IN THE SUPREME COURT OF FLORIDA

CLEMENTE JAVIER AQUIRRE-JARQUIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER SC06-1550

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

INITIAL BRIEF OF APPELLANT

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[1] ***Faretta v. California***, 422 U.S. 806 (1975).

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PRELIMINARY STATEMENT

Counsel will refer to the original record on appeal using a Roman numeral to designate the volume followed by the appropriate Arabic number designating the pertinent pages. Counsel will designate the supplemental record as (SR) with the appropriate Roman numeral to designate the volume followed by the Arabic number referring to pages therein.

STATEMENT OF THE CASE

On July 13, 2004, the spring term grand jury, Eighteenth Judicial Circuit, in and for Seminole County, returned an indictment charging appellant with two counts of first-degree murder of Cheryl Williams and Carol Bareis. (I 20-22) The state also charged appellant by information with burglary of dwelling with an assault or battery therein. (SR I 881) The indictment and information were subsequently consolidated. (SR I 882-83) On August 30, 2004, the state filed a notice of intent to seek the death penalty. (I 27)

Appellant filed several pleadings attacking the constitutionality of Florida's death penalty sentencing scheme. ***See e.g.,*** (I 50-88, 96-98, 103-123) Following a pretrial hearing, the trial court denied the majority of appellant's motions. (XVI 515) The pertinent motions will be discussed ***infra***. (XVI 515)

Appellant was represented by the Office of the Public Defender at the trial level. Approximately one year before trial commenced, appellant began complaining about his lawyers. (XVI 436-55) At several pretrial hearings, appellant vocalized his complaints. Each time, the trial court conducted a ***Nelson***[2] hearing. At the first two hearings, appellant's complaints were addressed and he chose to remain with his appointed counsel's representation. (XVI 436-455, 459-

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[2] ***Nelson v. State***, 274 So.2d 256 (Fla. 4th DCA 1973).

89) A third ***Nelson*** hearing was held on November 8, 2005. (XVI 546-89) Appellant requested that he be allowed to represent himself. (XVI 581) After a discussion with the trial judge, appellant decided there was no real choice but to represent himself. (XVI 581-88)

The case proceeded to a jury trial before the Honorable O.H. Eaton, Jr. (VI 1) During jury selection, the trial court denied appellant's cause challenge of juror Dorothy Morse. (VII 329) Appellant subsequently exhausted all of his peremptory challenges, and requested an additional challenge. (IX 678-81, 684) The trial court denied the request and the appellant was unable to strike juror Weinberg who ultimately sat on the jury. (IX 678-80)

During the state's case-in-chief, the trial court allowed testimony from Samantha Williams that appellant had trespassed in their home in the middle of the night approximately seven months prior to the murders. (IX 758-67)

At the close of the state's evidence, appellant moved for a judgment of acquittal, which the trial court denied. (XIII 1406-8)

Appellant testified in his own behalf. (XIII 1417-46) Following deliberations, the jury returned verdicts of guilty as charged on all three counts. (II 288-90; XIII 1591)

A penalty phase convened on March 9, 2006. (II 298; XIV 1-200; XV 201-

400; XVI 401-12) Throughout the penalty phase, the trial court repeatedly rebuffed the state's requests to instruct the jury on the witness elimination aggravating circumstance. (XIV 80-90)

Appellant objected to the jury being instructed on the heightened premeditation aggravating factor. (XIV 93-95) The trial court overruled the objection and instructed the jury that they could consider that particular aggravating circumstance for the murder of Carol Bareis. (XV 387-88) The trial court subsequently concluded that the state failed to prove this aggravating circumstance beyond a reasonable doubt. (III 424)

Following deliberations, the jury returned two advisory recommendations. By a seven to five bare majority, the jury recommended that appellant be put to death for the murder of Cheryl Williams. (II 318) By a nine to three vote, the jury recommended that appellant be executed for the murder of Carol Bareis. (II 319)

On June 1, 2006, the trial court heard additional testimony and evidence at the ***Spencer***[3] hearing. (II 340-490) Both parties submitted sentencing memorandums. (II 350-370; III 371-406)

On June 30, 2006, the trial court sentenced appellant to death for each of the two murders. (III 408) The trial court rendered a sentencing order setting forth the

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[3] ***Spencer v. State***, 615 So.2d 688 (Fla. 1993).

aggravating and mitigating circumstances considered and found. (III 409-32)

Appellant filed a timely notice of appeal on July 7, 2006. (III 440-41)

During the pendency of this appeal, the state complied with their duty of continuing discovery. On April 13, 2007, the Office of the State Attorney, Eighteenth Judicial Circuit, filed notice that the Seminole County Sheriff's Office had received a complaint about the quality of Donna Birks' work in the latent print section. On May 4, 2007, the Office of the State Attorney sent an email to Tim Caudill, Assistant Public Defender and appellant's trial counsel, stating that the FDLE did not agree that the latent print on the knife was of sufficient value to identify appellant as the person who touched the knife.

Appellant filed an unopposed motion for relinquishment of jurisdiction to resolve the issue. The trial court conducted an evidentiary hearing on September 25, 2007. (SR I 953-1042) On October 16, 2007, the trial court rendered an order denying appellant's motion for new trial and directed the clerk to return the record on appeal to this Honorable Court. (SR I 940-52)

This brief follows.

STATEMENT OF FACTS

Guilt/Innocence Phase

A manufactured home at 121 Vagabond Way, Seminole County, Florida, in the Altamonte Springs area housed three generations of women. Cheryl Williams lived there with her mother Carol Bareis, a stroke victim who used a wheelchair to help her get around. Cheryl Williams' daughter, Samantha, a woman in her early twenties, lived there also. (IX 769-70, 776-77) On the night of June 16, 2004, Samantha spent the night with her boyfriend, Mark Van Sandt. (IX 770)

At approximately 9:00 a.m. on June 17, 2004, Van Sandt went to the mobile home on Vagabond Way to retrieve some work clothes for Samantha. He discovered the body of Cheryl Williams just inside the front door of the mobile home.[4] (IX 726-35) Williams had been stabbed to death. She suffered a total of 129 separate wounds to her body. The medical examiner characterized many of the wounds as defensive. The stab wounds to her lungs would have resulted in unconsciousness within three or four minutes. (XII 1342-63; XIV 32-43) Some of Williams' wounds appeared to be peri-mortem, that is, close to the time of death. She may have been unconscious and therefore unable to feel these wounds. (XII

