A year later, in Miller v. State, 713 So.2d. 1008 (Fla. 1998), this Court considered the same issue in the context of defendant entering a grocery store to rob and kill. This Court reversed the burglary conviction and the felony aggravator, holding:

> Miller entered the grocery store when it was open, and on this record we can find no evidence that consent was withdrawn. . . This is not sufficient. It is improbable that there would ever be a victim who gave an assailant permission to come in, pull guns on the victim, shoot the victim, and take the victims money. To allow a conviction of burglary based on the facts in this case would erode the consent section of the statute to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute.
>
> Here, the argument was geared toward showing that Miller did not have consent to enter the grocery store to commit a crime. Clearly the store was open, so Miller entered the store legally. There was no attempt to show -- even through circumstantial evidence -- that although Miller entered the store legally, consent was withdrawn. **There must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred.** Not only do we not find any such evidence, we note that there was none argued by the State. Accordingly, we reversed Miller's burglary conviction. Because we reversed the burglary conviction, the "committed during the course of a burglary" aggravator is invalid. On the basis of this record, we can not find this improper aggravator to be harmless and therefore a complete new penalty phase proceeding before a jury is required.

Id., 713 So.2d. at 1010 - 11. [emphasis supplied].

This case is more analogous to Miller than Robertson. This Court requires "some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred." Miller, 713 at 1011. The State's argument here in support of burglary acknowledged the absence of such evidence; the prosecutor argued:

> But it also really qualifies as a felony murder because, remember what we talked about at jury selection, even if you go into the house in the beginning consensually, and your accepted into the house, if you remain in, once you begin committing a crime, your guilty of burglary.
>
> But also when you tie that in with the felony murder, the fact that he was committing the burglary at the time that he killed these people makes it felony murder as well. So not only do you have the premeditated murder, you have felony murder as well. You have both cases covered with no doubt whatsoever here, no doubt.

(T.10:974,975).

The burglary conviction, and application of "in the course of committing a burglary" aggravator, (T.2:332), were erroneous. Miller must be extended to apply to situations where an invited guest does no more than commit a crime once inside a residence. Otherwise, every homicide committed inside a dwelling, building or car would have an automatic aggravator. Indeed, under this reasoning, a wife simply threatening to slap her husband (an assault) commits a non-bondable life felony burglary, as she has remained in a place where she has a right to be with the intent to commit a crime. See Section 810.02, Fla. Stat. (1995). All murders would be skewed toward the death penalty by virtue of the inference that consent is withdrawn when a gun is produced. This legal

fiction would make virtually any homicide a capital crime. Presumptive death penalty statutes are unconstitutional. Lowenfeld v. Phelps, 484 U.S. 231 (1984). This Court must set aside the burglary conviction, and remand this matter for a new penalty hearing. Otherwise, all other degrees of homicide may be rendered virtually obsolete.

V.

THE FAILURE OF THE STATE TO ABIDE BY ITS DUTY TO SUPPLEMENT DISCOVERY UNDER FLA.R.CRIM.P. 3.220(j) DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV

The trial was scheduled to commence on Monday, April 7, 1997. The record reflected a two day continuance was granted when the State advised the defense on Monday morning that Mr. Martinez' fiancé, Laura Babcock (a listed defense witness), had advised the prosecutor over the weekend that she was prepared to testify to highly incriminating observations she made on October 27th. Because this continuance request was not transcribed, a reconstruction hearing was ordered by this Court on March 11, 1998. That hearing, conducted on July 13, 1998, (S.R.2), revealed two significant discovery violations were perpetrated by the State.

A. Eden Dominick and the Briefcase

Prosecutor Cox testified at the reconstruction hearing that Ms. Dominick called him on the Saturday before trial to advise him that Laura Babcock should be re-interviewed. Cox met with Ms. Babcock and Ms. Dominick and learned they had startling new evidence to offer. Ms. Babcock was now prepared to testify that late in the evening of October 27th, Eden called her to say that Joaquin was on his way home and had a suspicious briefcase in his custody. Ms. Babcock testified that when Joaquin arrived home, he looked like he had been in a fight and he did have a briefcase as described by Ms. Dominick. She questioned him, and he said that he had fought with a "Michael"; that "Michael" didn't have the money he owed Joaquin, so Mr. Martinez grabbed a large bag of pot off a table when he left "Michael's". He did not mention a shooting, or the presence of a woman. Inside the briefcase was a large bag of pot. The crucial aspect to this new testimony was that Ms. Babcock was now claiming that "Michael" was in fact Doug Lawson. (T:8:791-798).

