IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1408

JOHN F. MOSLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On direct review from a decision of the Circuit Court of the Fourth Judicial Circuit imposing a sentence of death

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
FLORIDA BAR NO: 0144886
P.O. BOX 568005
ORLANDO, FL 32856-8005
(407) 841-7676

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

PREFACE

This is an appeal from a judgment and sentence imposing the death penalty from the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, the Honorable Michael Weatherby presiding. John F. Mosley was the defendant in the trial court and will be referred to as "defendant" in this brief.

The State of Florida was the plaintiff in the trial court and will be referred to as "State" in this brief. The defendant is appealing his convictions and sentence of death. The record will be cited as [R. (volume number), p. (page number].

STATEMENT OF THE CASE AND FACTS

BACKGROUND

Defendant John Mosley and Carolyn Mosley had been married for over 15 years. R19, p. 1881-1882. Nevertheless, Carolyn Mosley was aware that her husband had an extramarital affair; She knew her husband had "cheated" on her. R19, p. 1502.

Defendant John Mosley had, in fact, been seeing a woman named Lynda Wilkes. R12, p. 620. Lynda Wilkes had an adult daughter named Marquita Wilkes. According to Marquita Wilkes, the Defendant would visit Lynda Wilkes during the evening. He would sometimes bring clothes for Lynda Wilkes' new baby, Jay-Quan Mosley. R13, p. 620. Marquita Wilkes was of the understanding that the infant Jay-Quan Mosley was born of Defendant John Mosley. R13, p. 637.

On December 27, 2003, the Florida Department of Revenue served Defendant John Mosley with a paternity lawsuit in order to force the Defendant to pay child support for Jay-Quan Mosley. R15, p. 1055. Approximately two months later, a default paternity judgment was entered against the Defendant. That default paternity judgment required the Defendant to pay $35 per week child support for

Jay-Quan Mosley. R15, p. 1056-1057. Eleven days later, on March 12, 2004, the Defendant filed a motion to set that default paternity judgment aside. R15, p. 1507.

On April 21, 2005, the Defendant stopped by Lynda Wilkes' home. He visited with her and Marquita Wilkes . R8, p. 630-631. The Defendant and Lynda Wilkes eventually went into a back bedroom and had sexual intercourse. R8, p. 623; R14, p. 915; R14, p. 964, 969. They made plans to meet again the following day at the nearby JC Penney shopping center. R14, p. 980-981.

On this same day, the Defendant arranged for a plumber to appear at the home shared by Defendant and his wife the following day in order to repair a leaky toilet. R18, p. 1751-1752, 1755.

The following day, April 22, 2004, Lynda Wilkes rose and prepared her children for school. R8, p. 642. She informed her second daughter, Naquita Wilkes, that she would be taking Jay-Quan Mosley, to the JC Penney store to meet with the Defendant and to do some shopping . R8, p. 643. This was the last time Naquita Wilkes ever saw Lynda Wilkes or Jay-Quan Mosley. R8, p. 624-645. For this reason, April 22, 2004 is referred to as the "day of the disappearance" in this brief.

CO-DEFENDANT BERNARD GRIFFIN'S DESCRIPTION OF THE MURDERS

Bernard Griffin was 15 years old at the time of the disappearance. R1, p. 2. Even though he himself was a suspect and ended up only being charged as Defendant's accessory, he described how Lynda Wilkes and Jay-Quan Mosley were killed, and how their bodies were disposed of. R13, p. 670.

According to Bernard Griffin, the Defendant wanted a baby killed. R13, p. 680. He offered Bernard Griffin $15,000 to kill it. R13, p. 681. The Defendant instructed him to enter Lynda Wilkes' house and shoot the baby and anyone else that got in the way. R13, p. 682. The Defendant gave Bernard Griffin a diagram of Lynda Wilkes' house. The Defendant told Bernard Griffin that he would provide him a gun. R13, p. 682.

On April 22, 2004, the day of the disappearance, Bernard Griffin telephoned the Defendant and asked the Defendant to drive him to the home of Ms. Kenya Mobley. Kenya Mobley lived in the Kendall Court Apartments. R13, p. 685.

The Defendant drove his Chevrolet Suburban truck to Bernard Griffin's home. R13, p. 685-686. The Defendant pointed out to Bernard Griffin that "the lady and the baby" were sitting in the truck. R13, p. 686. Bernard Griffin got in. The Defendant drove past the Kendall Court Apartments (R13, p. 688) and

continued on to a dirt-road, wooded area on the outskirts of town. He instructed Lynda Wilkes to step out of the truck. R13, p. 689. She obeyed, holding the infant Jay-Quan Mosley in her hands. R13, p. 689.

The Defendant then grabbed Lynda Wilkes by her neck and strangled her. R13, p. 689. He placed a bag over her head and put her body in the back of his truck. R13, p. 691.

The infant, Jay-Quan Mosley, was on the ground, crying. At Defendant's instructions, Bernard Griffin held open a plastic garbage bag. The Defendant placed the crying infant in it, tied it shut, and placed it in the back of Defendant's truck. R13, p. 691-692. The Defendant covered the bag and Lynda Wilkes' body with a blue plastic tarp. R13, p. 693. The infant could still be heard crying. R13, p. 692. As they drove out of the wooded area, the baby's crying stopped. R13, p. 692.

The Defendant dropped Bernard Griffin off at Ms. Kenya Mobley's home at the Kendall Court Apartments.

BERNARD GRIFFIN'S TESTIMONY ABOUT THE BODY-DISPOSAL TRIP

According to Bernard Griffin, the Defendant returned to Bernard Griffin's house around 11:00 p.m. that same evening. R13, p. 695. Bernard Griffin climbed into the Defendant's truck and noticed a foul smell. R13, p. 696. The Defendant drove "out of town." Bernard Griffin remembered seeing a "Gainesville" sign. The Defendant utilized his cell phone on the trip. R13, p. 696. They drove for "like about close to an hour" (R13, p. 697) and eventually ended up in a wooded area. R 13, p. 697-698.

Both of them donned gloves that the Defendant kept in the back of his truck. R13, p. 698. They removed Lynda Wilkes' body. The Defendant poured lighter fluid on it and set it on fire. R13, p. 699. The Defendant told Bernard Griffin that this was necessary because Lynda Wilkes had scratched him. R13, p. 699.

The pair climbed back into the truck. The Defendant continued driving away from Jacksonville for "a couple of hours." They ended up at a dumpster behind a Winn-Dixie supermarket. R13, p. 701. The Defendant removed the bag containing what Bernard Griffin assumed was the dead baby. The Defendant placed it in the dumpster. R13, p. 701. The Defendant instructed Bernard Griffin

to remove his gloves and shoes and place them in the dumpster as well. R13, p. 701.

On the way back to Jacksonville, The Defendant gave Bernard Griffin $100 cash. R13, p. 702. The Defendant stopped at an apartment building, took back $20 of cash from Bernard Griffin, and asked him to wait in the truck for "a couple of minutes." The Defendant went briefly to the front door of the apartment, and returned to the truck. R13, p. 702-703. He drove Bernard Griffin home. By the time they arrived, it was daylight. R13, p. 703.

Shortly thereafter, the Defendant contacted Bernard Griffin and asked for assistance in finding a tag to switch with the one on his truck. R13, p. 704. The Defendant informed Bernard Griffin he was going to switch the tires on his truck so the police could not match them to any tire tracks they had left behind. R13, p. 704. Eventually, Bernard Griffin went to the police. Over the course of several interviews, he told them what he remembered of the homicides. R13, p 704.

SEARCH FOR VICTIMS' BODIES

Bernard Griffin was able to take the police to the purported killing site. It was off Armsdale Road, on the outskirts of Jacksonville. R15, p. 1088-1091.

With the help of a police sketch artist and Bernard Griffin's limited recollection of some of the features of the body-burning site, the police were eventually able to find Lynda Wilkes' charred body. It was in a field near Waldo, Florida. R15, p. 1094-1098.

At the body-burning site, the police recovered three rings, a watch stopped at 2:29, keys and pieces of cloth from the charred remains. R14, p. 837; R 15, p. 1100. The keys fit victim Lynda Wilkes' car. R15, p. 1099-1100. The jewelry and watches were identified as those belonging to Lynda Wilkes. The State Medical Examiner submitted pieces of a femur and vertebra for DNA testing. R14, p. 885.

The DNA obtained from Lynda Wilkes' bones matched the DNA from the bloodstain found in Defendant's truck. R17, p. 1517-1518. Ultimately, the prosecution and defense stipulated that the charred body was indeed that of victim Lynda Wilkes. R17, p. 1419.

With Bernard Griffin's assistance, the police found the Winn-Dixie supermarket dumpster that Bernard Griffin believed the Defendant threw the infant's bagged body into. This was one week post-accident. Nothing was found in the dumpster. R15, p. 1088-1089. Investigation revealed that the dumpster contents had been transported to a landfill in Valdosta, Georgia. R15, p. 1159. An

extensive search of that landfill failed to produce any evidence of infant Jay-Quan Mosley. R15, 1105-1106.

The prosecution presented the testimony of a forensic anthropologist who testified that searches for bodies in landfills are very difficult. R 16, p. 1342-1343, 1347. An employee of the subject landfill testified that the landfill company uses massive tractors equipped with trash-pulverizing "cleats" to pulverize and compress the trash. This is done to maximize the use of expensive landfill space. R17, p. 1472.

A search of the Defendant's truck produced a gas can, black plastic bags, disposable gloves, and some blood-stained carpet. R14, p. 853-858.

According to State Medical Examiner Marguerite Arruza, a manually strangled human's body will ooze a bloody discharge. R14, p. 887.

DEFENDANT'S EMPLOYMENT AT A CONVENIENCE STORE

On the night before the disappearance, the Defendant showed up at his convenience store job at 10:00 p.m. to work the "graveyard shift." The graveyard shift ended at 7:00 a.m. on the morning of the disappearance. R16, p. 1378.

The Defendant was scheduled to begin another shift, just six hours later, at 2:00 p.m. in the afternoon of the disappearance. R16, p. 1321. However, the Defendant arrived late. R16, p. 1371. Time clock records reflect that he clocked in at 2:31 p.m. of the afternoon of the disappearance (R16, p. 1384), completed his shift, and clocked back out at 11:01 p.m. in the evening of the disappearance. R16, p. 1386.

At 6:00 a.m., the Defendant was present at the home of a girlfriend of his named Jamilla Jones. *See* testimony of Jamilla Jones, R8, p. 778-779.

There was no dispute about the times when the Defendant was present at his job. However, the question of what the Defendant was doing when he was *not* at work was hotly disputed. The prosecution and the defense each presented a great deal of evidence to show what the Defendant was doing between 7:00 a.m. and 2:31 p.m. on the day of the disappearance. This encompassed the time when Bernard Griffin claimed the murders occurred (see below).

The prosecution and defense also presented a great deal of evidence to show what the Defendant was doing between 11:01 that night and 6:00 the following morning. This encompassed the time that Bernard Griffin claimed the body-disposal trip occurred (see below).

CONFLICTING EVIDENCE OF THE DEFENDANT'S WHEREABOUTS AROUND THE TIME OF THE PURPORTED KILLING TRIP

A tire repair shop employee named Jimmy Horton told Detective Mark Romano that the Defendant dropped off a flat tire for repair at 9:00 in the morning of the disappearance and returned and picked it up at 1:00 that afternoon. R16, p. 1249. However, Mr. Horton later admitted that the repair was completed quickly and that the Defendant was out of the shop by 1:00 p.m., perhaps earlier. R18, p. 1631-1632. Mr. Horton also admitted that he had previously told the police that the Defendant acted nervous and said he needed a receipt for Court. R18, p. 1634.

The Defendant called a newspaper reporter from jail. The Defendant told the reporter that, during the afternoon of the disappearance, his time was consumed with getting a flat tire repaired, meeting briefly with Lynda Wilkes around "late 12:00 or something," arriving back at his own home around 1:00 in the afternoon, attempting some do-it-yourself plumbing repairs, calling a plumber, readying himself for work, and ultimately arriving at his convenience store job around 2:15 p.m. R 17, p. 1420-1426.

Police Sergeant Eason spoke with the Defendant during the initial "missing person" investigation. According to Sergeant Eason, the Defendant had a flat tire en route to his rendevous with Lynda Wilkes at the JC Penney parking lot. R14, p.