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[4] The women never locked any of their doors, even at night. (IX 733, 782-83, 787-88)

1332-37; XIV 58-62)

Carol Bareis was found in another part of the home. Bareis lived in the living room portion of the trailer which was one step down from the rest of the living quarters. (XIV 62-71) She had been stabbed once in the heart resulting in a fatal wound. She had been stabbed a second time in her back. Bareis died fairly instantaneously from the first stab wound to her heart. (XIV 39)

Appellant, an illegal immigrant from Honduras, lived next door at 117 Vagabond Way. He slept in a shed that was attached to a manufactured home at that address. Appellant shared the main portion of the mobile home with Feleciano Sequeida and Sequeida's cousin, Guillermo Espinosa. (X 771-72, 836, 841) All three worked at Luigino's Pasta and Steak House, a Heathrow restaurant. (IX 771-72, 781-82; X 836-45) Appellant sometimes socialized with his neighbors, especially Samantha Williams, who was close to his age. Although Appellant's English was not the best, the pair sometimes barbequed and drank beer together. (IX 771-73, 781-82, 784-85)

Appellant had been drinking for most of the night of June 16, 2004. (X 843-45) During the early morning hours of June 17, 2004, appellant knocked on Sequeida's bedroom door and asked to use his telephone. (X 839) Appellant wanted a beer that morning, but there was none in the house. (X 843-45)

Sequeida was unsure if appellant actually used the phone that morning. They were interrupted by the police knocking at their door and asking questions about the murders next door. (X 839-42)

Clothing apparently belonging to the appellant, was found in a bag on the roof of the shed where he lived. Appellant voluntarily handed over the bag to police. The clothing had blood stains that matched the DNA profile of Cheryl Williams. (XI 1158-69) Police also found a Sysco knife[5] in the yard outside of the victims' home. The knife had blood stains on the handle and blade. (XII 1223-24) Forensic testing indicated that the blood belonged to the two victims. (IX 797-98; X 810)

There were several latent prints made in blood on the handle of the knife. Donna Birks, a latent fingerprint examiner from FDLE testified at appellant's trial that a partial palm print on the handle of the knife matched that of the appellant. (X 959-87) During the pendency of this direct appeal, the credibility of that witness, Donna Birks, was called into question. Subsequent examination of the latent print on the handle of the knife revealed that it had no value and could not be connected to the appellant. (SR I 885-1043)

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[5] The knife was similar to those used in the restaurant where appellant and his roommates worked. (X 914-25) One of appellant's roommates testified that the knife looked to be similar to one they owned. (X 838, 914-941)

A blood spatter witness testified that the clothing recovered from the roof of appellant's shed had patterns that were consistent with a struggle between Cheryl Williams and the appellant. (XII 1264-1316) Bloody footprints throughout the victim's mobile home could have been made by appellant's shoes. The witness could not say they matched, only that they were similar. (XI 1006-9, 1048, 1099-1111-12)

Appellant testified in his own defense. He explained that he went next door that morning only to discover that his neighbors had been stabbed to death. He tended to Cheryl Williams before realizing that she was dead. His clothing became soaked with her blood when he attempted to revive her in his panicked state. When he realized the gravity of the situation, he became fearful for his own life. Appellant spotted the bloody knife lying on the floor near Williams' body. Fearing that her assailant was still in the house, he picked up the knife to defend himself. He tracked blood throughout the mobile home as he searched for the perpetrator. He discovered Carol Bareis' body elsewhere in the house before fleeing in a panic. He did not even remember dropping the knife outside. He did not call the police because he was fearful that he would be deported as an illegal alien. He initially lied to police because of his initial fear and confusion. (XIII 1417-46)

Evidence in Mitigation

Appellant was the youngest of four children and the only male child. His mother was married to his father, but had not been married to the fathers of appellant's older two sisters. Appellant was born in Honduras. His mother had difficulty during appellant's delivery. The doctors ultimately performed a cesarian section and appellant was born after a period of oxygen deprivation. He was very sickly as a child. (XIV 139) Appellant's parents separated and his father moved in with an underaged woman. She was the same age as appellant's older sister. The father did not provide much support to his prior family. Appellant's mother worked as a maid. (XIV 139-40)

Appellant blamed himself for his parents' separation. His father was a steady drinker, probably an alcoholic. He was violent toward appellant's mother. (XIV 140-42) As a child, appellant was disciplined with beatings from hands, belts, wooden sticks, or any object that was handy. These beatings left marks on appellant's body. The punishment was meted out for relatively minor offenses. (XIV 143-44)

When appellant was eight years old, he and a male friend were sexually abused by a thirteen-year-old neighborhood girl. The social stigma and psychological damage is sometimes more difficult for a young boy than for a girl.

(XIV 144-45)

The area where appellant grew up was stricken with poverty. Gangs were prevalent and essentially ran the community. Appellant had a friend who was murdered by a gang. (XIV 146-47) Appellant obtained the equivalent of a high school diploma. His schooling ended at the age of eighteen. (XIV 148-49) Appellant was ridiculed for his short stature. This resulted in low self esteem and difficulty in establishing trusting relationships. (XIV 149-50)

Appellant had a history of using drugs, especially inhalants. He began using cocaine at the age of eighteen and it became his drug of choice. The mental health experts described the highly addictive psychological nature of cocaine when combined with alcohol. (XIV 156-59) He was able to get cocaine cheaply from his roommates. (XIV 161)

Appellant told Dr. Day what transpired the day before and the morning of the murders. (XV 251-55) Appellant did not work the day before the homicides. He began drinking beer at 11 o'clock that morning. He could not remember exactly how much he drank during the next eighteen hours, but estimated about six pitchers of beer, ten individual beers, a couple of shots of tequila, and a shot of Jack Daniels. He and a friend then bought an eight ball of cocaine, approximately 2 ½ grams. After he finished that cocaine, appellant bought two more grams of

cocaine. Around 2 a.m., appellant realized that he was too drunk to drive, especially since he had no valid license. He and a friend bought more beer and went to a friend's house where they finished the cocaine. Appellant finally got home around 5 a.m.. After watching some television, he decided that he wanted another beer. There was no beer in his house, so he went next door to find one.