Ms. Babcock's testimony was suspect. She claimed that she first realized "Michael" was Mr. Lawson in January of 1996 -- fourteen months earlier. She sat on this highly pertinent testimony until -- coincidentally -- the weekend before trial, when someone told her that Mr. Martinez, while her fiancé, was sleeping with his ex-wife, and may have even slept with her step-sister. (T.8:814).

Ms. Babcock's suspect testimony was corroborated, however, by that of Eden

Dominick. Ms. Dominick was interviewed by police days after Mr. Martinez' arrest, and she told them nothing of significance regarding October 27th. But Ms. Dominick now recalled that when Mr. Martinez was at her house that evening, he was upset, very quiet, and had a suspicious briefcase with him that he wanted to leave at her house. (T.8:771-773). Ms. Dominick said she was so alarmed by this request that she called and warned Laura Babcock regarding the briefcase. (T.8:774).

Therein lies the first discovery violation. The prosecutor knew prior to trial that Ms. Babcock and Ms. Dominick had new information. He warned the defense of Ms. Babcock - the case was reset two days later for her deposition. The prosecutor failed to advise the defense of Ms. Dominick's new information regarding the briefcase and demeanor of Mr. Martinez. (S.R.2:59,69-84). This omission violates the State's duty to supplement discovery required under Fla.R.Crim.P. 3.220(j). All parties agreed at the reconstruction hearing that Ms. Dominick's new testimony was important, corroborative, and highly detrimental to the defense. (S.R.2:59,79).

B. Tina Jones and Time of Death

In Point I of the Argument, we have set forth how prosecutorial misconduct, ineffective lawyering, and the trial court's failure to dutifully instruct the jury created an unfair trial. Here, that prosecutorial misconduct is fleshed out, as the State violated Fla.R.Crim.P. 3.220(j)'s duty to supplement discovery concerning Ms. Jones changing

her testimony the Monday before trial.

The police, the prosecutor, and the medical examiner all believed the murders were committed after midnight on Saturday, October 28th, because Tina Jones was sure she had last spoken to her sister on Saturday afternoon. This recollection triggered the prosecution's time of death theory, and was relied upon by the defense. Yet on examination of Ms. Jones on the second day of trial, this was elicited:

> Q: Ms. McCoy [sic], you did tell the police on the night that you discovered your sister that you last talked to her on the 28th; is that correct?
> A: Yes.
> Q: Now, you subsequently came to the belief that you were incorrect?
> A: Yes.
> Q: Okay. Can you tell about when that occurred?
> A: The first time that I thought that I was incorrect was several months ago, and this past week on Monday it came to be true that I was incorrect.
> Q: Okay. So you were finally -- you finally decided in your mind that you were incorrect for sure this week?
> A: Monday.
>
> * * * *
>
> Q: You are somewhat familiar with the evidence in this case?
> A: Yes.
> Q: Okay. And you are somewhat familiar as to why you are being called about the time of death?
> A. Yes.
> Q: Okay. And so it was only this Monday that you became convinced you were incorrect from what you previously said?
> A: In my own mind. Everybody else knew it wasn't.

(T.7:654, 655). [emphasis supplied].

This second discovery violation was elucidated at the reconstruction hearing. The

prosecutor testified that Tina Jones first told him that she was changing her testimony regarding when she last spoke to her sister "after that weekend (before the trial began). . . basically during the trial." (S.R.2:33). Yet defense counsel were not advised of Ms. Jones' new recollection. (S.R.2:58,84). Her new testimony moved the time of death back two days, from Sunday morning to Friday evening. More importantly, it doved-tailed with the new versions of Friday evening that surfaced the weekend before trial from Ms. Babcock and Ms. Dominick. Until Ms. Jones changed her testimony, the State's evidence from Ms. Babcock and Ms. Dominick was that Mr. Martinez killed on Friday; in contrast, Ms. Jones had planned on testifying that her sister was alive on Saturday. The importance of Ms. Jones changing her testimony is apparent; what is unknown is why the prosecutor did not tell the defense of Ms. Jones' new recollection when he acquired the knowledge.