982. He telephoned Lynda Wilkes from a pay phone across the street from the JC Penney store. He told her he would meet her at 12:45 or 1:00 that afternoon. R14, p. 982. Another police detective testified that subpoenaed telephone records confirmed that such a pay phone call was indeed made at 11:38. a.m. R16, p. 1214.

The Defendant further explained to Sergeant Eason that, after leaving the tire shop, he stopped and talked about drugs with a cousin who lived on Lem Turner Boulevard. R14, p. 982. From there, he drove to the JC Penny shopping center and met Lynda Wilkes. The two of them conversed awhile and then headed off to view some nearby homes which were offered for sale. R14, p. 985. After that, they parked behind the JC Penney shopping center and Lynda Wilkes performed oral sex on him. R14, p. 986-987.

The Defendant left Lynda Wilkes and the JC Penney shopping center at 1:00 p.m. and heading home. R14, p. 986-987. Additional, substantially similar testimony appears in Volume 14, pages 914-915 and pages 966-967 of the record on appeal. The Defendant also spoke to missing persons police detective Dennis Fuentes by telephone. According to Detective Fuentes, the Defendant said that he left Lynda Wilkes at the JC Penney Shopping center at 1:30 p.m., after the two had a sexual encounter. R14, p. 926-928.

The Defendant's daughter, Amber Mosley, testified that she saw the Defendant inside the family home at approximately 1:00 p.m. that afternoon. R19, p. 1812-1813. The Defendant's Wife, Carolyn Mosley also testified that the Defendant had arrived home around 1:00. R19, p. 1897-1899.

CONFLICTING EVIDENCE OF THE DEFENDANT'S WHEREABOUTS DURING THE TIME OF THE BODY-DISPOSAL TRIP

A bank ATM machine receipt was among the items found in the Defendant's truck. After some investigation, the prosecution and the defense stipulated that the Defendant was indeed present and using the ATM machine at 11:08 p.m. of the evening of the disappearance. R17, p. 1550.

The Defendant's daughter, Alexis Mosley, testified at Defendant's trial. She observed the Defendant and his truck at the family home at 11:30 p.m. on the night of the disappearance. R19, p. 1823. However, she did not have an opportunity to observe the Defendant later on, during the middle of the night. R19, p. 1827.

The Defendant's wife, Carolyn Mosley, similarly testified that the Defendant slept with her in the family home on the evening of the disappearance. She herself fell asleep around 1:00 a.m. (R19, p. 1891-1892 and p. 1991).

The Defendant's Daughter, Alexis Mosley, testified that she observed the Defendant and his truck at the family home at 5:15 a.m. on the morning after the disappearance. R19, p. 1825- 1826. The Defendant's wife, Carolyn Mosley, similarly testified that the Defendant and his truck were present at the family home at 5:30 a.m. on the morning after the disappearance. R19, p. 1892-1902.

Ms. Mosley was adamant that the Defendant was indeed at home and was not with Jamilla Jones at 6:10 in the morning after the disappearance. R19, p. 1910. Jamilla Jones, however, testified that the Defendant was at her home at 6:00 a.m. R16, p. 1386.

Fellow convenience store employees testified that the Defendant was scheduled to begin work around 6:00 or 7:00 in the morning after the disappearance. However, the Defendant called in and notified his co-workers that he would be late because he had been up all night and did not get any sleep. R16, p. 1385-1387. Convenience store records reflected that the Defendant did not clock in until 12:49 p.m. that afternoon.

THEORY OF DEFENSE

Defense counsel's guilt-phase opening argument revealed that the defense strategy was to make the jurors wonder if Bernard Griffin had framed the Defendant. Defense counsel told the jurors, " . . . the family annoited Mr. Mosley as the easy target." Later on, during a mid-trial hearing on a defense continuance motion, defense counsel explained to the trial Court judge that the "theory of defense" was that Bernard Griffin and somebody else committed the offenses and that Bernard Griffin was someone with a history of falsely shifting blame in criminal cases. R19, p 1953.

The questions Defense counsel asked the various witnesses were clearly intended to fuel speculation that Bernard Griffin borrowed the Defendant's cell phone and truck for the crimes. During cross-examination, defense counsel got lead detective Mark Romano to admit that no one bothered to ask Bernard Griffin if he had borrowed the Defendant's cell phone. R15, p. 1155. Defense counsel also got Bernard Griffin to admit that he occasionally drove without a license. R13, p. 753.

Later on, during guilt-phase closing argument, defense counsel argued that Bernard Griffin, with the help of an unknown accomplice, had committed the

murders and had framed the Defendant in order to draw attention away from himself. R20, p. 2023.

POOR CREDIBILITY OF BERNARD GRIFFIN

The defense did much to attack the credibility of Bernard Griffin. Bernard Griffin admitted that he was on probation. R13, p. 675. He admitted that he had asked the Defendant for a gun for his own drug-selling activities. R13, p. 727. He admitted he was sentenced on a third-degree felony the day before the disappearance. R13, p. 727.

Griffin admitted telephoning his relatives from jail and assuring them he would be getting out of jail soon. R13, p. 729-730. He admitted that he would occasionally drive without a license. R13, p. 679, 752.

The defense questioned police detective Mark Romano. Detective Romano admitted on cross-examination that Bernard Griffin was convicted of a third-degree felony and had been on probation at the time of the disappearance. R15, p. 1115. Detective Romano also admitted that Bernard Griffin kept changing his story (R15, p. 1126-1128) and occasionally strayed so far from the truth that Detective Romano had to admonish him to stop lying. R15, p. 1155.

Detective Romano also admitted that Bernard Griffin initially denied knowing that the victims' bodies were in the truck during the body-disposal trip. R15, p. 1170-1171.

The defense also presented a recorded jail telephone conversation in which Bernard Griffin told his mother that he would not have to serve prison time and had been promised help with finding a job after he got out of jail. R19, p. 1868. This suggested that Bernard Griffin had worked out some kind of "deal" with the prosecution.

CELL PHONE TOWER EVIDENCE

The State presented demonstrative graphics and testimonial evidence of the location of the cell phone towers that the Defendant's cell phone connected with during the evening of the body-disposal trip. This evidence suggested that the Defendant's cell phone was in the vicinity the Maxville, Florida cell phone tower at 12:27 a.m. and was in the vicinity of Orange Heights, Florida cell phone tower at 2:24 a.m.

These cell phone towers are indeed close to the Waldo-area field where Lynda Wilkes' charred body was found. R16, p. 1285-1290 and State's Exhibit 77. R16, p. 1288-1289. *See also* chart and maps included in State's Exhibit 77.

In closing argument, defense counsel argued that it was this evidence of the Defendant's cell phone connecting with these towers and not the cooperation of Bernard Griffin that led the police to Lynda Wilkes' body, not Bernard Griffin. R20, p. 2034.

"CONSCIOUSNESS OF GUILT" EVIDENCE

The prosecution presented a great deal of testimony which was obviously intended to show the Defendant's consciousness of his own guilt.

Jamilla Jones was a woman who "had a relationship" with the Defendant. They had been "going out" together. R13, p. 771-772. The Defendant was present at her apartment at 6:00 in the morning after the disappearance. He gave her $20 cash. R13, p. 788.

After his arrest, the Defendant wrote her a letter from jail. He urged her to "tell the truth" and tell the police that he arrived at her house at 6:08 a.m. He also wrote, "In order to refresh your memory . . . . I called you April 23rd . . . at 6:07 a.m.

The police think we are stupid." R13, p. 787. He also wrote, "Do not lie at trial and say that boy (i.e. Bernard Griffin) was with me because I know you really don't know." R13, p. 787.

The Defendant also wrote: "It is legal and okay to change your statement in Court if you let the jury know the police pressured and coerced you to say something before they took the statement and during the statement. Those corrupt police officers don't care about you, me or Lynda W. They just see this as an opportunity to take another black man off the street. You are the only one that can put me on death row." R13, p. 784.

Contrary to the spin put on the letter by the prosecution, the defendant's letter to Jamila Jones speaks for itself. The defendant expressed that he is innocent and pleads with Jones to do nothing but tell the truth.

Reports of the victims' disappearance and the Defendant's connection to the victims were broadcast on the local news. Some women notified the police that a man resembling the Defendant was inside their home. Police officer Isaac "Ike" Brown showed up at their house and asked the Defendant to come out. When he Defendant did not do so, Officer Brown imitated the sound of a barking dog and announced that he was coming in with a police dog. He found the Defendant crawling out from underneath a bed. R13, p. 940-944.

The State made tire-track plaster casts at the alleged killing site. (R16, p. 1318). However, two days after the disappearance, the Defendant changed all four tires of his truck. R16, p. 1208, 1259. Consequently, the plaster casts of no evidentiary value. The Defendant's mother testified that the tires were actually changed pursuant to her wishes because the family was using the truck for a number of long-distance trips. R 18, p. 1729.

The Defendant's cousin, Kenneth Shanks, operated a car wash. He remembered learning about the subject victims' disappearance on the news. R17. P. 1408. Sometime after that, the Defendant appeared at the car wash asking for cleaning materials to remove a Kool-Aid stain from his truck. R17, p. 1409 Kenneth Shanks did not personally view the stain. One of his car wash employees gave the Defendant cleaning materials. R17, p. 1409.

The Defendant called a plumber named Jim Janette the day before the disappearance. The Defendant made arrangements for Mr. Janette to stop by his house the next day (i.e. the day of the disappearance) to work on his plumbing. R18, p. 1752. Mr. Janette arrived at the Defendant's house at 3:00 on the day of the disappearance.

The Defendant's wife, Carolyn Mosley, stated in a pre-trial sworn statement that the Defendant wrote his name on the receipt. R 19, p. 1912. At trial, she

admitted this was untrue. She herself added the Defendant's name to the plumbing receipt. R19, p. 1895-1896.

After the State rested the defense moved for a judgment of acquittal, arguing, *inter alia*, that there is no proof that the two alleged victims are even dead. R. 18, p. 1582.

SEQUENCE OF "GUILTY" VERDICTS

The Defendant's jury first announced that, as to Count 1, it found the Defendant guilty of first-degree murder of Lynda Wilkes. Immediately thereafter, it announced that it had also found the Defendant guilty in Count 2, first-degree murder of Jay-Quan Mosley. R20, p. 2142-2143, R4, p. 606-607.

PENALTY PHASE AND ADVISORY SENTENCES

The State served notice that it intended to present proof of the following aggravating circumstances for the murder of victim Lynda Wilkes: (1) Defendant was previously convicted of another capital felony, (2) The capital felony was committed for pecuniary gain, (3) The capital felony was especially heinous, atrocious, or cruel, (4) The capital felony was a homicide and was committed in a

cold, calculated, and premeditated manner without any pretense of moral or legal justification. R3, p. 501.

The State also served notice that intended to present proof of the same aggravating circumstances for the murder of victim Jay-Quan Mosley *plus* the aggravating circumstance of the victim of the capital felony being less than 12 years of age. R3, p. 502. The State subsequently announced that it would not argue the "heinous atrocious and cruel" aggravating circumstance with respect to Jay-Quan Mosley. R20, p. 2173.

As for mitigation, the defendant called his mother, Barbara McKinney, and U.S. Navy recruiter Jeff Pace. The defendant did not want any other witnesses to be called and to be heard by the jury. The defendant waived this right. R. 21, p. 2370-2381. Additional witnesses were put on by the defense in front of the judge alone at the *Spencer* hearing.

The defendant's younger sister was born premature and was mentally challenged. R. 21, p. 2298. His parents eventually divorced and his father never paid a dime in child support, which was a real financial hardship for the family. The defendant's father was abusive and only came by to beat the defendant and his siblings. The father sexually abused the defendant's sisters. This deeply affected the defendant. R. 21, p. 2302-2305, 2322-24.

The defendant was close to his maternal grandmother. The maternal grandmother was murdered by the defendant's "step" grandfather in 1974. The defendant always worked and supported his family. Following 9-11 the defendant enlisted in the U.S. Navy and obtained a position as a medical corpsman. R. 21, p. 2306-2327.

Following the penalty phase evidence and argument, the jury recommended a sentence of life without the possibility of parole for the murder of Lynda Wilkes. R5, p. 795. For the murder of Jay-Quan Mosley, the jury voted 8 to 4 for a sentence of death. R5, p. 796.