He found the front door cracked. He was unable to open the door completely, but he saw Cheryl Williams lying on the floor. He touched her and realized that she was dead. He tried to pick her up and laid her across his legs. He put her back down on the floor and began to walk around the house. The house had been ransacked. He found the other victim in the other room. He saw the knife in the middle of the murder scene. Fearing that the assailant is might still be in the house, he picked up the knife to use in self-defense. (XV 251-55)

Appellant could not explain why he took the knife when he left the trailer. He recalled throwing it down, but did not remember where. He went back to his room and took off his clothes to wash them. He thought about calling the police but did not, due to his illegal alien status. He put his soaked clothing in a plastic bag and threw them on the roof. Appellant could not explain this action. (XV 251-255)

Several hours later, the police showed up. Appellant did not tell the police

anything when initially questioned. Subsequently, appellant went to a friend's house and they began accusing him of committing the murders. Although he was unsure if they were serious, he became frightened. Appellant decided to tell the police everything. During the interrogation, the police told him that they had a lot of evidence against him. When the police claimed that the crimes were committed with a sexual motive, appellant refused to continue talking. (XV 255-256)

Two respected psychologists agreed that when appellant committed the murders, he was under the influence of a mental or emotional disturbance. They disagreed as to whether or not the disturbance was "extreme." The trial court resolved the disagreement in favor of the appellant. The court was reasonably convinced that appellant was under the influence of an extreme emotional disturbance at the time of the killings. However, the trial court gave only moderate weight to this statutory mitigating circumstance. This was based on the fact that appellant chose to abuse drugs. Additionally, the trial court found that it was not clear that the cocaine and alcohol "made" appellant commit the murders. (III 424-25)

The trial court also concluded that appellant's capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law were also substantially impaired. This was based on the

"extreme emotional disturbance" referenced in the prior mitigating factor. For the same reasons cited in weighing the prior factor, the trial court assigned only moderate weight to this particular mitigating circumstance. (III 425)

The trial court also found appellant's age at the time of the murders to be mitigating. Although appellant had a chronological age of twenty-four at the time of the murders, appellant had both significant emotional immaturity and mental problems. (III 426) The evidence reasonably convinced the trial judge that appellant's psychological make-up was that of an adolescent. However, the trial court assigned little weight to this mitigating circumstance. The trial court noted that, despite appellant's emotional immaturity, he was able to function in society. He came to this country from Honduras and "established" himself here. He held a dishwashing job at a restaurant and received a promotion to prep cook. Based on the foregoing, the trial judge assigned little weight to this mitigating circumstance. (III 426)

Nonstatutory Mitigating Circumstances.

The trial court found numerous nonstatutory mitigating factors to be applicable to appellant's cases. The trial court found almost all of the following factors:

(1) Appellant suffers from long term substance abuse.

There is no doubt that he had been using alcohol and cocaine during the hours just prior to the murders (moderate weight);

(2) Appellant was raised in a dysfunctional family setting without a father figure; appellant was left alone as a small child; appellant was subjected to severe punishment for violation of household rules. (Assigned little weight, because they do little to mitigate the murders in this case.);

(3) Appellant suffered from physical abuse as a child- little weight; (see discussion above);

(4) Appellant performed poorly in the later years of his education. This circumstance is established by the evidence and had the effect of limiting appellant's employment as evidenced by his work as a dishwasher. (assigned little weight without stating any reasons.);

(5) Appellant suffered brain damage as a result of his abuse of substances including inhalants. The trial court was reasonably convinced that appellant suffers from brain damage, but assigned only moderate weight where there is no evidence that the brain damage contributed to appellant's decision to murder the two victims.;

(6) The history of appellant's birth indicated that he suffered from oxygen deprivation and possible brain damage. Although evidence established this history, appellant's development was normal. The court was not convinced that the circumstances of his birth caused appellant any long term physical or emotional problems and, therefore was not mitigating in nature.

(III 424-26)

SUMMARY OF THE ARGUMENT

Appellant challenges his convictions and death sentences based on numerous errors that occurred during the proceedings below. Initially, the trial court erroneously denied appellant his constitutional right to represent himself. After expressing dissatisfaction with this court-appointed lawyers on numerous occasions, appellant was clear and unequivocal in his request to represent himself. Inexplicably, the trial court misled appellant about the ramifications of proceeding *pro se*. The trial court told appellant that if he proceeded *pro se*, he would not have access to the prosecuting attorney "for the purpose of discussing what evidence might be presented or to negotiate a resolution." The judge told appellant that " it takes a lawyer to do that." He then chose to keep his court-appointed lawyers based on the trial court's misrepresentation that he would not be privy to discovery nor plea negotiations.

Error occurred during jury selection when the trial judge erroneously denied appellant's cause challenge of potential juror Dorothy Morse. Ms. Morse clearly favored capital punishment for all first-degree murder cases. Additionally, Ms. Morse believed that appellant would be released in twenty or thirty years if he was sentenced to life imprisonment without the possibility of parole. Appellant exhausted his peremptory challenges and requested additional. Appellant wanted

to exercise a peremptory challenge on juror Weinberg who leaned toward the imposition of the death penalty. Although there is some confusion about the preservation of this issue, close scrutiny of the record indicates that this issue was preserved for review.

Appellant also contends that he is entitled to a new trial where his convictions and death sentences were based, in part, on the perjured testimony of a state witness. During the pendency of this direct appeal, the state complied with their continuing duty of discovery by disclosing that Donna Birks, a latent fingerprint examiner for the Florida Department of Law Enforcement, had come under a cloud of suspicion. Subsequent reexamination of the latent palm print retrieved from the apparent murder weapon did not match appellant's palm print, as Donna Birks had testified at trail. This Court remanded for a hearing before the trial judge. The trial court denied appellant's request for a new trial based on this new revelation. Donna Birks was part of the government who prosecuted appellant. Her perjured testimony led to appellant's convictions and death sentences. Appellant's convictions and death sentences are constitutionally infirm. ***Giglio v. United States***, 450 U.S. 150 (1972).