C. The Remedy of a New Trial

It seems clear that Rule 3.220(j) was violated twice; that Rule places a duty on the State to promptly disclose additional material. See Neimeyer, supra; McArthur v. State, 671 So.2d. 867 (Fla. 4th DCA 1996) (failure to advise the defense of mistake in discovery disclosure reversible error); Lowery v. State, 610 So.2d. 657 (Fla. 1st DCA 1992) (continuing duty). Equally clear, however, is the absence of a defense objection on either occasion. See Reese v. State, 694 So.2d. 678 (Fla. 1997) (discovery violation

waived by defendant's late objection). The list of omissions by defense counsel grows longer and longer. See White v. Singletary, 972 F.2d. 1218 (11th Cir. 1992) (approach taken by counsel ineffective if tack not taken by reasonably competent counsel).

An objection at either instance would have mandated a hearing on the violations. See Richardson v. State, 246 So.2d. 771 (Fla. 1971). A refusal to conduct such a hearing is reversible error. Simms v. State, 681 So.2d. 1112 (Fla. 1996). The hearing would have resulted in a determination that the violation was wilful, substantial, and affected the Defendant's ability to prepare. State v. Schopp, 653 So.2d. 1016 (Fla. 1995).

Both Ms. Jones and Ms. Dominick changed the face of the trial. Without their material new testimony, the State's case was at sea as to when the murders occurred -- the Babcock/Dominick version defied Ms. Jones' recollection, until Ms. Jones changed her testimony. The critical nature of Ms. Jones' change is self-evident. Both the State and the defense agreed at the reconstruction hearing that Ms. Dominick's new evidence was important. An objection by the defense during the testimony of either Ms. Jones or Ms. Dominick would have warranted a Richardson hearing, and eventually a mistrial. See Barrett v. State, 649 So.2d. 219 (Fla. 1994) (failure to reveal recent expert fingerprint comparison reversible error); Mobley v. State, 705 So.2d. 609 (Fla. 4th DCA 1997) (late disclosure of witness a discovery violation and reversible error).

Had the State timely notified the defense, as required by the Rule, the defense would have had the opportunity to request the deposition of Ms. Jones (it had not deposed her pre-trial), or depose Ms. Dominick (it had not deposed Ms. Dominick), or had the opportunity to reconstruct its approach to trial. See Schopp, supra, 653 So.2d. at 1020 ("the defense is procedurally prejudiced if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred.") Indeed, the Defendant could have recognized the improbability of an acquittal, and accepted the pending plea offer which would have avoided the death penalty. Rule 3.220(j) is in place to avoid "trial by ambush". Donahue v. State, 464 So.2d. 609, 611 (Fla. 4th DCA 1989). That happened here.

This Court can rectify the error, notwithstanding the absence of an objection, by proceeding down two equally available avenues. First, no confidence in the integrity of the outcome of this trial exists. This Court's decision in Robinson, supra at 702 So.2d. 213, is the seminal case which is clearly analogous. Second, the notion that counsel for Mr. Martinez was asleep at the wheel grows and grows. This Court, on several occasions, has set aside capital cases where omissions by counsel render a result unreliable. See Cherry v. State, supra; State v. Gunsby, supra. See also Point VI, infra. We now ask that Joaquin J. Martinez v. State be added to that list of reversals.

VI.

IN THE UNIQUE CIRCUMSTANCES OF THIS CASE, WHERE TRIAL COUNSEL'S INEFFECTIVENESS IS APPARENT FROM THE RECORD, THE DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 16, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

Although claims of ineffective assistance of counsel are disfavored on direct appeal, this case presents unique circumstances warranting reversal because of counsel's deficient performance and the resulting prejudice to the defense which is apparent from the record on direct appeal. While the Defendant would submit that the omissions set forth herein, and throughout this brief, are so overwhelmingly prejudicial that it constitutes ineffective assistance of counsel on the face of this record, he would ask that, if this Court disagrees with that issue, said finding be made without prejudice to his ability to raise the claim in a subsequent motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure. See Gregory v. State, 588 So.2d. 676 (Fla. 3rd DCA 1991).

To establish that defense counsel was ineffective in violation of the Sixth Amendment right to counsel, a defendant must show (1) that his attorney's representation was deficient -- i.e., that it "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that counsel's errors were prejudicial -- i.e., "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694. Rose v. State, 675 So.2d. 567 (Fla. 1996). Although ineffective assistance of counsel is generally considered to be a collateral matter, this claim may be raised on direct appeal when "the facts giving rise to such a claim are apparent on the face of the record, or conflict of interest or prejudice to the Defendant is shown." Gordon v. State, 469 So.2d. 795 (Fla. 4th DCA 1985); Owen v. State, 560 So.2d. 207 (Fla. 1989); Ross v. State, supra.