Following a separate, "judge" sentencing hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993), the trial court judge followed the jury's recommendations and sentenced the Defendant to life in prison without the possibility of parole for the murder of Lynda Wilkes and sentenced the Defendant to death for the murder of Jay-Quan Mosley. R6, p. 998-999. The defendant timely filed his notice of appeal and his initial brief follows.

SUMMARY OF ARGUMENT

It is also only a matter of time before the United States Supreme Court strikes down Florida's death penalty scheme. In this regard, the defendant has raised several arguments that have already been rejected by this Court in order to preserve them for future review. However, the defendant has also raised new issues that this Court has not addressed.

Significantly, the Defendant is arguing that the Florida due process clause provides more protection than the federal due process clause. This Court has not addressed the constitutionality of Florida's death penalty scheme with this fundamental concept in mind.

Precedent does not apply because there has never before been a holding that the Florida constitution provides more protection to defendants. When you couple this with the trial court's holding that it needed a special verdict form in this case, the defendant's death sentence is unconstitutional.

ARGUMENT 1: THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION PROVIDES MORE PROTECTION TO CRIMINAL DEFENDANTS THAN THE UNITED STATES CONSTITUTION AND THIS COURT SHOULD APPLY THE DOCTRINE OF PRIMACY TO THIS CASE

Article I, Section 9 of the Florida Constitution provides higher standards of protection than the United States Constitution. See Traylor v. State, 596 So.2d 957, 961-966 (Fla. 1992); Hlad v. State, 585 So.2d 928, 932 (Fla. 1991) (Kogan, J., dissenting); In re Forfeiture of Eight Thousand Four Hundred Eighty-Nine Dollars in U.S. Currency, 603 So.2d 96, 98 (Fla. 2d DCA 1992); Brown v. State, 484 So.2d 1324, 1328 (Fla. 3d DCA 1986).

The doctrine of primacy states that this Court should review claims of constitutional violations under the Florida Constitution before it reaches the United States Constitution. Traylor at 962-63; B.H. v. State, 645 So.2d 987, 991 (Fla. 1994).

As a point of comparison, Article I, Section 17 of the Florida Constitution, the prohibition against cruel and unusual punishment, explicitly states in its text that this provision must be construed exactly the same as the Eighth Amendment of the United States Constitution, as defined by the U.S. Supreme Court. Florida's

due process clause does not have this limiting language. This is a dispositive difference.

The due process clause of the Florida constitution can be read more stringently than the federal due process clause. State v. Barquet, 262 So.2d 431, 435-36 (Fla. 1972). See also State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102-03, 120 So. 335, 347 (1929).

In fact, Florida's due process clause provides higher standards of protection than its federal counterpart. See State v. Griffin, 347 So.2d 692, 696 (Fla. 1st DCA 1977) ("Florida due process standards in many instances exceed federal standards as defined by the United States Supreme Court.").

This Court has never made a ruling on the protections of Florida's due process clause as compared to the federal due process clause. It is still an open question.

The people of Florida have chosen to give its citizens more rights and protections in the area of governmental encroachment on individual rights. This necessarily includes the fairness of trials and executions.

If this Court were to disagree with the defendant on this issue, then Florida's due process clause would be redundant and therefore meaningless. The citizens of

Florida did not intend for this to be the case. The people seek more protection from the government than that offered by the federal constitution.

The court in M.E.K. v. R.L.K., 921 So.2d 787, 790 (Fla. 5th DCA 2006), held that the Florida Constitution provides higher standards of protection for parents in termination of parental rights proceedings than its federal counterpart due to the fundamental liberty interests at issue.

The M.E.K. mandate applies with equal or more force when applied to the criminal defendant, who is protected by a fundamental liberty interest against confinement, and in this case, death. Therefore, the Florida Constitution provides more protection than the federal constitution when this interest is infringed upon.

For example, the Florida due process clause provides greater protection against self-incrimination than the federal constitution. Charton v. State, 716 So.2d 803, 807 fn3 (Fla. 4th DCA 1998), *citing* Hoggins v. State, 689 So.2d 383, 386 (Fla. 4th DCA 1997), *approved* 718 So.2d 761 (Fla. 1998). See also Lee v. State, 422 So.2d 928, 930 (Fla. 3d DCA 1982).

In addition, Florida provides greater protection than the federal courts in preventing discriminatory jury selection practices. Whitby v. State, 2008 WL 321509 (Fla., February 7, 2008) (J. Pariente concurring), *citing* State v. Slappy, 522

So.2d 18, 20-21 (Fla. 1988) (which holds that Article I, Section 16 of the Florida Constitution, impartial trial, provides more protection than federal guarantees).

Significantly, however, it is essential that this court be reminded of this fundamental point of American jurisprudence: The constitution dictates the case law. It is not the other way around.

In sum, the Florida due process clause provides heightened protections to citizens accused of committing a crime. This Court should apply this standard to all claims of constitutional violations in this brief. In so doing, this Court should not be bound by prior decisions of this Court, or other courts, that simply apply a federal constitutional analysis to the case before them.

If this Court holds that the Florida due process clause provides more protection, then all of this Court's prior precedent would not automatically apply to the issues in this brief. Such a holding would require a re-examination of all precedent with the new mandate that Florida's due process clause provides more protection. Since there has never been such a holding, there has never been an analysis of an appellate issue with this fundamental concept in mind.

ARGUMENT 2: THE PROSECUTOR'S IMPROPER AND INFLAMMATORY REMARKS DEPRIVED THE DEFENDANT OF A FAIR TRIAL

In analyzing the prejudicial effect of improper, inflammatory, prosecutorial remarks, the inquiry of the appellate Courts is whether the prosecutor's comments were so outrageous as to taint the jury's finding of guilt or recommendation of death. Crump v. State, 622 So.2d 963, 971 (Fla. 1993).

Alternatively, the reviewing Courts determine whether the improper comments so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See* Dufour v. State, 905 So.2d 42, 64 (Fla. 2005), quoting Maxwell v. State, 490 So.2d 927, 932 (Fla. 1986).

The problematic prosecutorial remarks at issue fall into the following four categories. Where defense counsel objected, the objection is noted. However, this Court will consider the effect of improper prosecutorial comments even without objection where prejudice is demonstrated. Sufour v. State, 905 So. 2d 42 (Fla. 2005).

In Ruiz v. State, 743 So.2d 1 (Fla. 1999) this reviewing Court commented, "[t]he State argues that because defense counsel failed to object to several of the prosecutor's guilt and penalty phase statements, he is barred from raising the issue

on appeal. We disagree. When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted."

The improper prosecutor comments in the subject case are described below. The inflammatory comments denied the Defendant's due process and fair jury trial rights secured by the 5th, 6th and 14th Amendments to the United States Constitution and by Article 1, Sections 9 and 16 of the Florida Constitution.

A. The Prosecutor's Improper Comment That the State Does Not Seek the Death Penalty In Every First-Degree Murder Case

During voir dire, prosecutor improperly indicated to the prospective jurors that the State had put this case through some kind of screening process and had determined that it to be appropriate case for the death penalty. The prosecutor did this by telling the prospective jurors, ". . . does everyone understand that the death penalty is not sought in every first-degree murder case." R10, p. 184. There was no objection by the defense.

The prosecutor repeated the same impropriety during its penalty phase closing argument by telling the jurors, "As His Honor told you, and we have told you, death is not appropriate and it's not sought in every first-degree murder case, but it is sought in this one . . ." R22, p. 2412. Again, there was no objection by the defense.

Prosecutor comments which indicate that the State has put a case through its own evaluation process and determined it to be appropriate for pursuit of the death penalty are contrary to the sentence-recommendation function of the jury and are impermissible. Hall v. United States, 419 F.2d 582 (5th Cir. 1969), Pait v. State, 112 So.2d 380 (Fla. 1959). This Court found a similar comments by a prosecutor from the same State Attorney's Office to be among the prejudicial factors requiring a new sentencing-phase trial in Brooks v. State, 762 So.2d 879 (Fla. 2000).

B. The Prosecutor's Improper, "Comparative Worth" Argument

At the conclusion of his initial, guilt-phase closing argument, the prosecutor made the following comments to the jury:

> Lynda Jean Wilkes, she was a sister, a daughter, a mother and a friend but most importantly, and again for purposes of this proceeding, Lynda Wilkes was a human

> being. Jay-Quan Lyndarius Mosley, ten months old forever. Perfectly healthy, perfectly helpless with an absolutely infectious toothless grin. These are the dead."
>
> (R19, p. 1988).

The prosecutor made the same kind of improper, "comparative worth" argument in its final, guilt-phase closing argument as follows:

> As His Honor told you and we have told you, death is not appropriate and it's not sought in every first-degree murder case but it is sought in this one . . .
>
> (R22, p. 2412)

These statements, along with the other, improper prosecutor comments which are described in this brief, undoubtedly inflamed the passion of the jurors and indicated that the lives of the victims were worth more than the life of the defendant.

Although there was neither an objection by defense counsel nor any corrective admonition by the trial court, this Court has repeatedly condemned "comparative worth" arguments that effectively ask the jurors to compare the value of the victim's life with the value of the Defendant's life. Knight v. State,

923 So.2d 387 (Fla. 2005). *See also* Ruiz v. State, 743 So.2d 1 (Fla. 1999) and Urbin v. State, 714 So.2d 411 at 420-421 (Fla. 1998).

Indeed, even in *civil* cases, courts have held "value of human life" arguments to be improper. *e.g.,* Public Health Trust of Dade County v. Gerber, 613 So.2d 126 (Fla. 3d DCA 1993).

C. The Prosecutor's Improper Comments Which Made Certain "Other Bad Acts" of the Defendant the Main Feature of the Trial

As noted in the statement of facts above, guilt-phase evidence was presented at Defendant's trial which indicated, unavoidably, that the Defendant had extramarital affairs with victim Lynda Wilkes and State witness Jamila Jones.

Indeed, defense counsel was completely frank about this in his guilt-phase opening argument when he candidly told the jury that the Defendant " . . . was having three extramarital affaris: with Lynda Wilkes and with Alesha Jackson and with Jamila Jones . . . .all while he was married (but) those things don't make him a murderer." R12, p. 582-583.

During the guilt phase of Defendant's trial Detective Mark Romano testified that the police recovered the Florida Driver's License of a certain Mr. William Bowden from the Defendant's truck. R18, p. 1641.

In its final, guilt-phase closing argument, the prosecutor reminded the jury that a Detective Holmquist had testified to finding someone else's driver's license in Defendant's car by saying, "This guy (Defendant) is driving around with other people's driver's licenses in his car." R20, p. 2072-2073. There was no objection or corrective admonition by the trial court.

The prosecutor further argued to the jury:

> "We heard at the beginning (of the defense's guilt-phase closing argument) that the Defendant was leading a normal life. Is that what we've heard? He was leading a normal life? He had girlfriends all over the place. One of them is trying to get child support."
>
> (R20, p. 2087)

There was no objection nor corrective statement of any kind. It is quite possible to make improper, prejudicial argument about evidence properly admitted. The *way* an attorney argues proper and admissible evidence can render that evidence improper and prejudicial.

For example, there was evidence presented in the subject case that someone else's driver's license was found in the defendant's truck. R18, p. 1641. In his guilt-phase closing argument, defense counsel reminded the jury that police got the driver's license of someone other than the Defendant or Bernard Griffin out of the Defendant's car (R19, p. 1996).

This supported the "theory of defense" that the murders were committed by Bernard Griffin and an unknown accomplice, not the Defendant. However, the way the prosecutor talked about the driver's license suggested that the Defendant was a thief who stole it.

Improperly admitting evidence of collateral crimes evidence is presumed to be harmful error because of the danger that the jury will accept the collateral crime evidence as evidence of guilt of the crimes being tried. Henrion v. State, 895 So.2d 1213, 1216-1217 (Fla. 2d DCA 2005).

Admittedly, there exists case law which holds that evidence of unrelated crimes or wrongs which are inextricably intertwined with the crimes charged is admissible where it is impossible to give a complete or intelligent account of the crime charged without referring to the other crime or bad acts. *See, e.g.* Simmons v. State, 790 So.2d 1177 (Fla. 3d DCA 2001).

In the present case, there can be no doubt that the Defendant's extramarital affairs were inextricably intertwined with the circumstances of the crimes charged. However, the prosecution is prohibited from making the evidence of the other crimes or wrongs a feature of the trial. Butler v. State, 842 So.2d 817 (Fla. 2003).