Appellant also contends that the evidence is insufficient to support his convictions. The evidence against appellant was circumstantial. No apparent

motive existed for the murders. Although there was circumstantial evidence that tied appellant to the scene of the crimes, there was no physical evidence that conclusively established that he was the perpetrator. The revelation that Donna Birks perjured herself further bolsters this argument.

Error occurred at the guilt phase where the trial court overruled appellant's objections and allowed Samantha Williams to testify to unrelated and prejudicial evidence that appellant had committed other, unrelated crimes. Specifically, Samantha Williams testified that seven months before the murders, she woke up in the middle of the night to find appellant standing in her bedroom. This unrelated and highly prejudicial criminal activity by appellant impermissibly led to appellant's convictions and death sentences.

Appellant attacks his death sentences on various grounds. He challenges the constitutionality of a bare majority jury verdict in support of the death sentence imposed for the murder of Cheryl Williams. Appellant recognizes that this Court has previously rejected this argument. Appellant asks this Court to reconsider its prior holdings.

Appellant sets forth two separate challenges to the trial court's finding that the murder of Carol Bareis was committed to eliminate her as a witness. The trial judge repeatedly rejected the state's attempts to instruct the jury on this particular

aggravating circumstance. The trial court correctly concluded that there was insufficient evidence to justify a jury instruction. Following the ***Spencer*** hearing, the trial judge inexplicably had a change of heart and concluded that the evidence did support the finding of this aggravating factor. Additionally, the trial court assigned great weight to the factor in support of the death sentence imposed. As the trial judge candidly admits, such a practice is constitutionally suspect after ***Ring v. Arizona***, 536 U.S. 584 (2002). This Court has previously upheld a similar finding in ***Williams v. State***, 967 So.2d 735 (2007). However, the ***Williams*** trial judge expressly stated that the imposition of the death sentence was not contingent on his finding of a statutory aggravator which the jury did not consider. The trial court in appellant's case apparently disregarded Justice Pariente's warning in her ***Williams***' concurrence that trial courts should not consider nor find aggravators on which the jury was not instructed.

In addition to this error, appellant contends that the evidence is woefully insufficient to support the trial court's finding of this particular aggravator. The trial court's finding rested almost exclusively on his erroneous conclusion that Cheryl Williams was killed first and that Carol Bareis heard the prolonged struggle of her daughter with the assailant. The evidence presented at trial simply does not support this conclusion. For similar reasons, the evidence does not

support the trial court's finding that the murder of Carol Bareis was especially heinous, atrocious or cruel. The trial court's finding of that particular aggravator was based on the same erroneous speculation of the sequence of events on the night of the murders. The trial court's conclusions are mere speculation unsupported by any evidence presented at trial.

Appellant also contends that the trial court should not have instructed the jury on the heightened premeditation circumstance. The evidence was insufficient to prove this factor, as the trial court subsequently concluded.

Finally, appellant suggests that the standard jury instructions improperly shift the burden of proving that life is the appropriate penalty. Appellant also contends that Florida's capital sentencing scheme violates the United States Constitution as interpreted in ***Ring v. Arizona***, 536 U.S. 584 (2002) Appellant concedes that this Court has repeatedly rejected this argument but urges reconsideration.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY REQUIRING APPELLANT TO PROCEED TO TRIAL WITH COUNSEL WHOM HE HAD SOUGHT TO DISCHARGE AND BY PRECLUDING A MEANINGFUL EXERCISE OF APPELLANT'S RIGHT TO REPRESENT HIMSELF WHEN THE TRIAL COURT BLATANTLY MISLED APPELLANT DURING THE ***FARETTA***[6] COLLOQUY.

A trial court's decision as to self-representation usually is reviewable for abuse of discretion. ***Holland v. State***, 773 So.2d 1065, 1069 (Fla. 2000). The issue in this case is whether the actions of the trial judge himself may have denied Appellant the right to elect self-representation. The issue thus presents a factual question to be determined by this Court on review. Appellant therefore respectfully suggests that the standard of review in this case should be *de novo*. This Honorable Court must make its own finding of fact from the record on appeal.

The right to self-representation is conferred by the Sixth Amendment to the United States Constitution. To be entitled to represent oneself, Florida courts require a defendant to specifically ask to do so. ***See, e.g., Howell v. State***, 707

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[6] ***Faretta v. California***, 422 U.S. 806 (1975).

So.2d 674 (Fla. 1998). Where the defendant has been misled concerning his right to represent himself, however, his failure to assert that right does not constitute a valid waiver. ***See, e.g., Johnson v. Zerbst***, 304 U.S. 458 (U.S. 1938). (A waiver is ordinarily an intentional relinquishment or abandonment of a **known** right or privilege).

In this case, Appellant had come to court on several occasions expressing his complete and utter dissatisfaction with his count-appointed lawyers. Appellant first complained more than one year before his trial commenced. (XVI 436-455) Each time appellant complained, the trial court duly conducted a ***Nelson***[7] hearing. At each ***Nelson*** hearing, the trial court addressed appellant's specific complaints about his lawyers. At the end of each of the first two ***Nelson*** hearings, appellant grudgingly accepted the continued representation of the Office of the Public Defender. (XVI 436-55, 459-89)

However, things changed with the November 8, 2005, ***Nelson*** hearing. (R XVI 546-589) Defense counsel (Mr. Caudill) explained to the trial court that appellant wanted his lawyers to file a demand for speedy trial. They explained to him that they would not honor his request, because they did not feel that it was in his best interest. At that point, appellant expressed dissatisfaction with any further

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[7] ***Nelson v. State***, 274 So.2d 256 (Fla. 4th DCA 1973).

representation by these lawyers. (XVI 546-548) There was a discussion among the lawyers and the trial judge who concluded that the parties could be ready to try the case within three months time.[8] (XVI 548-559)

The trial court then conducted a colloquy with the appellant addressing each of his individualized complaints. (XVI 560 *et seq.*) Appellant indicated that he had been in jail for seventeen months awaiting trial. In addition to his complaint about the delay, appellant indicated that his lawyer told him that they would lose the guilt/innocence phase of the trial. Appellant stated, "I don't think a lawyer can tell that to his client at any time for any reason. So, today I want to fire him. He will not be my lawyer anymore." (XVI 561) The trial judge explained to the appellant that he had a constitutional right to a lawyer; that he had the right to hire his own lawyer; and that if he could not afford to hire his own lawyer, the court would appoint one for him. (XVI 561-62) The trial judge relayed his doubt that appellant could convince him that the experienced, court-appointed lawyers were not providing adequate representation. The trial court told appellant that if he wanted to fire his lawyers, he could represent himself or hire his own lawyer. The trial judge also pointed out that hiring a different lawyer would cause further delay in the trial. (XVI 562) Appellant indicated his understanding and stated:

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[8] As they predicted, jury selection began on February 20, 2006. (VI 1)

> But I think that an attorney cannot tell his client that we're gonna lose. I think I can represent myself. I can represent myself better if I'm sure that I'm gonna lose with somebody. I know that I'm gonna lose with him, that is what he said.