This Point is included to demonstrate the cumulative nature of counsel's omissions. They are staggering and include:

1. A statement by defense counsel in voir dire that he believes in the death penalty. (T.4:235);

2. The failure to file a notice of alibi, notwithstanding the defense of alibi;

3. The failure to object to the prosecutor's eliciting testimony that the Defendant failed to pay child support. (T.6:469);

4. The failure to object to the prosecutor eliciting testimony that the Defendant was unfaithful to his pregnant wife. (T.6:473);

5. The failure to request a jury instruction regarding the appropriate use of the transcript prepared by the State. (See Point II);

6. The failure to object and request a Richardson hearing when Ms. Jones offered new substantial and damaging testimony changing the time of death. (See Point V, infra);

7. The failure to object and request a Richardson hearing when Ms. Dominick offered new, substantial and damaging testimony regarding the eve of October 27th. (See Point V, infra);

8. The failure to request an alibi instruction, notwithstanding the elicitation of testimony and the presentation of the defense of alibi in summation. (See Point I, infra);

9. The failure to object to false representations made by the prosecutor in closing argument regarding "legal papers" to establish a motive. (T.1018); (See Points I and III, infra); and

10. The failure to object to the prosecutor's reference in summation that both the detective and a fellow assistant State attorney had no doubt of the Defendant's guilt. (T.10:1012).

It must be "clear from the record that counsel's [omissions] resulted in the jury hearing damaging evidence and rendered his representation 'outside the wide range of professionally competent assistance.'" Williams v. State, 515 So.2d. 1042, 1043 (Fla. 3rd DCA 1987) (quoting Strickland, 466 U.S. at 690) (failure to object to inadmissible hearsay); see also, Chatom v. White, 858 F.2d. 1479 (11th Cir. 1988) (counsel's failure to object to predicate for atomic absorption test "fell below standards of reasonable performance"); State v. Stacey, 482 So.2d. 1350 (Fla. 1985) (failure of trial and appellate counsel to research and raise ex-post facto violation was ineffective); Ross v. State, supra (failure to object to prejudicial argument by prosecutor ineffective assistance of counsel cognizable on direct appeal). There was no conceivable strategic justification for this

conduct by counsel. Cf. United States v. Wolf, 787 F.2d. 1094 (7th Cir. 1984) (failure to object could not have been tactical decision). Where, as here, the prejudice is apparent from the face of the record, relief on direct appeal is appropriate. See State v. Salley, 601 So.2d. 309, 310 n.1 (Fla. 4th DCA 1992); Gordon v. State, 469 So.2d. 795 (Fla. 4th DCA 1985) (trial counsel's ineffectiveness was grounds for reversal on direct appeal where counsel failed to timely file a list of alibi witnesses, resulting in defense being stricken, failed to remove biased juror, and failed to object to repeated improper questions or comments by prosecutors). There is at least a reasonable probability that, if not for counsel's errors, the outcome of the trial would have been different.

VII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

Defense counsel raised a number of challenges to the constitutionality of Florida's capital sentencing statute in the trial court, attacking (1) the imposition of the death penalty by a bare majority vote, (R.119-121), (2) the lack of guidance provided to the sentencing jury and the inadequacy of appellate review, (R.113-118), and (3) the statutory presumption that death is the proper punishment. (R.122-127). Each of these challenges was rejected by the trial court. (T.13:1357-66). Although this Court has previously rejected similar challenges to the constitutionality of Florida's capital sentencing statute, Mr. Martinez respectfully submits that those decisions are in error and should be

reconsidered.

A. The Florida Capital Sentencing Statute is Unconstitutional Because it Permits Imposition of the Death Penalty Based Upon A Bare Majority Vote by the Sentencing Jury.

This Court has held that there is no constitutional infirmity in permitting the advisory jury under Florida's capital sentencing statute, Section 921.141, Fla. Stat. (1996), to recommend a sentence of death based upon a simple majority vote. James v. State, 453 So.2d. 786, 791-92 (Fla. 1984). It has been acknowledged by this Court that Florida is the only state where the jury plays a role in sentencing which allows a simple majority vote to be sufficient to impose the death penalty. Mr. Martinez was sentenced to death upon a nine to three vote by the sentencing jury, a margin that would have resulted in a life sentence or life recommendation in any other state.