This Court has explained that unfair prejudice results when the prosecution makes the collateral bad act a "feature" rather than a mere "incident" of the trial. Bryan v. State, 533 So.2d 744 (Fla. 1988). Bad acts which are admissible because they are inextricably intertwined with the charged offenses become impermissible "features" of the trial when the prosecution devolves into an assault upon the character of the accused. Conde v. State, 860 So. 2d 930 (Fla. 2003).

In the present case, the prosecutor complained to the jury that "We heard at the beginning (of the defense's guilt-phase closing argument) that the Defendant was leading a normal life. Is that what we've heard? He was leading a normal life? He had girlfriends all over the place. One of them is trying to get child support." (R20, p. 2087).

The prosecutor went too far. There is a grave risk that Defendant's jury found him to be guilty as much for thievery and adultery as for murder. Worse still, the prosecutor's focus on such "other bad acts" of the Defendant made them function as illegal, non-statutory aggravating circumstances.

Considering the fact that the jury recommended the death sentence for only one of the two murders, and considering that such death recommendation was only by an 8 to 4 vote, there is ample reason to believe that the jury's recommendation of death was a direct result of the prosecutor's highly inflammatory remarks.

D. The Prosecutor's Improper Comments Which Sought to Have the Jurors Put Themselves in the Place of the Victims and Imagine What They Felt

During trial, State Medical Examiner Marguerita Arruza explained how an adult's death by manual strangulation occurs. She explained that it would take such an adult victim about 10 seconds to lose consciousness and about 4 minutes to die. R14, p. 117-888, 891.

Arruza also explained how placing an infant in a plastic bag causes death. She explained that the infant would be in a confined space and breathing "against the plastic" every time it exhaled, causing death to occur quickly. R14, p. 889.

During his final, guilt-phase closing argument, the prosecutor made the following, objected-to statements which were clearly intended to get the jurors put themselves in victims's place and imagine what they felt:

> PROSECUTOR: Maybe she (adult victim Lynda Wilkes) wondered why they were picking up this young

boy but they picked him up and began driving, and they got out to that wooded area and she must have wondered why. She must have wondered then what are we doing here, but the defendant stops the car and he's looking for something in the car. Maybe she was excited about that. She steps out of the car and then the defendant grabbed her and strangled her. And her last moments must have been –

DEFENSE COUNSEL: I object Your Honor, improper argument.

THE COURT: Well, go ahead, Mrs. Senterfitt. Try to stick to the facts.

PROSECUTOR: She blacked out. Didn't take long. With the pressure around her throat she would have blacked out in darkness and then Jay-Quan Mosley is crying and then darkness. He's in a bag and he's trying to breathe but the bag gets closer and closer to his face.

DEFENSE COUNSEL: Your Honor, I object. It is actually –

PROSECUTOR: Your Honor, that is absolutely testimony in this case.

DEFENSE COUNSEL: It's improper argument, your honor. I need a sidebar.

> THE COURT: It is in the evidence, Mr. Kuritz. The objection is overruled.
>
> (R20, P. 2088-2089)

Shortly thereafter, defense counsel moved for mistrial. Defense counsel cited Bertolotti v. State of Florida, 476 So.2d 130 (Fla. 1985) as condemning prosecutorial efforts to get the jurors to imagine a victim's last moments of pain, terror, apprehension, fear or suffering. R20, p. 2098-2099. The trial court denied the mistrial motion as follows:

> THE COURT: Everything that she (State Medical Examiner Marguerita Arruza) said after your objection was based exactly on Dr. Arruza's testimony or Bernard Griffin's testimony, the length of the time of the strangulation, the going – the blacking out, the fact that the child might have been sucking up the plastic. I mean it's obvious from the evidence that it went dark when the baby went into the bag. If the jury can't infer that from the evidence I don't know what they can infer.
>
> (R20, p. 2100)
>
> * * *
>
> DEFENSE COUNSEL: So the Court is gong to deny?

> THE COURT: Just a moment. I can't – I thought I highlighted it. Well, the point of that was is that I agree and did in fact direct (the prosecutor) to stick her arguments to the facts and she did after that and as to the rest of it, I guess, the record will have to speak for itself because by my recollection Dr. Arruza did say all those things.
>
> DEFENSE COUNSEL: All right, sir.
>
> (R20, p. 2099-2103)

The trial court further commented that the prosecutorial remarks in question lasted "something like 22 seconds" (R20, p. 2103-2104) and were " . . .things that could have been inferred by the jury from the simple facts of the case as well as Dr. Arruza's testimony." R20, p. 2104.

The prosecutor renewed its efforts to get the jurors to put themselves in the place of the victims and imagine what they felt during its penalty phase closing argument by saying, "From the testimony of the Medical Examiner, she (adult victim Lynda Wilkes) did not go unconscious right away. Lynda Wilkes was on the ground, looking up at that man, that face, someone she trusted, knowing that she wasn't leaving Armsdale (the alleged killing site)." R22, p. 2140.

Appeals to jury sympathy or emotions or fear are impermissible. Taylor v. State, 583 So.2d 323 (Fla. 1991), Rhodes v. State, 547 So.2d 1201 (Fla. 1989),

King v. State, 623 So.2d 486 (Fla. 1993). A combination of unopposed and opposed appeals to jurors motions can have the cumulative effect of depriving the Defendant of a fair penalty phase. Brooks v. State, 762 So.2d 879 (Fla. 2000).

Argument which asks jurors to imagine an injured victim's anguish is improper; Allowing it is reversible error. Cohen v. Pollack, 674 So.2d 805 (Fla. 3d DCA 1996). Similarly, arguments which cause jurors to fear for their own welfare are improper. Norman v. Gloria Farms, Inc., 668 So.2d 1016 (Fla. 4th DCA 1996); U.S. v. Gainey, 111 F. 3d 834 (3rd Cir. 1997).

In the present case, the prosecutor told Defendant's jurors that Lynda Wilkes was on the ground, looking up at that man, that face, someone she trusted, knowing that she wasn't leaving Armsdale (the alleged killing site)." R22, p. 2140. This was nothing but a thinly veiled "golden rule" argument which asked the jurors to put themselves in the victim's place.

"Golden rule" arguments are impermissible because they encourage jurors to decide a case based on their own, personal interest and bias rather than on the evidence. Goutis v. Express Transport, 699 So.2d 757 (Fla. 4th DCA 1997). "Golden rule" arguments are ordinarily reversible error. Metropolitan Dade County v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992).

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court viewed argument that invited the jury to imagine the victim's final pain, terror and defenselessness as a mere variation of proscribed "Golden Rule" arguments. The Bertolotti Court stated " . . . the prohibition of such remarks has long been the law of Florida."

ARGUMENT 3: THE TRIAL COURT ERRED IN RULING THAT THE RECORDED HUSBAND-WIFE JAIL CONVERSATIONS WERE ADMISSIBLE

In reviewing a trial court's ruling on a spousal privilege matter, the appellate Courts review the record on appeal and apply a "reversible error" standard of review. An erroneous ruling on the spousal privilege is harmful when it is so prejudicial that it vitiates the entire trial. Woodel v. State, 804 So.2d 316 (Fla. 2001); Bolin v. State, 793 So.2d 894, 898 (Fla. 2001).

Florida Courts recognize a strong public policy supporting marital privilege. Smith v. State, 344 So.2d 915, 919 (Fla. 1st DCA 1977).

The Defendant made a jail-recorded telephone call to his wife Carolyn Mosley while he was in incarcerated awaiting trial. His statements turned out to

be very damaging to his defense. They suggested that the Defendant was eliciting his wife's assistance in fabricating an alibi defense.

The recording, which was played to the jury begins with the automated announcement which both communicants receive and which states, "This call is subject to monitoring and recording. Thank you for using AT&T." R 19, p.1929. The following recorded statements made by the Defendant to his wife, Carolyn Mosley were among those played to Defendant's jury and were especially damaging to the defense:

- "Remember the 22nd when I came in about 11:30 after I had left work." R 19, p. 1929-1930)
- "Remember that was the night my mama stayed over with you." Id. P. 1930.
- "My mama, Alexis and Amber need to write a statement and get it notarized that I was home all night Thursday the 22nd last week." Id. 1930.
- "Needs a written statement that he got home at approximately 11:30 p.m. and remained at home all night on the evening of the disappearance." Id. P. 1930.

The defense knew of the recorded conversation and the State's intent to play it to the jury. Therefore, prior to trial, defense counsel filed a motion (obviously

unsuccessful) to suppress the recording. That motion was entitled Motion to Suppress Statements, Admissions and Confessions. R3, p. 451-470.

In a nutshell, that written motion contains the defense's arguments that the recording, monitoring, disclosure and use of the husband-wife recorded jail phone conversation:

(A) violated the Defendant's right to be free from unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 12 of the Florida Constitution;

(B) violated the Defendant's right to counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 23 of the Florida Constitution;

(C) violated Defendant's right to privacy guaranteed by Article 1, Section 23 of the Florida Constitution;

(D) violated the Defendant's right to communicate with friends and family as protected by the First and Fourteenth Amendments of the United States Constitution and by Article 1, Sections 2 and 9 of the Florida Constitution;

(E) violated Fla. Stat. Chapter 934;

(F) violated case law establishing that inmate consent is needed to record an inmate's phone conversations;

(G) violated the residual right of privacy which case law has established as applicable to pre-trial detainees;

(H) violated the communication rights protected by the First Amendment to the United States Constitution; and

(I) violated the due process and equal protection clauses of the United States Constitution and the Florida Constitution. R3, p. 451-470.

The trial court denied the motion and held that the recorded, husband-wife, jail phone conversation was admissible because the Defendant tried to create false alibi evidence. R19, p. 878-879.

Portions of the record on appeal reveal additional reasons why the trial court may have deemed the recording admissible. After the trial court held that the recorded jail conversation was admissible, the defense did call the Defendant's wife to testify.

The defense indicated that the court's ruling made this necessary and the defense was not waiving any privilege by so calling her to testify. R19, p. 1878-1879. Carolyn Mosley admitted that the defendant's mother may indeed have stayed at the Defendant's house on the day before or the day of the disappearance. R19, p. 1889.

The Defendant's daughter Amber Mosley testified at the Defendant's trial. She testified that her grandmother (Barbara McKinney, the Defendant's mother) was not at the Defendant's home and did not stay overnight on the evening of the disappearance. R19, p. 1815-1816.

The trial court ruled that the recorded jail conversation was relevant and admissible because it contradicted other evidence that it contradicted other evidence that the Defendant *was* at home on the night of the disappearance. R19, p. 1878. The court also indicated it denied the suppression motion because "There are 'phone call is recorded' and 'don't talk to anybody' signs at the jail." R8, p. 1458.

Indeed, defense counsel conceded that the phone communicants do indeed receive an automated audio announcement that their call is being recorded. R8, p. 1458. As required by Rule 4-3.3, Fla. R. Prof. Cond., the defense candidly admitted in its motion to suppress that each inmate at the subject jail receives a 22-66 page long Inmate Handbook which contains a paragraph mentioning that jail phone calls will be monitored. R3, p. 459.

As noted in the defense's Motion to Suppress Statements, Admissions and Confessions (R3, p. 451-470) there is little support for the State's position that jail phone recording is done for –and justified by– jail security concerns. The trial

Court allowed the defense to submit copies of three depositions from a still-pending, serial-murder case entitled State v. Paul Durrousseau (Duval County Circuit Court Case No. 2003-6686-CFA). That case is currently still awaiting jury trial below and will take awhile to reach the appellate level.

The depositions are of Sergeant Dwayne Price, Lieutenant George Dunnington, Correctional Officers with the Jacksonville Sheriffs Office, and Herbert Wright, a detective with the Jacksonville Sheriffs office. Although the copies of these three, Durousseau depositions were filed in this Mosley case, it appears that they were inadvertently omitted from the record on appeal. Appellant will move this appellate Court to supplement the record on appeal to include them.

Sergeant Price is in charge of security at the Duval County Pre-Trial Detention Facility where the Defendant was incarcerated and recorded. (Price deposition p. 51). He explained that all jail phone conversations are recorded. (Price deposition, p. 65). He testified that jail telephone recordings are considered public record, subject to release. (Price deposition p. 51).