(XVI 562-63) At that point, the trial court closed the courtroom to all but the appellant, his lawyer, and an interpreter. (XVI 563) The trial judge and the appellant proceeded to have an in-depth discussion about appellant's dissatisfaction with his lawyers.[9] Appellant then reiterated his desire to fire his lawyers. (XVI 568) At the trial court's request, defense counsel responded to appellant's complaints, reviewed the state's evidence, documented their progress in trial preparation, and assessed the likelihood of success at trial. (XVI 568-80) The trial court then made a finding that appellant's lawyers were providing adequate representation. The court denied appellant's request to appoint new lawyers. He then told appellant that he could remain with his present counsel, hire his own lawyer, or represent himself. The trial judge suggested that self-representation was the worst choice, but indicated that it was appellant's decision to make. (XVI 580-81)

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[9] Appellant's dissatisfaction stemmed mostly from the long delay between his arrest and the beginning of trial, as well as the lawyers' bleak assessment of their chances to win an outright acquittal. Appellant also complained about his lawyers' refusal to file a demand for speedy trial. (XVI 563-68)

Appellant reiterated his intention, "I am going to represent myself." (XVI 581) The trial judge once again went over the pitfalls of self-representation. (XVI 581-87) These included the fact that English was not appellant's first language. (XVI 582-84) It was at this point that the trial judge inexplicably misstated appellant's true position, if he chose to represent himself:

> **THE COURT: You understand that you will not be able to have direct access to the prosecuting attorney in this case for the purpose of discussing what evidence might be presented or to negotiate a resolution in this case. It takes a lawyer to do that.**
>
> **MR. AGUIRRE-JARQUIN: So, I won't get any information.**
>
> THE COURT: Finally, if you are convicted, you're not gonna be able to claim on a appeal that your lack of legal knowledge or skill constitutes a basis for a new trial. In other words, you cannot claim that you received ineffective assistance of counsel if you decide to represent yourself.
>
> One of the most revered presidents of the United States was Abraham Lincoln. And one of the things he said when he was practicing law in the State of Illinois was that a person who represents himself has a fool for a client. President Lincoln was correct.
>
> MR. AGUIRRE-JARQUIN: So, you recommend that I should continue on with lawyers that are telling me we're gonna lose.
>
> THE COURT: I'm recommending that you stay with

lawyers rather than try to represent yourself, because representing yourself is not in your best interest, and I'm telling you that.

MR. AGUIRRE-JARQUIN: Okay. I just want it on the record that he said that we're gonna lose and that I came here three times –

THE COURT: Okay.

MR. AGUIRRE-JARQUIN: - - to get rid of him.

THE COURT: All right. Well, I want to make sure that you have made your decision now.

And I'm telling you, I think you're making the correct decision. You need to keep your lawyers, because they can help you with this trial. Is that what you want to do?

MR. AGUIRRE-JARQUIN: There is not an option.

THE COURT: All right. Thank you.

(XI 587-88) (Emphasis added.)

Appellant's failure to affirmatively maintain his right to represent himself flowed directly from the trial court's pre-emptive and incorrect announcement that Appellant would have no access to the prosecutor for negotiation or discovery. What occurred here is similar to the "Hobson's choice" with which the defendant was faced in ***State ex rel. Wright v. Yawn***, 320 So.2d 880 (Fla. 1975). In that case, through the State's delay, the defendant appeared to be faced with choosing between his coequal rights, **i.e.**, his right to effective representation or his right to

a speedy trial. The Supreme Court held that an accused cannot be forced to make such a choice and ordered that Wright be discharged.

This case is not an example of "defendants who use their right to counsel or to self-representation in deliberate attempts to disrupt the trial." ***Smith v. State***, 677 So.2d 370, 371 (Fla. 2d DCA 1996). As noted above, Appellant began complaining about his lawyers more than one year prior to trial. His efforts and concerns were not those of a defendant who seeks to "delay and continually frustrate his trial." ***State v. Young***, 626 So.2d 655, 657 (Fla. 1993). In ***Smith***, ***supra***, the District Court found that:

> . . . With the power to control the proceedings and prevent disruption, the trial judge would have been justified in refusing to grant Smith a continuance or otherwise disrupt a trial that was at least half-way finished. **The trial judge was not justified, however, in refusing Smith's request to discharge his attorney and in failing to inform him of his right to self-representation.**

Id., 677 So.2d at 371. (Emphasis supplied.) The gravamen of the trial judge's error in ***Smith*** was expressed in Judge Campbell's specially concurring opinion, and is the crux of what happened in appellant's case:

> **Had the trial judge in this case, by his advice to appellant, not created the real possibility that appellant may have misunderstood the scope of his rights,** I might have been persuaded to affirm. . . .

Id., 677 So.2d at 372.

In ***Cribbs v. State***, 378 So.2d 316 (Fla. 1st DCA 1979), the District Court held that a confession should be suppressed because the police chief had, in process of advising Cribbs of his rights, told him in effect that he could not talk with a public defender until the attorney had been appointed by the court. This misinformation, the Court held, vitiated the ***Miranda*** warnings that had previously been given. ***Miranda v. Arizona***, 384 U. S. 436 (1966).