The slimmest margin the United States Supreme Court has permitted under the Sixth Amendment for determining a defendant's guilt is a 9 to 3 majority. Johnson v. Louisiana, 406 U.S. 356, 363 (1972). Although the Supreme Court has held that the sixth amendment right to a jury trial does not extend to capital sentencing proceedings, Spaziano v. Florida, 468 U.S. 447, 458-459 (1984), principles of due process and eighth amendment requirements of reliability compel adherence to similar standards of certainty in a jury's verdict in a capital sentencing proceeding. Since the trial judge is required to give "great weight" to the jury's recommendation under Tedder v. State, 322 So.2d. 908

(Fla. 1975), and Smith v. State, 515 So.2d. 182 (Fla. 1987), Florida's simple-majority rule allows a bare majority of the jury to render a death sentence that may be overridden only in extraordinary circumstances. Like improper jury instructions, the simple-majority rule undermines the reliability of the ultimate verdict of the trial judge. Cf. Espinosa v. Florida, 505 U.S. 1079 (1992).

B. The Florida Capital Sentencing Statute is Unconstitutional Because it Provides Inadequate Guidance to the Sentencing Jury and Does Not Require any Written Findings by the Jury, Precluding Adequate Appellate Review.

It is axiomatic that "[b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (citing Furman v. Georgia, 408 U.S. 238 (1972)). Notwithstanding the federal Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), Florida's capital sentencing statute can no longer be assumed to satisfy these constitutional requirements.

The statute provides no guidance as to how a jury should determine the existence of the sentencing factors or weigh them against each other. It does not state whether the jurors must find individual sentencing favors unanimously, by a majority, by a plurality, or individually. It establishes no standard of proof regarding mitigating circumstances and

does not require the jury to specify any of their findings other than their ultimate recommendation whether the defendant should be sentenced to death or life. The statute therefore fails to give the jury adequate guidance in finding and weighing the aggravating and mitigating circumstances and provides no assurance that the weighing process was properly conducted, thereby undermining the reliability of the jury's recommendation. See Parker v. Dugger, 498 U.S. 208 (1991); McKoy v. North Carolina, 494 U.S. 433, 440 (1990). Because the trial judge is required to give "great weight" to the jury's recommendation under Tedder and Smith, supra, the constitutional flaws in the procedure by which the jury renders its "advisory" verdict also taint the ultimate decision of the trial judge. See Espinosa, supra. Moreover, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing precludes adequate appellate review.

C. The Florida Capital Sentencing Statute Creates an Unconstitutional Presumption in Favor of the Death Penalty.

Mr. Martinez also submits that Florida's capital sentencing statute is unconstitutional because it does not require the State to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances before a sentence of death can be imposed; rather, it creates an unconstitutional presumption that death is the appropriate penalty and requires the defendant to overcome that presumption by proving

that the mitigating circumstances outweigh the aggravating circumstances.

The capital sentencing statute requires both the sentencing jury and judge to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1996); see also, id., Section 921.141(3)(b) (trial judge to determine whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances"). Thus, the statute creates a presumption that, once one aggravating circumstance is established, death is the appropriate penalty, and the burden of persuasion lies with the defendant to demonstrate mitigating circumstances which outweigh aggravating circumstances. See State v. Dixon, 283 So.2d. 1 (Fla.1973). This presumption and the corresponding allocation of the burdens of proof and persuasion do not comport with state or federal principles of due process and interfere with the jury's ability to give effect to mitigating evidence in violation of the state and federal constitutions. See Jackson v. Dugger, 837 F.2d. 1469, 1473-1474 (11th Cir. 1987); cf., Arango v. State, 411 So.2d. 172, 174 (Fla. 1982) ("burden-shifting" instruction might violate due process under Mullaney v. Wilbur, 421 U.S. 684, (1975), but instructions as a whole did not violate due process because jury was later properly instructed that it could recommend death only "if the state showed the aggravating circumstances outweighed the mitigating circumstances.").