The reasons for recording the calls include preventing inmates from making harassing phone calls and concerns about contraband and escape attempts. (Price deposition p. 57). Not all phone calls are monitored (listened to). Phone calls are monitored only when the correction officers receive a tip that someone may be

plotting to do something that is a jail security or contraband risk. (Price deposition p. 58). If law enforcement requests a recording, the jail personnel deliver it without question. (Price deposition p. 59).

The jail has no written policies regarding the release of recorded jail phone conversations. (Price deposition p. 59). Law enforcement agencies routinely ask for and receive recordings of jail phone conversations for use in their police investigations. (Price deposition p. 67).

Lieutenant George Dunnington is the "Lieutenant in charge of security" at the Duval County Pre-Trial Detention Facility where the Defendant was incarcerated. (Dunnington deposition p. 6). He explained that jail phone calls are recorded for in-house investigations of criminal activity and to stop inmates from making harassing phone calls. (Dunnington deposition p. 7-9). He explained that all inmate phone calls are recorded and then deleted after 60 days. (Dunnington deposition p. 13).

The facility does not "monitor" (listen to) every single phone call. Rather, if someone calls and requests a recording, it is provided. (Dunnington deposition p. 13). The jail phone calls ("collect" calls all) raise money for the government and assist in detecting plots to escape and plots to introduce contraband. (Dunnington deposition p. 14). Calls are monitored for crime-investigation purposes as well.

(Dunnington deposition p. 15). The recordings are considered public information. Anyone can request and obtain a copy of the recording unless the recording pertains to a matter which is "under investigation." (Dunnington deposition p. 26-27).

Detective Herbert Wright is the Jacksonville Sheriffs Office Detective assigned as the liason between the Duval County Pre-Trial Detention Facility and the Detective Division of the Jacksonville Sheriffs Office. (Wright deposition, p. 34). The focus of his activity is jail security, "mostly contraband and things like that." (Wright deposition p 36).

When a law enforcement officer or a prosecutor requests a recording of a jail phone conversation, he provides it. (Wright deposition, p, 40). All inmate phone calls are recorded and the recordings are all kept 60 days. (Wright deposition, p. 46).

Detective Wright is under the impression that the recording of calls is legal because the inmate handbook and the automated voice message assure that both communicants are aware that their conversation is being recorded. (Wright deposition, p. 47).

Under Fla. Stat. Section 90.504, a "husband-wife" privilege exists which enables a spouse to prevent another from disclosing communications which were intended to be made in confidence between spouses while husband and wife.

As noted above, the trial court indicated that the subject recorded jail phone conversation was not privileged because the communicants are given notice that their conversations are being recorded. However, as noted by Charles W. Ehrhardt, in Florida Evidence (2006 Ed.), § 504.3, at p. 451:

> However, when there is a reasonable expectation of privacy and if the husband and wife intend that their communications are privileged, the privilege applies despite the fact that the communications are overheard. If an unknown third person listens through a closed door when it is not reasonably apparent to either the husband or the wife that the third party is *present*, the privilege is not destroyed. Neither of the spouses can be compelled to testify nor can the third person be called as a witness over the objection of either spouse. The communications were intended to be confidential, and there was a reasonable expectation of privacy.
>
> *(emphasis added)*

In the subject case, the fact that a machine recorded the call, and the small possibility that someone might listen to the recording before it would be destroyed

in 60 days cannot be regarded as vitiating the "reasonable expectation of privacy" as needed for a "waiver" of the privilege.

In Koon v. State, 463 So.2d 201 (Fla. 1985) this Court rejected the State's claim that there had been a waiver of the husband-wife privilege with the following statement, " . . . appellant and his wife did intend for their communications to be privileged and made the communications when they had a reasonable expectation of privacy. No other party was *present* at the time of the incriminating conversations between appellant and his wife." *(emphasis Appellant's)*. No one was "present" when the subject phone call occurred between the Defendant and his wife.

Florida Courts have been rigid in their defense of the marital relationship and the husband-wife privilege. In Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977), the Court rejected an effort to impose a "nexus with the marital relationship" requirement for the husband-wife privilege.

The Court stated, "[a] married couple should be secure in the knowledge that their private communications will be protected and will not be susceptible to exposure by an after-the-fact determination that the communications did not arise as a direct result of the marital relationship." *See also* Johnson v. State, 451 So.2d 1024 (Fla. 1st DCA 1984) in which the court reversed the trial court's erroneous

ruling that the husband-wife privilege does not apply to spouses who were committing a crime.

A prisoner retains all constitutional rights that are not inconsistent with his or her status as a prisoner, or with the legitimate penological objectives of the corrections system. Pell v. Procunier, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

The husband-wife, jail-recorded phone conversation qt issue has nothing to do with contraband or escape efforts or any other jail security concern. It was not a "harassing" phone call by an inmate. The subject recorded conversation was simply an accused man's effort to preserve and secure the evidence he needed for his lawyer to effectively represent him and free him from incarceration.

By violating the husband-wife privilege, it appeared as though the State had lucked into prosecutorial pay dirt. Play-back of the recorded conversation in Court made it appear that the Defendant had been suborning perjury.

The subject, jail-recorded telephone conversation was, in fact, innocent and not the kind communication the jail recording system was intended to intercept. That husband-wife phone communication with no one else "present" and was made with a reasonable expectation of privacy.

The conversation was intended to be confidential, so it is protected. See Yokie v. State, 773 So.2d 115, 117 (Fla. 4th DCA 2000). The trial court erred in holding that it was not shielded from disclosure by the husband-wife privilege. There is adverse authority on this argument. See United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998).

However, in Jackson v. State, 603 So.2d 670 (Fla. 4th DCA 1992), a murder conviction was overturned because the trial court allowed the defendant's wife to testify that her husband called her from jail with threats in an effort to get her to change her story.

Additionally, the recording should have been excluded because the jail also records in-person conversations between inmates and their spouses. It is therefore impossible to have any privileged husband/wife conversation when one spouse is incarcerated in Florida. This is impermissible state action. The husband/wife privilege does not stop at the jailhouse door. This alone is grounds for reversal on this issue.

ARGUMENT 4: THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A CONTINUANCE AND FOR A MISTRIAL BASED ON A DEFENSE WITNESS FAILING TO APPEAR AT TRIAL

The propriety of a trial court's denial of a motion for continuance or postponement of trial is subject to the "abuse of discretion" standard of appellate review. Valle v. State, 394 So.2d 1004 (Fla. 1990). With regard to denials of continuance motions which are based on a missing witness, an abuse of discretion occurs when the inability to locate a subpoenaed witness goes to the very heart of the defense. Robinson v. State, 561 So.2d 419 (Fla. 1990).

Immediately before presenting its first witness, defense counsel notified the trial court judge that the first defense witness –someone who had been successfully served with a subpoena– failed to appear. R17, p. 1585.

As noted in the Statement of Facts above, Bernard Griffin had admitted that he was on probation. R13, p. 675. During trial, after most of the other defense, guilt-phase witnesses had testified, Defense counsel notified the trial court that he had *subpoenaed* Bernard Griffin's probation officer, Mr. Billy Powell, and that Mr. Billy Powell had failed to appear. R19, p. 1843-1846.

Defense counsel indicated to the court that Bernard Griffin was under pressure to cooperate with the state. Defense counsel pointed out to the trial Court that Bernard Griffin had been arrested for violation of probation and had entered his admission to the violation the day before the subject disappearance.

Defense counsel sought to reveal, through direct examination of probation officer Billy Powell, that Bernard Griffin told Billy Powell that he (Bernard Griffin) was actually innocent of the separate criminal charge upon which the violation of probation charge was based, but took the blame to protect his cousin. R 19, p. 1843.

In other words, defense counsel wanted to present the testimony of probation officer Billy Powell to demonstrate to show that Bernard Griffin is a liar who freely manipulates the criminal justice system.

Defense counsel had successfully served Billy Powell with a trial subpoena. R19, p. 1843-1847. However, the trial Court criticized defense counsel for waiting until shortly before trial to serve the subpoena. R19, p. 1849-1850. Defense counsel responded that he did not realize Billy Powell's importance until the trial Court released Bernard Griffin's prior juvenile delinquency case Pre-Disposition Report ("PDR") just a few days earlier.

Upon receipt of that juvenile delinquency case Pre-Disposition Report, he acted promptly to subpoena Billy Powell to trial. (R19, p. 1850, 1854). The trial Court confirmed that the juvenile delinquency case PDR did indeed indicate that Bernard Griffin claimed to have falsely admitted to a cocaine-related violation of probation to protect his cousin. R19, p. 1850-1851.

Defense counsel told the Judge that the defense needed either a continuance to secure Billy Powell's attendance at trial, or else a stipulation that Bernard Griffin falsely admitted violating probation to protect his cousin. R 19, p. 1848.

After the trial court denied the mistrial and continuance motions (R19, p. 1851-1852) defense counsel explained that the "theory of defense" was that Bernard Griffin and somebody else committed the offenses and that Bernard Griffin was liar with a history of falsely shifting blame in criminal cases. R19, p 1953.

Nonetheless, the trial court remained steadfast in his denial of the continuance and mistrial motions, noting that the proposed testimony of probation officer Billy Powell would have been "improper impeachment" on an immaterial, "collateral" matter. R19, p. 1853.

The defense investigator, Mr. Mike Hurst, testified in Defendant's trial. He explained that Billy Powell was Bernard Griffin's probation officer. Mike Hurst

further explained that Bernard Griffin had been sentenced in a separate juvenile delinquency case just one day before the subject disappearance. R19, p. 1864. Mike Hurst confirmed that he himself served Billy Powell with a trial subpoena and even rented him a hotel room to assure his participation in the subject case. R19, p. 1864.

Unfortunately, secondhand information has nowhere near the persuasive force of firsthand testimony. The trial court erred in not granting the continuance. Denying the continuance motion prevented the jurors from hearing firsthand how Bernard Griffin's was someone who was under the weight of probation and was someone who considered it acceptable to lie, shift blame, and manipulate of the judicial system.

To prevail on a motion for continuance, the Defendant must show (1) prior due diligence to obtain the witness' presence, (2) that substantially beneficial testimony would have been forthcoming, (3) that the witness was available and willing to testify, and (4) that denial of the continuance motion caused material prejudice. Geralds v. State, 674 So.2d 96 (Fla. 1996).

As noted in the Statement of Facts above, probation officer Billy Powell's testimony was crucial to the theory of defense that Bernard Griffin was a liar and a manipulator of the criminal justice system who framed the Defendant. As also

indicated above, defense counsel provided all of the information required of Geralds, supra.

The loss of probation officer Billy Powell's testimony about Bernard Griffin being having the pressure of probation and an attitude of deception toward the criminal justice system was devastating to the defense. The trial court erred in denying the continuance and mistrial motions that were based on failure to appear and testify at trial. The damage was compounded by the trial Court's refusal to give the "pressure or threat used against the witness" standard jury instruction as described in the argument for Issue 8 below.

In addition, after both sides rested their guilt-phase cases, defense counsel orally conveyed the Defendant's own, oral, *pro se* motion for continuance based on the defense's inability to find and present the testimony of a certain Ms. Wanda Swearingen. R19, p. 1941.

Defense counsel explained to the Court that police detective Mark Romano had interviewed Ms. Swearingen and she said that she had observed the infant Jay-Quan Mosley at a grocery store and in the arms of a different, unknown, black male at 2:45 p.m. in the afternoon of the disappearance. R19, p. 1941-1942.

Defense counsel also informed the Court that its own, extensive investigation failed to locate Ms. Swearingen. R19, p. 1941-1942. The trial court

denied the motion for continuance and for mistrial made on this ground. R19, p. 1941-1942.

The trial court's denial of the continuance and mistrial motions violated the Defendant's right to due process of law, secured by the Fifth and Fourteenth Amendments to the United States Constitution and secured by Article 1, Section 9 of the Florida Constitution.

This also violated the Defendant's rights to have a fair trial and to confront witnesses, as secured by the Sixth and Fourteenth Amendments to the United States Constitution and as secured by Article 1, Section 16 of the Florida Constitution.

ARGUMENT 5: THE TRIAL COURT ERRED IN INCLUDING A VIDEOTAPE OF THE DEFENDANT IN CHAINS, SHACKLES AND JAIL GARB AMONG THE MATERIALS DELIVERED TO THE JURY ROOM IN VIOLATION OF ITS OWN ORDER

The standard of review of applied in "jail garb" cases would appear to be applicable to cases involving other insignia of incarceration, such as chains and shackles.