Similarly, Judge Eaton's chilling and erroneous declaration that "it takes a lawyer" to negotiate and discuss evidence with a prosecutor effectively discouraged Mr. Aguirre-Jarquin from maintaining his constitutional right to proceed *pro se*. As appellant admitted to the trial court, "There is not an option." (XI 588) The judge's determination may have been a genuine attempt to look out for appellant's well-being, but his actions nevertheless violated Mr. Aguirre Jarquin's rights. ***See, e.g., D.N. v. State***, 529 So.2d 1217, 1223 (Fla. 1st DCA 1988), wherein the District Court held that whether the defendant was deprived of his constitutional right to counsel "does not depend upon a malevolent intent to mislead on the part of the investigating officers." Even though intended to be descriptive of legal procedures, the officers' misinformation about D.N.'s right to counsel "undoubtedly had a chilling coercive effect[.]"

The Supreme Court of the United States recently reiterated the importance of the right to counsel of choice. ***United States v. González-López***, 126 S. Ct. 2557 (2006). That particular case dealt with the improper disqualification of the defendant's counsel of choice. In their consideration of whether the error is subject to review for harmlessness, the Court pointed out that constitutional errors are divided into two classes. "Trial errors" occur during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt. ***Arizona v. Fulminante***, 499 U.S. 279 (1991). The second class of constitutional error is called "structural defects." These defy analysis by harmless error standards because they affect the framework within which the trial proceeds and are not simply an error in the trial process itself. ***Arizona v. Fulminante***, 499 U.S. at 309-310. The three leading examples of this type of error include the denial of counsel, the denial of the right to a public trial, and **the denial of the right of self-representation**. ***See McKaskle v. Wiggins***, 465 U.S. 168 (1984). (Emphasis added.)

To force a defendant to accept against his will a state-appointed lawyer deprives him of his constitutional right to conduct his own defense. ***State v. Bowen***, 698 So.2d 248 (Fla. 1997). The record shows that Appellant was unable

to freely, voluntarily or knowingly choose to exercise his right to conduct his own defense because he was misled about the ramifications of such an election. His constitutional right to self-representation was improperly denied. ***Art. I § 16[10], Fla. Const.; Amends. VI and XIV, U. S. Const.***

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[10] "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, **to be heard in person**, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. . . . " (Emphasis supplied.)

POINT II

APPELLANT'S CONVICTIONS AND DEATH SENTENCES CANNOT STAND WHERE THEY ARE BASED ON PERJURED TESTIMONY BY THE STATE'S LATENT FINGERPRINT EXAMINER WHO ERRONEOUSLY PLACED THE MURDER WEAPON IN APPELLANT'S HAND.

Introduction

The most critical piece of evidence offered by the state at trial was the apparent murder weapon which was found outside the house where the homicides occurred. Donna Birks, a latent fingerprint examiner for the Florida Department of Law Enforcement, testified that it was her expert opinion that the knife handle had a partial bloody palm print that matched Appellant. ***See, e.g.,*** (X 964-967, 970) This was the only physical evidence that connected appellant to the actual act of murder. Although his clothing contained blood that matched the victims, that can innocently be explained by his contact with the crime scene and the victims following their murder by a third party.

After appellant's sentencing and during the pendency of this appeal, the state disclosed that Donna Birks had falsified several of her latent print comparisons. A reexamination of the evidence in appellant's case indicated that the print on the knife handle could not be matched to appellant. In fact, the latent

print was of little to no value and could not match nor exclude anyone. There was a foreshadowing of this problem prior to trial when FDLE laboratory problems began to surface. However, the state called appellant's request for a chance to depose FDLE personnel on this issue a "fishing expedition." (XVI 527-42)

Following a relinquishment by this Court and an evidentiary hearing, the trial judge rendered an order denying appellant's motion for a new trial based on newly discovered evidence. The trial court reasoned that, even without Birks' testimony, the jury would "probably" still convict. (SR I 945-946) The trial court appeared to place weight on the fact that appellant testified at trial and admitted to having the knife in his hand. However, it is unlikely that the state would have benefit of appellant's testimony during a retrial of this cause. ***See Harrison v. United States,*** 392 U.S. 219 (1968). The trial court further concluded that the tainted evidence had no impact at the penalty phase where identity was no longer an issue. (SR I 947)

Argument

At best, the revelation about Donna Birks' testimony at appellant's trial constitutes newly discovered evidence. At worst, appellant's conviction was based on perjured testimony presented by the state. Under either scenario, appellant is entitled to a new trial to fairly determine his guilt or innocence. To

establish a valid claim under ***Giglio***, a defendant must show that (1) some testimony at trial was false, (2) the prosecutor knew that the testimony was false, and (3) the testimony was material. ***Suggs v. State***, 923 So.2d 419, 426 (Fla.2005) "This Court applies a mixed standard of review to ***Giglio*** claims, 'defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] *de novo* the application of those facts to the law.' " ***Id.*** (alterations in original) (quoting ***Sochor v. State***, 883 So.2d 766 (Fla.2004)). ***Dailey v. State***, 965 So.2d 38, 45 (Fla. 2007).

In ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), the Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is exculpatory, "irrespective of the good faith or bad faith of the prosecution." The good faith, or lack thereof, by the prosecutor is immaterial because the concern is not punishment of society or misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. ***Id.***, citing ***Mooney v. Holohan***, 294 U.S. 103 (1935). Applying these principles, the Court in ***Giglio v. United States***, 405 U.S. 150 (1972), held that the trial prosecutor's knowledge of offers of leniency made to the codefendant and chief witness was immaterial:

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as

> such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.

Giglio v. United States, 405 U.S. 150, 154 (1972).

Knowledge of the Perjury by the Lead Prosecuting Attorney is Irrelevant.

A prosecutorial claim of the lack of personal knowledge of the information suppressed is not determinative because "[t]he prosecutorial's office is an entity and as such it is the spokesman for the Government." ***Giglio v. United States***, 405 U.S. 150, 154 (1972). In ***Giglio***, a previous assistant United States attorney promised the government's key witness that he would not be prosecuted if he cooperated. The ***Giglio*** court attributed that promise to the newly assigned assistant United States attorney in spite of his ignorance of the promise. The ***Giglio*** Court held, that in certain circumstances, knowledge of perjured testimony may be imputed to the prosecutor who lacks actual knowledge of the falsity.