Appellant further submits that, contrary to the decision in Ford v. Strickland, 696

F.2d. 804, 817-818 (11th Cir. 1983) (en banc), cert. denied, the reasonable doubt standard should be applied to the weighing process as a whole. The Fifth and Fourteenth Amendments to the Constitution "protect[s] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re: Winship, 397 U.S. 358, 364 (1970). The same standard of proof is constitutionally required to establish any fact upon which a death sentence is to be based, for the "qualitative difference" between death and lesser criminal penalties requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Elledge v. State, 346 So.2d. 998, 1003 (Fla. 1977) (applying heightened standard of review when "a man's life is at stake"), see also Specht v. Patterson, 386 U.S. 605, 608 (1967) (due process protections are required where "a new finding of fact . . . that was not an ingredient of the offense charged" must be made in order to support a particular sentencing outcome).

Florida's capital sentencing statute is therefore inconsistent with the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17, and 22 of the Florida Constitution.

VIII.

THE PENALTY PHASE AND THE SENTENCING PROCESS INCLUDED VARIOUS ERRORS WHICH RENDERED THE

PROCESS UNFAIR IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII AND XIV

Where life is at stake, every safeguard must be in place to guarantee fairness. Gregg v. Georgia, 428 U.S. 153 (1976). This Court has acknowledged the existence of heightened due process safeguards in capital cases. Elledge v. State, 346 So.2d. 998 (Fla. 1997). The process was tainted in this case for several reasons.

A. The Improper Use of the Burglary Conviction to find the Aggravating Circumstance of "in the commission of" Under Section 921.141(5)(d) Fla. Stat. (1996) Was Erroneous

Count Three of the Indictment alleged that the Defendant committed a burglary in that he remained in the residence of Doug Lawson to "commit a battery upon" the victims. (R.46). The State did not allege or prove an unlawful intent on entering, nor was pecuniary gain alleged nor proven. A conviction was returned through the artificial notion that Mr. Martinez, as a guest, became a burglar when a fight began and the homicides ensued.

Point IV, infra, argues the inapplicability of Section 810.02, Fla. Stat. (1995). See Miller v. State, 713 So.2d. 1008 (Fla. 1998). Setting aside the burglary conviction must also result in a new penalty hearing, as the jury was instructed that the conviction was an aggravating circumstance under Section 921.141(5)(d), and the trial judge utilized this circumstance in imposing the death penalty. (R.2:332) ("the instant [Mr. Martinez]

formed the intent to kill his presence became a burglary."). See Socher v. Florida, 504 U.S. 527 (1992); Espinosa v. Florida, 505 U.S. 1079 (1992).

A capital sentencing scheme must narrow the class of eligible persons found guilty of murder to pass constitutional muster. Zant v. Stephens, 484 U.S. 231 (1983). It is the rare murder that occurs outdoors; this "presumed withdrawal of consent" once a guest begins a criminal act artificially adds a burglary charge to almost every murder. Using this rationale, all domestic homicides done in the heat of passion would be transformed from second degree murders to first degree felony murders -- a knife or gun raised in anger would automatically be enhanced to a first degree felony murder. This statutory construction must inure in favor of the accused under the doctrine of lenity. Thompson v. State, 695 So.2d. 691 (Fla. 1997). Setting aside this aggravating circumstance requires a new penalty hearing. See Sochor v. Florida, supra.

B. Application of the HAC Circumstance in this Case is Unconstitutional as the Vague Instruction and Inconsistent Application Under the Facts of this Case Make the Circumstance Inappropriate

This case underscores the irrational application of the heinous, atrocious and cruel aggravating circumstance of Section 921.141(5)(h), Fla. Stat. (1996). The State presented evidence that Mr. Martinez went to visit a friend, Doug Lawson, to collect a debt. A fight ensued -- witnesses observed that the Defendant looked like he had been in a fight, as he had a swollen lip and scraped knuckles. (T.8:798). Sloane Martinez

testified that Joaquin told her the incident began when Lawson physically threatened him. (T.6:548). According to the medical examiner, and the Sentencing Order entered by the trial court, Lawson was shot four times and Ms. McCoy was shot once and stabbed repeatedly; she had defensive wounds to her hands, fought for her life and was conscious for one or two minutes before she bled to death. (R.2:331-333). The court found the HAC factor did not apply to Lawson, but did apply to Ms. McCoy. This finding demonstrates the unconstitutional nature of this circumstance.