In United States v. Dawson, 563 F.2d 149 (5th Cir. 1977), the court explained that the concern in jail garb cases is with the impairment of the presumption of innocence rather than any "right" to be tried in civilian clothing. Therefore, the appellate Courts determine, on a case by case basis, whether a given set of prison clothing improperly projects an implication of guilt.

At the present Defendant's trial, the State indicated it intended to play a news videotape of the defendant being escorted by the police in chains, shackles and jail garb and responding to a reporter that he did not have a 15-year-old accomplice. R15, p. 1045-1046.

In response to an objection by the defense, the Court ruled that the jury could hear the audio portion, but the television screen would have to be turned around so that the jurors could not view the video portion.

In response to defense counsel's further objection to the videotape being subsequently admitted into evidence for subsequent viewing by the jury, the trial Court ruled that it would not allow the jurors to take the videotape into the deliberation room. R15, p. 1050-1051. Unfortunately, it appears that the trial court forgot to remove the videotape and television from the evidence and materials delivered to the jury deliberation room.

As explained by the Court in United States v. Dawson, 563 F. 2d 149 (5th Cir. 1977):

> The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). Because of this presumption "[n]o insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument." Brooks v. State of Texas, 381 F.2d 619, 624 (5th Cir. 1967). In safeguarding the presumption of innocence we have held that trying an accused in his prison clothing infringed this fundamental right. e. g., Boswell v. State of Alabama, 537 F.2d 100 (5th Cir. 1976); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1967), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971).

In the present case, the trial court previously ruled that the jury could not view the video portion of the videotape because it showed the Defendant in chains, shackles and jail garb.

To allow the jury to have the videotape for viewing during deliberations violated the defendant's right to due process of law secured by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 1, § 9 of the Florida Constitution. It also denied Defendant's rights to a fair jury trial secured by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, §§ 16 and 22 of the Florida Constitution.

The Defendant's presumption of innocence was impaired. It also violated the Defendant's rights of equal protection of law secured by the Fourteenth Amendment to the United States Constitution and by Article 1, §2 of the Florida Constitution. The state cannot prove that this error was harmless.

ARGUMENT 6: THE TRIAL COURT ERRED IN EFFECTIVELY RULING THAT A DOUBLE MURDER AUTOMATICALLY SUFFICES AS THE "PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY" AGGRAVATING CIRCUMSTANCE

The *de novo* standard of review applies to a trial court's construction of a statute. State v. Burris, 875 So.2d 408 (Fla. 2004). The defense challenged this issue below. R21, p. 2223-2230

The "previously convicted of another capital felony" aggravating circumstance of Fla. Stat. Section 921.141(5)(b) was among the aggravating circumstances relied upon by the state in support of its pursuit of the death penalty. R21, p. 2227-2228.

As indicated in the Statement of Facts above, the evidence presented in this case was that the Defendant strangled Lynda Wilkes and then immediately placed her infant child Jay-Quan Mosley in the plastic bag. There was no significant separation between these two events.

The evidence presented by the State suggested that this was simply a double murder, and not one homicide followed by an intervening event, followed by a second homicide. Defense counsel moved the trial Court to prevent the jury from considering "previously convicted of another capital felony" aggravating circumstance on this basis. R21, p. 2223-2225. The trial court denied the motion. R21, p. 2226.

Courts have not gone so far as to hold that the first killing in a double murder automatically and absolutely renders the murderer "previously convicted of another capital felony." *See, e.g.* Pardo v. State, 563 So.2d 77 (1990); Wasko v. State, 505 So.2d 1314 (1987); Knight v. State, 746 So.2d 423 (Fla. 1998).

There is seemingly adverse authority on this issue. See King v. State, 390 So.2d 315, 320-21 (Fla. 1980).

The plain language of the Florida death sentencing statute (quoted above) explicitly requires that the Defendant be previously *convicted* of another capital felony. There is insufficient evidence of whether the child or the mother died first.

As noted in the article What Constitutes Former Conviction, 5 ALR 2d, p. 1084 (Lawyer's Cooperative, 1949), "The courts are not unanimous with respect to the availability as a "conviction" where there has been no pronouncement of sentence upon the verdict or plea of guilty. The majority hold, as will be seen by a review of the cases . . . that the imposition of sentence is necessary in order to constitute a "conviction" within the meaning of the (habitual offender and enhanced sentence) statutes. . ."

In State v. McFadden, 772 So.2d 1209 (Fla. 2000) this Court made it clear that, for purposes of impeachment, a "conviction" requires an *adjudication* of guilt.

Florida Statutes Section 775.021 (1) is Florida's "rule of lenity." It mandates that penal statutes be narrowly construed in favor of the accused.

As noted by the court in Kilgore v. State, 933 So.2d 1192 (Fla. 2d DCA 2006), criminal statutes must be given a *reasonable* interpretation in light of the

rule of lenity. Interpreting Fla. Stat. Section 921.141(5)(b) as allowing half of a double murder to be regarded as a "previous conviction" is not a "reasonable" interpretation and does not favor the Defendant.

By deeming the occurrence of the subject, seemingly double murder sufficient to render the subject Defendant a person "previously convicted of a capital felony," the trial Court violated the Defendant's right to due process of law, secured by the Fifth and Fourteenth Amendments to the United States Constitution and secured by Article 1, Section 9 of the Florida Constitution.

This also violated the Defendant's rights to have a fair trial, as secured by the Sixth and Fourteenth Amendments to the United States Constitution and as secured by Article 1, Section 16 of the Florida Constitution. This also violated the Defendant's right to equal protection of law, as secured by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 2 of the Florida Constitution.

The trial court held that the State proved this factor beyond a reasonable doubt because "[t]here can be no question but that the death of Jay-Quan Mosely and his mother occurred contemporaneously." [R. 984]. In fact, there was no evidence as to when the child died.

ARGUMENT 7: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE ITS CASE BEYOND A REASONABLE DOUBT

The standard of review of a trial court's denial of a motion for judgment of acquittal is de novo. Fowler v. State, 921 So.2d 708, 711 (Fla. 2d DCA 2006), *citing* Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). This court is going to review this issue in any event.

The defendant had a reasonable hypothesis of innocence that was not overcome. The defendant had an alibis for the crimes. The case was entirely circumstantial save for the plea-induced and inherently suspect testimony of the defendant's co-conspirator.

As for the death of Jay-Quan Mosley, there is insufficient evidence adduced that the child is even dead. There is no corpus delecti. No body was ever recovered. All we know is that the child was placed in a plastic bag. There is no physical evidence of the child's death. All we have is the direct testimony of Bernard Griffin on this issue, but there was no testimony that the child was actually dead. He did not even see the child after the fact.

There was insufficient evidence to prove beyond a reasonable doubt that the child is dead. The Defendant only got a death sentence for the death of the child, so reversal on this issue would reduce the Defendant's sentence to life imprisonment.

ARGUMENT 8: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THE GUILTY VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE

The "abuse of discretion" standard of review is applied to the lower Court's disposition of the "weight of evidence" ground of a motion for new trial. Stephens v. State, 787 So.2d 747 (Fla. 2001).

As noted in the Statement of Facts above, Defendant's "guilty" verdicts were based almost completely on the testimony of Bernard Griffin, an extremely low-credibility witness.

The body of infant Jay-Quan Mosley was never found. Hence the *only* evidence of the murder of Jay-Quan Mosley (the *only* "murder" for which Defendant's jury recommended the death penalty) was the very dubious testimony of Bernard Griffin.

Bernard Griffin not only "changed his story" repeatedly, his recorded jail telephone conversation with his mother (played to Defendant's jury) suggests he was "cooperating with" and "had a deal" with the prosecution. No one should receive a sentence of death based solely on the testimony of a witness as unbelievable as Bernard Griffin.

Even Bernard Griffin's dubious testimony raises serious doubts that the crimes occurred as he claimed. For example, Bernard Griffin gave additional testimony pinpointing the time *when* the murders occurred. On the day of the disappearance, the Defendant drove his Chevrolet Suburban to Bernard Griffin's home and picked him up.

On direct examination, Bernard Griffin could not remember *when* the Defendant arrived. R 13, p. 685. However, on cross-examination, he admitted that the Defendant picked him up at 12:57 or 1:00 p.m. in order to commit the murders. R13, p. 740-742. Bernard Griffin further testified that the murders were complete and that he was already back inside the home of Ms. Kenya Mobley and speaking to the defendant over the phone by 1:21 p.m., a mere 24 minutes later. R13, p. 742.

When asked a second time, Bernard Griffin confirmed that: (1) The Defendant picked him up at his home; (2) He was present with the Defendant at

the killing site and he assisted the Defendant with the murders; (3) The Defendant thereafter dropped him off at Ms. Kenya Mobley's apartment at the Kendall Court Apartments, where (4) he, Bernard Griffin, called and spoke to the Defendant by phone. Bernard Griffin testified that all of these things occurred within just 24 minutes. R13, p. 742.

The State Medical Examiner, Dr. Marguerite Arruza, testified that it takes 4 minutes for someone to die from manual strangulation. R14, p. 877.

Detective Romano retraced and timed the route. It took him 10 minutes, 24 seconds to drive 5.8 miles from Bernard Griffin's home to the Armsdale Road killing site. It took an additional 4 minutes, 48 seconds to drive from the Armsdale Road killing site to the Kendall Court Apartments. R15, p. 1105.

That is a total of 15 minutes, 12 seconds. When one adds 4 minutes strangulation time, the total time consumed by these tasks equals 19 minutes, 12 seconds. That leaves less than five minutes to bag the bodies, load them into the truck, and cover them with the tarp. Indeed, according to Lynda Wilke's niece Kesha Sutton, Lynda Wilkes weighed "about 190, 210 pounds." R16, p. 1652, 1670. Loading such a body into a truck would take a while.

Bernard Griffin was the only witness to the the killings who testified at Defendant's trial. His testimony was inherently suspect and dubious co-

conspirator testimony with an over-the-top plea deal as a mere accomplice after the fact instead of a principal. For the reasons given above, it is highly unlikely that the murders occurred as claimed by Bernard Griffin.

The trial Court role in determining a motion for new trial on "weight of the evidence" grounds is to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

This broad judge's re-assessment of the evidence presented at trial serves "as a safety valve in those cases where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict." Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984).

This requires the trial Court Judge to exercise his discretion to weigh the evidence. When the record shows that the trial Court Judge failed to so weigh the evidence, or if it is unclear whether the trial Court Judge weighed the evidence, his decision denying the motion for new trial must be reversed. Thomas v. State, 574 So.2d 160 (Fla. 4th DCA 1990).

In the present case, the trial Court erred in not weighing the evidence and granting Defendant's motion for new trial. This violated Defendant's rights to due process of law and rights to a fair trial secured by the Fifth, Sixth and Fourteenth

Amendments to the United States Constitution and by Article 1, Sections 9, 16, and 22 of the Florida Constitution.

ARGUMENT 9: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR THE STANDARD JURY INSTRUCTION WHICH CONCERNS PRESSURE OR THREAT AGAINST A WITNESS

The "abuse of discretion" standard of review is applied to questions concerning the failure or refusal to give a jury instruction. Carpenter v. State, 785 So.2d 1182 (Fla. 2001). The denial of a jury instruction is an abuse of discretion when the absence of that instruction is prejudicial to the point of causing a miscarriage of justice. Chandler v. State, 744 So.2d 1058 (Fla. 4th DCA 1999).

During trial, defense counsel requested subsection 7 of the standard "Weighing the Evidence" jury instruction which provides, in pertinent part, as follows:

> 3.9 WEIGHING THE EVIDENCE
>
> It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find

> some of the evidence not reliable, or less reliable than other evidence.
>
> You should consider how the witnesses acted, as well as what they said. Some things you should consider are:
>
> * * *
>
> 7. Has pressure or threat been used against the witness that affected the truth of the witness' testimony?
>
> (Fla. Std. Jury Instr. (Crim) 3.9)

Defense counsel asked that the trial Court give this instruction. R17, p. 1595-1596. Defense counsel explained that the instruction was needed because the police were under pressure to resolve the case and because Bernard Griffin had been pressured to assist them. R17, p. 1596. The trial Court denied the request. R17, p. 1596.

The trial court erred in denying the request for this "pressure or threat used against the witness" portion of the standard, "Weighing the Evidence" jury instruction. The notion that Bernard Griffin was a person of questionable morals who was pressured by and "cut a deal" with the State to frame the Defendant was the very heart of the defense.