Although the trial prosecutor in appellant's case clearly was not personally aware of Donna Birks' perjury, Birks was part of the "prosecuting team" through her status as a latent fingerprint examiner for the Florida Department of Law Enforcement. ***Giglio*** and ***Brady*** both apply to evidence possessed by any member of the "prosecution team," including both investigators and prosecutors. ***See Kyles***

v. Whitley, 514 U.S. 419, 438 (1995) (prosecutor's failure to disclose ***Brady*** material in possession of police not excused by lack of personal knowledge).

The error was exacerbated through the improper bolstering of Donna Birks' testimony. Specifically, the prosecutor asked Birks if her work in matching latent fingerprints is "checked by another latent print examiner." (X 967) Donna Birks assured the jury that her work was checked by another professional. This testimony came over a timely hearsay objection which the trial judge overruled. (X 967)

The prosecutor further exacerbated the error during closing argument. The prosecutor focused on the physical evidence, specifically the bloody clothing, the footwear impressions, and the bloody knife which had appellant's latent palm print impression on the handle:

> The knife, we have a latent palm print off the knife that matched the Defendant. We had DNA from the print, the bloody print. The print was in blood that matches Cheryl Williams' DNA profile. You have DNA on the middle of the blade that matches Carol Bareis. You have it on the handle, another area of the handle, not specifically where the palm print was, but where the other blood was, and that matched Cheryl Williams. Now, Mr. Figgatt brought up a point that I can address at this time in reference to the palm print in blood, about why wasn't there any more on the rest of the handle of the knife, on the label. Donna Birks testified. She pointed over that right side, the ridge detail, said that was of no value.

> There was stuff there, it's just I couldn't make anything out of it. The knife....

(XIII 1514-15)

Counsel and this Honorable Court can debate the procedural niceties of the issue presented. The bottom line remains that appellant's convictions and death sentences are based, at least in part (appellant submits a rather large part), on the perjured testimony of a latent fingerprint examiner for the Florida Department of Law Enforcement. Counsel attempted to nip this issue in the bud by seeking remand so that the trial court could short circuit the lengthy appellate process and order the new trial required in this case. This Court can hasten the ends of justice by granting appellant the new, fair trial that he deserves. Why wait for a federal court to take the appropriate action?

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S CAUSE CHALLENGE OF JUROR MORSE WHO CLEARLY BELIEVED THAT DEATH WAS THE APPROPRIATE PENALTY IN ALL FIRST-DEGREE MURDER CASES.

The standard for reviewing a trial judge's decision on a challenge for cause is abuse of discretion. ***Fernandez v. State,*** 730 So.2d 277(Fla. 1999) and ***Castro v. State***, 644 So.2d 987, 990 (Fla.1994). Trial judges must settle the query as to "whether the juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." ***Lusk v. State***, 446 So.2d 1038, 1041 (Fla.1984). "When making this determination, the court must acknowledge that a 'juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes.' " ***Rodas v. State***, 821 So.2d 1150, 1153 (Fla. 4th DCA 2002), ***review denied***, 839 So.2d 700 (Fla.2003). "Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of

excusing the juror rather than leaving doubt as to impartiality." ***Williams v. State***, 638 So.2d 976, 979 (Fla. 4th DCA 1994), ***review denied***, 654 So.2d 920 (Fla.1995). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. ***See Bryant v. State***, 656 So.2d. 426, 428(Fla. 1995).

In the instant case, the responses of prospective Dorothy Morse clearly reflected a strong belief that death was the appropriate penalty for all first-degree murders. Additionally, Morse believed that, if sentenced to life, Appellant might be released in a few years. The statements by Juror Morse created more than a reasonable doubt about her ability to be fair and impartial. This juror should have been struck for cause, and the court erred in denying the appellant's challenge for cause. ***Busby v. State***, 894 So.2d 88(Fla. 2005).

Dorothy Morse, juror number A-29, was married to a retired trucking businessman. She had four step-children. The oldest worked as an investigator with the sheriff's department in Martinsville, Virginia. During voir dire, the prosecutor posed five distinct positions on the issue of death penalty. Ms. Morse selected the most extreme position in favor of capital punishment, specifically that the death penalty should be automatically imposed for all first-degree murder cases. (VII 232-33) The prosecutor asked Ms. Morse if she could think of a single

circumstance where she would not recommend the death penalty. Ms. Morse replied, "It would have to be a lot of mitigating circumstances for me not to feel that way." (VII 233) In his subsequent questioning of individual jurors, the prosecutor practically skipped over Ms. Morse:

> MR. CARTER (prosecutor): Miss Morse, I think we already got your position from earlier, that you're pretty much in favor of the death penalty?
>
> MS. MORSE: Yes, sir.
>
> MR. CARTER: It would take an extreme circumstance not?
>
> MS. MORSE: Right.
>
> MR. CARTER: Nothing you've heard here today has changed your position on it?
>
> MS. MORSE: No, sir.

(VII 243-44)

Subsequently, defense counsel was questioning potential jurors about their perception of life in prison without possibility of parole as an alternative sentence to the death penalty. Ms. Morse apparently raised her hand and pointed out:

> Well, sometimes they get life in prison and they are out in twenty or thirty years....or less....over the years you see different cases and they're out....they got life but they are out, back on the streets.

(VII 285) Defense counsel valiantly attempted to explain to the venire that life

imprisonment without possibility of parole meant exactly that.

Subsequently, defense counsel honed in on Miss Morse's feelings about the death penalty:

> MR. CAUDILL (defense counsel): Miss Morse, one of the things that you said yesterday was that, and again, there are no right or wrong answers here, you generally believe in the death penalty.
>
> MS. MORSE: Yes, I do.
>
> MR. CAUDILL: Be fair to say that it's a strong belief?
>
> MS. MORSE: Yes.
>
> MR. CAUDILL: ...But one of the things that I thought I heard you say was it would take a lot of mitigation.
>
> MS. MORSE: Well, the State Attorney asked me if it would be anytime that I wouldn't...recommend the death penalty, and it would take a lot.
>
> MR. CAUDILL:...So I don't want to put words in your mouth. But one of the things that I thought I heard you say was it would take a lot of mitigation.
>
> MS. MORSE: Well, the State Attorney asked me if it would be any time that I wouldn't –... recommend the death penalty, and it would take a lot.
>
> MR. CAUDILL: Okay. So would it be fair to say, and again, you can say yes or no, would the Defense in that second phase of the trial have an uphill battle for you, would you lean towards the recommending the death penalty?