1. The Deficient Instruction

The Defendant moved pre-trial to declare this circumstance unconstitutional as vague and overbroad due to the failure of its defining terms to allow a jury to be properly guided. (R.98-109). See Maynard v. Cartwright, 486 US. 361 (1988). Although the definitions provided by the judge were approved by this Court, see Standard Jury Instructions Criminal Law 90-1, 579 So.2d. 75 (Fla. 1990), the Defendant would contend here that the instructions remain deficient. The best evidence of this claim is the need for further instructions requested by the jury in its written question to the trial court, asking for a definition of "wicked". (T.11:1189). The use of archaic terms that are beyond the comprehension of modern jurors renders this circumstance invalid and unconstitutional under the United States Constitution, as jurors remain unguided and/or unable to objectively analyze this factor. See Proffitt v. Florida, 428 U.S. 242 (1976).

2. Inconsistent Application Under the Facts of this Case

This Court has limited application of this factor to "torturous murders involving extreme and outrageous depravity." Santos v. State, 591 So.2d. 160, 163 (Fla. 1991). This class is further limited to those murders where the perpetrator "exhibits a desire to inflict a high degree of pain, or in utter indifference to or enjoyment of the suffering of another." Chesire v. State, 568 So.2d. 908 (Fla. 1990).

Application of this factor has been inconsistent. Left unclear is whether the mindset of the killer or the fear visited upon the victim delineates "torturous". See Pope v. State, 441 So.2d. 1073 (Fla. 1984) (mindset of the defendant not at issue); cf. Chesire supra (primary focus is desire of defendant to inflict pain). Also unclear is the uncertainty involved in analyzing whether the victim endured the torture and pain; examination of the medical examiner entailed the gruesome task of eliciting an unscientific opinion as to how long Ms. McCoy was conscious once the attack began. (T.5:409-424) (varied opinion from 30 seconds to several minutes). Speculation can not be the basis for application of this circumstance. Lee v. State, 686 So.2d. 1316 (Fla. 1996). Finally, the State argued that Ms. McCoy suffered, knowing Lawson was dying. Yet this Court held in Street v. State, 636 So.2d. 1297 (Fla. 1994), that evidence of this sort is insufficient.

The greatest factor which inures against application of this factor are the facts

themselves. The killings were a responsive and spontaneous act, according to the evidence, when Lawson "physically threatened" Mr. Martinez. There was no evidence whatsoever regarding premeditation, outside the act itself. If the Defendant began shooting, and as the State posits, ran out of bullets and began stabbing Ms. McCoy, the fight was rapid and uninterrupted. The murders happened too quickly for any desire to inflict pain or torture to surface. Santos, supra at 591 So.2d. 163; Robertson v. State, 611 So.2d. 1228 (Fla. 1993). Many of the stab wounds were post-consciousness. See Jackson v. State, 451 So.2d. 458 (Fla. 1984) (error to consider wounds inflicted after victim lost consciousness). If the HAC factor did not fit the killing of Mr. Lawson, then it did not apply to Ms. McCoy, so long as the Defendant's mindset is the determinative point of relevance. It was not both conscienceless or pitiless, and unnecessarily tortuous, thus inapplicable. Hartley v. State, 686 So.2d. 1316 (Fla. 1996).

IX.

IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS DISPROPORTIONATE, WHERE THE DEFENDANT PROVED CONSIDERABLE MITIGATING CIRCUMSTANCES AND THE FACTS SURROUNDING THE HOMICIDES REMAIN UNCLEAR

Certain cases are troubling. Those which haunt the halls of justice are capital cases where there is no eye witness to the incident, no physical evidence linking the defendant to the act, a disputed or unreliable admission, and jail house snitches. This case has all

the earmarks of unreliability, yet Joaquin Martinez is condemned to die. Death is disproportionate here, and a violation of Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful and deliberate proportionality review, considering the totality of the circumstances and comparing it with other capital cases. Porter v. State, 564 So.2d. 1060 (Fla. 1990). The due process clauses of our state and federal constitutions require this heightened scrutiny. Sinclair v. State, 650 So.2d. 1138 (Fla. 1995). Two separate considerations require a vacating of the death sentence here: the uncertainty regarding what happened, and the nature of the aggravating and mitigating circumstances.

No one testified how or why Mr. Lawson and Ms. McCoy were killed. Sloane Martinez testified her ex-husband admitted it to her, but she testified "he wasn't specific. . . I had no idea. I thought he could be telling a story. . . I wasn't sure." (T.7:579-580). She also testified he was not clear why it happened; the deal between Mr. Martinez and Mr. Lawson "was merchandise or drugs, I didn't exactly know." (T.6:548). Mr. Martinez was apparently hurt in the struggle; he had a swollen lip, scraped knuckles, and looked like he had been in a fight. (T.8:798). Most significantly, Mr. Martinez allegedly told his ex-wife that Lawson "threatened me"; Lawson "was going to physically hurt him." (T.6:548).