The failure to give this jury instruction was indeed "prejudicial to the point of causing a miscarriage of justice." Chandler, supra. The damage of this was compounded by the trial Court's refusal to continue the trial to secure probation officer Billy Powell's attendance at trial as discussed in the argument for Issue 3 above.

The trial Court's refusal to give the "pressure or threat used against the witness" portion of the standard, "Weighing the Evidence" jury instruction violated the Defendant's right to due process of law, secured by the Fifth and Fourteenth Amendments to the United States Constitution and secured by Article 1, Section 9 of the Florida Constitution.

This also violated the Defendant's rights to have a fair trial and to confront witnesses, as secured by the Sixth and Fourteenth Amendments to the United States Constitution and as secured by Article 1, Section 16 of the Florida Constitution.

ARGUMENT 10: FLORIDA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT AND *RING v. ARIZONA* AND ITS PROGENY

Prior to trial, Defendant filed a motion seeking to declare Florida's statutory death penalty sentencing scheme, Fla. Stat. Section 921.141, unconstitutional. R1, p. 137-149. In it, defense counsel argued –among other things– that Florida's statutory death-sentencing scheme violates the principles of Apprendi v. New Jersey, 530 U.S. 466 (2000).

Specifically, defense counsel argued that Florida's death-sentencing scheme is deficient because the jury is not told how many juror votes are needed to find an aggravating circumstance (R1, p. 146) and because it does not require a unanimous or majority jury finding of even one, single aggravating circumstance. R3, p. 334; R1, p. 146. That motion was denied. R3, p. 337; R2, p. 352.

Defense counsel also filed motions to require the jury to put its findings (votes) on aggravating circumstances in writing and also to instruct the jury that its aggravating-circumstance findings must be unanimous R3, p. 340; R4, p. 656. Such motions were also denied. R3, p. 342; R4, p. 658.

The Defendant filed a written request for a special verdict form identifying the total jury vote for each individual aggravating circumstance and for the

recommendation of death. R4, p. 667. That request was denied. R4, p. 671. Significantly, however, the trial court found in its sentencing order that:

> **[I]f there were ever a case which supports the proposition that Florida juries be asked to specify which aggravating factors they find from the evidence, this is the one. Had that been required as a matter of law, this Court would have had a much better understanding of the manner in which the jury reached its diverse recommendations.**

R6, p. 993.

The failure to have a special verdict has deprived the defendant of meaningful appellate review. See State v. Steele, 921 So.2d 538, 553 (Fla. 20005) (C.J. Pariente, dissenting in part). The failure to have detailed appellate review is a due process violation in and of itself.

The due process issues in this argument (and in this brief) have not been considered with the mandate that the Florida due process clause provides more protection that the federal constitution. Therefore, all of these issues require re-analysis and precedent should actually change.

It appears, that this court has relied on the failure of the U.S. Supreme Court to reverse its decisions as dispositive authority. However, the U.S. Supreme

Court's rulings are irrelevant when this court is interpreting the Florida constitution.

Because of the trial court's specific holding that a special verdict was needed in this case, the arguments put forth in this argument section are greatly enhanced and may even be immune from past precedent because of the trial court's finding and the unique facts of this particular case.

How can a trial court and an appellate court accurately uphold a jury verdict where no one has any idea what the jury was thinking? If it is not necessary to know what the jury was thinking, then in Florida having a jury in a capital case is an empty formality, and this is not constitutionally acceptable.

The Defendant also filed a motion for an instruction informing the jurors that their vote as to each individual aggravating circumstance must be unanimous and, if they do vote to recommend the death penalty, that vote must also be unanimous. R4, p. 697. That motion was denied. R4, p. 699.

Florida's death penalty scheme is unconstitutional on its face and as applied to the facts of this case. This issue was preserved in the lower court and is therefore an issue of law subject to de novo review.

The Sixth Amendment right to a jury trial and the right to due process of law embodied in both the Florida and United States Constitutions is violated by

the mandates and implementation of Florida's statutory scheme and case law on attaining a conviction and sentence of death in a capital case.

Florida's death penalty scheme violates the Sixth Amendment and due process. See e.g. Cunningham v. California, 127 S.Ct. 856 (U.S., January 22, 2007); United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Based upon the reasoning and the logical extensions of these cases, permitting a jury to find death on less than a unanimous vote does not pass constitutional muster. Currently, precedent is to the contrary. It is only a matter of time before this changes. Florida is the only state that allows the jury to find both the existence of aggravating circumstances and make a recommendation that the defendant receive the death penalty by majority vote.

The United States Supreme Court's continuing strengthening of the Sixth Amendment, and the principles of due process embodied therein, cast a dark shadow over Florida's death penalty system.

The concurring opinions of Justices Quince, Bell, Anstead, and Pariente in Coday v. State, 946 So.2d 988, 1009-1026 (Fla. 2006), are hereby incorporated by reference. See also State v. Steele, 921 So.2d 538 (Fla. 2005).

The defendant hereby specifically argues that the following Sixth Amendment, Fourteenth Amendment and other constitutional deficiencies invalidate the imposition of death in this case:

A. Because aggravating circumstances are elements of the offense under Florida law and Ring, they should have been charged in the indictment based upon a finding of probable cause by a grand jury and found by the jury beyond a reasonable doubt.

B. Ring and its progeny mandate that the jury, not the judge, make the necessary findings of fact to determine eligibility for the death penalty, and the ultimate question of whether death shall be imposed.

C. A special verdict form should have been submitted to the jury so that they could have made specific findings on each of the aggravating factors in this case. See State v. Steele, 921 So.2d 538, 552 (Fla. 2005) (J. Pariente dissenting in part). Currently, Florida allows a jury to return a death recommendation without a

majority of the jury agreeing on a single aggravating factor – thereby condemning some unknown fraction of criminal defendants to serve an illegal sentence.

D. The Sixth Amendment requires juries to *unanimously* find the existence of aggravating factors and *unanimously* find that death should be imposed.

E. The requirement that the defendant must prove that the mitigating factors must outweigh the aggravating factors is unconstitutional burden shifting. It results in a presumption of death. The jury instructions in this case shifted the burden of proof to the defendant to prove that the death sentence was inappropriate and the same standard was employed by the sentencing judge. The jury should have been instructed that the aggravating factors must outweigh any mitigating factors.

F. The sentencing statute fails to provide a necessary standard for determining that aggravating circumstances "outweigh" mitigating factors, does not define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravating circumstances. The jury instructions are unconstitutionally vague which results in inconsistent findings of death.

G. The procedure does not have the independent re-weighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

H. Florida's failure to follow Ring violates the defendant's equal protection rights because Florida is the only State in the nation that allows the death penalty to be imposed based upon a majority vote by the jury as to whether aggravating factors exist and as to the recommendation of death itself.

I. Florida's death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment.

Pursuant to all of the foregoing, Florida's death penalty scheme stands in violation of the Eighth Amendment, the Sixth Amendment, and the Fourteenth Amendment of the United States Constitution. As for the Florida Constitution (which provides more protection than its federal counterpart), the scheme violates, equal protection, due process , and the proscription against cruel and unusual punishment.

It is not clear whether this Court has considered all of these arguments within the context of the principle that Florida's Constitution affords more protection to persons accused of committing a crime as compared to the Federal Constitution.

Florida capital cases require a unanimous verdict by a jury of twelve. *See* Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that, "Because . . . enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' . . . the Sixth Amendment requires that they be found by a jury.

The Defendant's death sentence fails in the wake of Ring for a number of reasons. First, the jury recommended death by a margin of 8 to 4. Second, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the Defendant's case. Third, Ring and Rules 3.270 and 3.440 require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has held that indictments need not state the aggravating circumstances upon which

the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the present Defendant's jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

A literal reading of Florida's death penalty sentencing scheme (F.S. Section 921.141, formerly F.S. Section 919.23) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death penalty.

In view of Apprendi and Ring, supra, the Defendant's death sentence cannot stand because his jury did not unanimously recommend death and because it is impossible to know whether the jurors would have unanimously found any specific aggravating circumstances. In the present Defendant's case, the jury death recommendation was by a vote of eight to four. It was not unanimous.

Accordingly, there is a high probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance.

Given that this Court has already acknowledged in Steele that Florida's death sentencing statute *should* be revisited to require *some unanimity* in the jury's recommendation, and given that the Florida Supreme Court has deferred to the legislature as best it can, and given the continuing lack of legislative action, the Defendant submits that the trial court erred in not ruling that Florida's death sentencing scheme is unconstitutional.

ARGUMENT 11: THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL

PRESERVATION

Proportionality is not an issue for the trial court therefore it was not necessary to raise this issue in the trial court. Circuit courts have no authority over how this Court reviews its capital cases. There is also nothing to "contemporaneously" object to.

If explicit preservation was required, then the defendant received ineffective assistance of trial counsel for not raising this precise argument below. The defendant should not be penalized for his trial attorney's oversight and this Court should review this issue de novo.

The defense had nothing to lose and all to gain by making this challenge. The defendant was prejudiced because if this Court had a more expansive proportionality review his death sentence would be overturned.

Alternatively, this is a "facial challenge," which can be raised for the first time on appeal. It applies to every capital defendant. This Court's current proportionality review constitutes fundamental error because it reaches into the very heart of meaningful appellate review in every single capital case.

CONSTITUTIONALITY

In reviewing a sentence of death this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

This Court must consider the totality of the circumstances and compare it with other capital cases. Proportionality review is not a comparison between the

number of aggravating and mitigating circumstances. Woods at 990. See also Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003).

This Court generally only reviews cases in which a death sentence has been imposed and only expands its review when multiple defendants or participants are involved. This is legally insufficient because it is an insufficient body of evidence to determine whether death sentences are proportionate and pass constitutional muster.

The defendant hereby incorporates by reference Chapter 7 from the September 2006 ABA report, pages 207 to 212, and pages xxii to xxiii. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 17, 2006.

This Court's proportionality review should include a review of cases in which a death sentence was imposed, cases in which a death penalty was sought but was not imposed, and cases in which the death penalty could have been sought but was not. This Court should also make a comparison to death sentences in other states and in federal cases. The Constitution does not stop at the state line.

All of this criteria must be utilized to achieve both statewide and national uniformity, to ensure that death is not "unusual," and to ensure that a death

sentence is not arbitrary. The failure to engage in this multi-faceted analysis deprives every capital defendant of a meaningful proportionality review.

The current review violates equal protection, violates the due process clauses of the Florida and United States Constitutions, and results in cruel and unusual punishments in derogation of Article 1, Section 17 of the Florida Constitution and the Eighth Amendment. See Simmons v. State, 934 So.2d 1100, 1122 (Fla. 2006). As discussed in Argument 1 above, the Florida Constitution affords more protection to criminal defendants than the Federal Constitution.

To pass constitutional muster, this Court must determine what level of aggravation is sufficiently low and what level of mitigation that is sufficiently high to raise concerns about arbitrariness and uniformity. This is impossible without objective empirical data about Florida's capital punishment system as a whole, and data from other jurisdictions as well. A defendant's chances of death should not vary based upon which jurisdictional border he has crossed.

This Court should impose mandatory data collecting procedures consistent with the suggestions herein. The defendant hereby incorporates by reference: Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 St. Thomas Law Review. 299 (2004).

The ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 211.

The ABA Report noted, "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 212.

The shift in the affirmance rate and in the manner in which the proportionality review is conducted is evidence of arbitrariness. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. This Court's current limited scope of review presents an undue risk that death will be imposed in an arbitrary and discriminatory manner.

If this Court increased the body of evidence in its proportionality review, as suggested above, it would reverse the sentence of death in this case. This case is not consistent within Florida. See Lanzafame v. State, 751 So.2d 628 (Fla. 4th DCA 1999) (no death sentence for first degree premeditated murder where the

defendant, without provocation, hit the victim in the head with a baseball bat in excess of ten times).

This case is also not consistent with other states. See In re Elkins, 144 Cal.App.4th 475 (Cal. App. 1 2006) (defendant who was 19 years old when he robbed and killed his victim by repeatedly hitting him with a baseball bat did not receive a sentence of death, *and in fact was granted parole*). If this Court reviewed cases like this, it would be clear that the sentence of death in this case is disproportionate.

In sum, this Court should: (1) address whether this Court's current limited proportionality review passes constitutional muster – a subject which seems to be one of first impression for the Court; (2) adopt a more comprehensive review as suggested herein; and (3) apply the new comprehensive review to this case.

The United States Supreme Court has held that comparative proportionality review is not constitutionally required. See Pulley v. Harris, 465 U.S. 37, 44-54 (1984). Over time, this decision has proven itself to be violative of the Eighth and Fourteenth Amendments, and therefore should be overruled. See Tuilaepa v. California, 512 U.S. 967, 995 (1994) (J. Blackmun dissenting); Turner v. California, 498 U.S. 1053 (1991) (J. Marshall dissenting from denial of certiorari).

This Court does provide at least some form of comparative proportionality review. This decision places the extent of its review under the Constitutional microscope. See Evitts v. Lucey, 469 U.S. 387, 401 (1985) (when a State opts to act in a field with discretionary elements it must do so in accord with the dictates of the Constitution, and in particular, the due process clause).

This question is one of first impression for this Court. This is due to the fact that death penalty case law has evolved significantly over the last 8 years (since Ring) and now Florida stands alone on the fringe of what death penalty protections should be applied in a statutory scheme.

In sum, Florida has not followed the death penalty revolution, despite this Court's urging,[1] and therefore this Court must employ a more comprehensive comparative proportionality review to make up for it.

Florida's death penalty scheme does not provide the necessary constitutional safeguards to allow this Court's proportionality review to be so narrow.

Florida is the only state that allows juries to find the existence of aggravating factors and allows the decision to impose death on a mere majority

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[1] State v. Steele, 921 So.2d 538, 548-50 (Fla. 2005) ("need for legislative action" because Florida is the "outlier state."

vote. There is also no assurance that the jurors are even agreeing on the same aggravating factors. This Court is constitutionally required to undertake a more comprehensive review as a result.

The United States Supreme Court case law on this issue is pre-Ring and therefore is ripe for abrogation. Regardless, the high court specifically makes the holding that comparative proportionality review is not required when the State system at issue provides sufficient safeguards against arbitrariness. See Pulley v. Harris, U.S. 37 (1984).

Florida's system does not satisfy this criteria. Florida does not provide sufficient safeguards given the recent changes in death penalty jurisprudence and new statutory capital schemes throughout the states.

ARGUMENT 12: THE DEFENDANT'S SENTENCE OF DEATH IS DISPROPORTIONATE

It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first degree murders. Woods v. State, 733 So.2d 980, 990 (Fla. 1999). This court will review this issue in any event.

The defense filed a sentencing memorandum, which is hereby incorporated by reference. R5, p. 887. The trial court followed the jury's recommendation of life for the death of Lynda Wilkes and death for the 10 month-old child Juay-Quan Mosley. R6, p. 973.

First-off, an 8 to 4 recommendation is not a strong mandate for death. There is no HAC aggravator, which is the most serious. As for particular facts regarding mitigation, the defendant rose above a broken home and became a hood high school student. The defendant was mentally abused as a child. R6, p. 989. He was also adversely affected by witnessing physical and sexual abuse at an early age.

The defendant is patriotic and joined the U.S. Navy after 9-11. The defendant has the support and love of his family. He has been involved in many community activities and volunteer work. He is intelligent and will not be a threat to others while in prison. He has the potential to be a productive inmate.

Significantly, the crimes in this case were aberrant behavior. The defendant has always lived a law-abiding life. A man is more than the worst thing he has ever done. It is abundantly clear that the tragic few minutes of April 22, 2004 are in aberration in the defendant's life and character. Compare Johnson v. State, 720 So.2d 232, 238 (Fla. 1998).

ARGUMENT 13: LETHAL INJECTION AND FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL

This issue was raised below and therefore preserved for review. Vol. 5, p. 957. Lethal injection itself, the death chemicals, Florida's lethal injection statute (Fla. Stat. § 922.105), and the existing procedure that the State of Florida utilizes for administering lethal injections violate numerous constitutional provisions, to wit: Article II, Section 3 and Article I, Section 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Death by lethal injection violates the proscription against cruel and unusual punishment because it inflicts undue pain on the prisoner. In addition, Florida's implementation of lethal injections violates due process because of inadequate guidelines which make the prospect of a mishap very likely.

All courts rendering adverse decisions on this issue are rendered obsolete due to new court rulings, new scientific evidence and other evidence that was not in existence at the time those decisions were made.

Previously, courts have held that the possibility of a prisoner feeling pain and the possibility of mishaps during the execution were speculative. New court

holdings and research as well as actual events require this court to re-assess these determinations.

The petitioner's pleadings, arguments and the record-on-appeal in Lightbourne v. McCollum, SC06-2391, are hereby adopted and incorporated by reference as they are relevant to the details of the Diaz execution and the current problems with lethal injection in Florida.

This additional list of new evidence and research (which is hereby incorporated by reference) renders precedent on this issue obsolete:

(A) The Governor's Commission on Administration of Lethal Injection, Final Report with Findings and Recommendations, March 1, 2007;

(B) Lethal Injection for Execution: Chemical Asphyxiation?, Dr. Teresa A. Zimmers, Public Library of Science, April 2007;

(C) The Florida Department of Corrections revision of its lethal injection protocols, promulgating "Execution by Lethal Injection Procedures", signed by DOC Secretary James R. McDonough on August 16, 2006, and August 1, 2007;

(D) The April 16, 2005 article published in the medical journal THE LANCET. See Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 THE LANCET 1412 (2005);

(E) The recent decisions granting relief in lethal injection challenges. See Harbison v. Little, 3:06-1206 (M.D. Tenn., September 19, 2007); Evans v. Maryland, 2006 WL 3716363 (Md. App., December 19, 2006); Morales v. Tilton, 465 F.Supp.2d 972 (N.D. Cal. 2006); Taylor v. Crawford, 2006 WL 1779035, 05-4173-CV-C-FJG (W.D. Mo., June 26, 2006), *reconsideration denied* October 16, 2006.

(F) The Diaz execution debacle.

On March 1, 2007, the Florida governor's own commission concluded that the policies and procedures of the Florida Department of Corrections implementation of lethal injections were lacking in a number of significant areas, which included:

i. Lack of supervision over personnel;

ii. Insufficient guidance to select personnel;

iii. Lack of suitably trained and qualified personnel to perform their assigned duties;

iv. Lack of a command structure over personnel;

v. Failure to adhere to DOC Protocol 14(e);

vi. Inadequacy and insufficiency of DOC Protocol 14(e);

vii. The current administration of lethal chemicals;

viii. The inability to conclude that the inmate does not feel pain.

Final Report at p. 8-10.

In *Lethal Injection for Execution: Chemical Asphyxiation?*, Dr. Theresa A. Zimmers, Public Library of Science, April 2007, six scientists spent three years analyzing more than 50 medical examiner reports of executed prisoners and concluded that the prisoners had probably suffered immense pain before they died. The prisoners slowly suffocated while conscious but were unable to communicate.

Currently, 11 States have suspended lethal injections pending a review and likely overhaul of their existing procedure. Given these current problems, and the failure of Florida's Department of Corrections to remedy these concerns, the lethal injection process in Florida does not pass constitutional muster.

Evidence not previously available to this Court when it decided Sims v. State, 754 So.2d 657 (Fla. 2000), and not considered by the Court in the cases, Hill v. State, 921 So. 2d 579 (Fla. 2006), Rutherford v. State, 926 So.2d 1100 (Fla. 2006) and Rolling v. State, 944 So.2d 176 (Fla. 2006), demonstrates that the existing procedure that the State of Florida uses in executions is unconstitutional in that there is an unduly high risk that the execution will inflict pain upon the defendant or otherwise go awry.

The new August 1, 2007 procedures promulgated by the Department of Corrections well after the defendant was sentenced, but will be applied to him, do not cure all of the foregoing problems. The new protocol remains in adequate to prevent the foreseeable risk of gratuitous pain.

The dispostive standard on this issue should be whether the method of execution creates an unnecessary risk of suffering (as opposed to a substantial risk of the wanton infliction of pain).

There are also other chemicals and procedures that can be used, as an alternative to Florida's current cocktail and procedures, which pose less risk of suffering. The least restrictive alternative is constitutionally required. Compare Baze v. Rees, 217 S.W.3d 207 (KY. 2007), *cert. granted*, 2007 WL 2075334 (U.S. Sup. Ct., September 25, 2007).

In Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), this Court upheld the constitutionality of Florida's lethal injection procedures as currently administered. The defendant asks this court to judicially notice said record as it did in Schwab v. State, 969 So.2d 318 (Fla. 2007).

To be clear, the defendant is challenging the inherent per se unconstitutionality of lethal injection itself as cruel and inhumane, in violation of *inter alia*, Article I, Section 9 of the Florida Constitution (See Harbison v. Little,

511 F.Supp.2d 872 (M.D. Tenn. 2007) – as well as challenging the fact that Florida's implementation of lethal injection presents an unnecessary risk of pain and suffering.

The new May 2007 and August 2007 lethal injection protocols promulgated by the Department of Corrections do not sufficiently minimize the risk of pain and suffering in lethal injection executions.

The dispostive standard on this issue should be whether the method of execution creates an unnecessary risk of pain and suffering (as opposed to a substantial risk of the wanton infliction of pain). Regardless, Florida's procedures do not comply with either standard.

Florida's procedures are also unconstitutional because there are readily available alternatives that pose less risk of pain and suffering. Other chemicals and procedures can be implemented, as an alternative to Florida's current cocktail and procedures, which pose less risk of suffering. Using the least restrictive alternative is constitutionally required.

The continued use of the three drugs – sodium thiopental, pancuroniam bromide, and potassium chloride – individually or together, also violate the proscription against cruel and unusual punishment.

All of these issues are currently pending with the United States Supreme Court in Baze v. Rees, 217 S.W.3d 207 (KY. 2007), *cert. granted*, 2007 WL 2075334 (U.S. Sup. Ct., September 25, 2007) (07-5439). It is requested that this Court not rule until Baze is decided. Lightbourne does not resolve all of the arguments presented in the case at bar.

DOC's current procedures are also insufficient because the consciousness assessment needs to meet a clinical standard using medical expertise and equipment and a one-drug protocol utilizing only a lethal dose of sodium pentothal (sodium thiopental) is a less restrictive, and more humane, alternative.[2]

Currently, Florida courts are providing too much deference to DOC on these issues. Precedent on this point will most likely change after the United States Supreme Court decides Baze. This Court will then have a new freedom to do what's right – something DOC is apparently unwilling or unable to do.

EVOLVING STANDARDS OF DECENCY

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[2] See Schwab v. State, 2007 WL 3286732 at fn 3 (Fla., November 7, 2007) (J. Pariente concurring), noting that the one-drug protocol was recommended by Tennessee's protocol committee but was not adopted. See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn 2007).

Courts must refer to evolving standards of decency that mark the progress of a maturing society when determining which punishments are so disproportionate as to be "cruel and unusual" within the meaning of the Eighth Amendment. Roper v. Simmons, 543 U.S. 551, 560-61 (2005).

Due to evolving standards of decency and continuing problems with lethal injection executions in Florida and throughout the country, death by lethal injection constitutes cruel and unusual punishment and violates due process.

The New Jersey Death Penalty Study Commission Report, dated January 2, 2007, is hereby incorporated by reference. The Committee concluded that New Jersey's death penalty needs to be abolished because, *inter alia*:

There is increasing evidence that the death penalty is inconsistent with evolving standards of decency; abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing; the penalogical interest in executing a small number of guilty persons is not sufficiently compelling to justify the risk of an irreversible mistake.

Accordingly, the United States Supreme Court's "evolving standard of decency" standard for overturning death penalty precedent is now met.

As a result of all of the foregoing this Court should review all of these issues as if they were properly preserved below and hold that the defendant is to be sentenced to life imprisonment without the possibility of parole.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Appellant/Defendant, JOHN F. MOSLEY, respectfully requests this Honorable Court to reverse his convictions and release him forthwith or remand for a new trial/penalty phase, or reduce his sentence to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, Appeals Division, The Capital, PL-01, Tallahassee, Florida 32399-1050 on this 28th day of February 2008.

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
Florida Bar No. 0144886
Appellate Attorney for Defendant
P.O. Box 568005
Orlando, FL 32856-8005
(407) 841-7676

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 28th day of February 2008.

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RYAN THOMAS TRUSKOSKI, ESQ.
Appellate Attorney for Defendant