The State's theory was that Mr. Martinez went to the house to collect a debt. Alternatively, the State argued that he went there while enraged after receiving a court injunction from his ex-wife. A fight broke out at the Lawson home, and both victims were shot; because the gun jammed, the struggle ended with the stabbings. But the State's theory was but a guess; the prosecution conceded in summation that it had no evidence of how or why the killings occurred. Indeed, the trial judge declined to instruct on pecuniary gain, as there was no evidence of robbery, and said "I think we'll be asking the jury to speculate on what the reasons for this killing was." (T.11:1053).

These facts do not warrant death. The death penalty is reserved for the most aggravated and least mitigated first degree murders. State v. Dixon, 283 So.2d. 1, 7 (Fla. 1973). The trial court found ample evidence of mitigation. The Sentencing Order reveals the judge found that Mr. Martinez, who was 23 years old at the time of the incident, proved (1) he had no significant history of criminal activity; (2) an excellent family background as a loving, religious son who was of great help to his legally blind father, and the elderly and the poor; (3) an able, generous "wonderful father" to his two young daughters; (4) that he suffered from depression and disorientation as a result of an automobile accident which left him in need of counseling; (5) he had a reputation for being a hard worker; (6) he had an aversion to violence; (7) he would adjust to prison very well, as he had spent almost two years in jail without any disciplinary actions, and

he participated in educational and religious programs; (8) that his ex-wife asked that his life be spared to enable her and their two daughters to maintain a relationship; and (9) psychological testing was introduced that Mr. Martinez is an intelligent man with a healthy personality, is neither sociopathic nor psychopathic, and will adjust well to prison life. (R.2:332-335).

In contrast, the aggravating factors were less compelling. Two were legally automatic: the contemporaneous violent felony against Mr. Lawson and the burglary. But the Lawson incident may have been provoked by the victim - the evidence from Sloane Martinez suggests as much; the burglary conviction is artificial, and should carry little weight. See Point IV, infra. What remains is HAC, which is less compelling where substantial mitigation is proven. Morgan v. State, 639 So.2d. 6 (Fla. 1994) (substantial mitigating circumstances outweigh two aggravating factors, including HAC); Thompson v. State, 647 So.2d. 824 (Fla. 1994).

This Court's precedents include several theories for vacating the death sentence. First, the line of cases describing the "robbery gone bad" scenarios provide a reasonable analogy. See Johnson v. State, 23 Fla. L. Weekly S563 (Fla. 1998) (murders which occurred in course of debt collection, with two aggravators and substantial mitigators, was disproportionate); Terry v. State, 668 So.2d. 954 (Fla. 1996) ("robbery gone bad" didn't warrant death penalty). Second, the unclear circumstances surrounding the events cast

a doubt on the applicability on death as an appropriate punishment. See Terry, supra, 668 So.2d. at 965 ("we simply can not conclusively determine on the record before us what actually transpired immediately prior to the victim being shot."). The evidence suggests the homicides escalated from a fight, rather than a calculated plan to inflict death. See Sager v. State, 699 So.2d. 619 (Fla. 1997); Buckner v. State, 714 So.2d. 384 (Fla. 1998) (disproportionate where a victim was shot five times after "tussling" with defendant). Finally, the large number of compelling mitigating circumstances compel a life sentence, even where the HAC circumstance exists. Nibert v. State, 574 So.2d. 1059 (Fla. 1990); Smalley v. State, 546 So.2d. 720 (Fla. 1989). Due process and principles of fairness require a vacating of the death sentence for each and every reason set forth herein.

CONCLUSION

This Court will not countenance an unreliable proceeding where a life is at stake. The guilt phase was replete with errors, some preserved and others which undermined the integrity of the process. These verdicts can not stand. Nor is death appropriate here when the death penalty relied on invalid aggravators which were nevertheless outweighed by substantial mitigating evidence. A new trial or a vacated sentence is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of January, 1998 to: **CLERK OF THE COURT**, Florida Supreme Court,

Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925; **MS. CAROL M. DITTMAR**, Counsel for Appellee, Assistant Attorney General, Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607; and **MR. JOAQUIN MARTINEZ**, Reg. No.: 124396, c/o Florida State Prison, P.O. Box 181, Starke, Florida 32091-0747.

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