MS. MORSE: It would be an uphill battle.

MR. CAUDILL: Okay. And I'm not saying this is gonna happen, but if we decided, for example, in that second part of the trial not to present anything in mitigation, all that you heard in that second part of the trial would be whatever evidence the State presented in the way of aggravation in favor of the death penalty.

MS. MORSE: Uh-huh.

MR. CAUDILL: Would you still be able to, even at that point, consider a recommendation for life or for you would it be death?

MS. MORSE: Well, you have to consider all possibilities.

MR. CAUDILL: Right.

MS. MORSE: That's fair.

MR. CAUDILL: Okay.

MS. MORSE: But --

MR. CAUDILL: It would be difficult?

MS. MORSE: It would be difficult.

MR. CAUDILL: All right. I appreciate your answer.

(VII 297-99) When it came time to exercise challenges, defense counsel took exception to juror Morse:

THE COURT: State, Dorothy Morse.

CARTER: Acceptable.

MR. CAUDILL: I'd move to challenge her for cause, Your Honor, because of her response in reference to surrounding the death penalty. She said she leaned heavily in the death penalty, Defense would definitely have an uphill battle and she would require a lot of mitigation to be presented for her to consider life in prison.

THE COURT: I listened to her and I don't think that disqualifies her. I think it would be a hard sell, but she didn't say that she was not going to consider both possible penalties. So, I'm gonna deny your motion for cause. You want to strike her?

MR. CAUDILL: Yes, sir.

MR. CARTER: Just so I have my numbers right, that's the third peremptory?

THE COURT: Yeah.

MR. CAUDILL: That's correct.

(VII 329)

Appellant preserved this issue for review pursuant to ***Trotter v. State***, 576 So.2d 691 (Fla. 1990). Once appellant had exhausted all his peremptory challenges, appellant unsuccessfully requested additional peremptory challenges. It is clear from the record that appellant wanted to strike Ms. Weinberg who ultimately sat on this jury. (IX 678-81, 684) When juror Weinberg was seated in the final twelve, appellant asked for the additional challenge and pointed out that they were forced to use a peremptory challenge on a prior juror who should have

been excused for cause. There was much confusion concerning the identity of that particular juror. Defense counsel mistakenly thought that Glenna Robinson was the juror in questions. Despite several pauses reflected on the record, none of the participants at the trial court level could remember that Dorothy Morse was the potential juror that appellant unsuccessfully challenged for cause. (IX 679-81)

The fact that no one could remember juror Morse's name when appellant requested additional challenges is of no import. Appellant reminded the judge that his cause challenge had been erroneously denied. It is also clear from the record that appellant would have used that additional peremptory challenge on juror Weinberg. (IX 678-80)[11]

Although Weinberg was not challengeable for cause, she was far from an ideal juror from a defense perspective. Of the five positions posed by the prosecutor during voir dire, Weinberg selected the second most extreme position on capital punishment. Although she did not believe that all first-degree murders cases called for the death penalty, she found the punishment appropriate and could return a verdict in the right case. (IX 632-33) She had no jury experience and had very little contact with the criminal justice system. (VIII 569) She had never

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[11] Although defense counsel did not expressly state that the additional peremptory would be used on Weinberg, the record is clear that it was appellant's intention to do so.

visited a jail or prison, (VIII 588) despite the fact that she had two relatives who had been charged with minor offenses. (IX 605-7) Additionally, she admitted to seeing the newspaper article about the case on the morning of jury selection. (VIII 547-48) Furthermore, she was not a registered voter and could not explain her failure to register. (IX 616)

When it came time to accept the jury defense counsel stated:

> That appears to be the jury, your Honor. We did not want to be seen as accepting the jury other than subject to our previous objections and motions.

(IX 684) Because an objectionable juror served on appellant's jury, and a cause challenge was erroneously denied, Appellant is entitled to a new trial. ***Amends. V, VI, VIII and XIV, U. S. Const.; Art. I, §§9, 16, and 17, Fla. Const.***

POINT IV

THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR FIRST-DEGREE MURDER AND BURGLARY.

At the close of the State's case-in-chief, defense counsel moved for a judgment of acquittal contending that the evidence was insufficient to prove a lack of consent to support a conviction for burglary. This was based on the fact that appellant lived next door to the victims and had a history of socializing with them at their house. The motion was also a tacit argument that the evidence was insufficient to support the charge of felony murder. The trial court denied the motion, concluding that the state had produced enough circumstantial evidence to send the case to the jury. (XIII 1406-8) Defense counsel never specifically moved for a judgment of acquittal on the charge of murder. However, this Court has a duty, particularly in capital cases, to review the record on appeal to determine whether sufficient evidence exits to support the convictions, even where the issue has not been raised by the Appellant. ***See Mansfield v. State***, 798 So. 2d 636, 649 (Fla. 2000). The standard of review for the denial of a judgment of acquittal is *de novo*. ***Jones v. State***, 790 So. 2d 1194, 1996 (Fla. 1st DCA 2001).

The Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the

crime for which he is charged. ***In re: Winship***, 397 U. S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. ***Cox v. State***, 555 So. 2d 352 (Fla. 1989). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged. ***Hall v. State***, 90 Fla. 719, 720; 107 Southern 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. ***Williams v. State***, 143 So. 2d 484 (Fla. 1962). Circumstantial evidence is not sufficient when it requires the pyramiding of inferences. ***Chaudoin v. State***, 362 So. 2d 398, 402 (Fla. 2d DCA 1978). When the State relies upon purely circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilty but it must also be inconsistent with any reasonable hypothesis of innocense. ***McArthur v. State***, 351 So. 2d 972 (Fla. 1977).

In this case, the State's hypothesis was that Appellant, one of three men who lived next door to the victims, entered the unlocked front door of the victim's home during the early morning hours. He may have been searching for a beer or he may have been engaged in an unannounced visit with people he had previously

socialized. The State further theorized that he was discovered in the home and was not welcomed. When confronted, the State theorized that Appellant stabbed Cheryl Williams to death. The State's theory also included the hypothesis that Appellant had armed himself with a professional chef's knife that he took from the restaurant where he worked. The State's scenario then imagined that Appellant stabbed Carol Bareis in an effort to eliminate her as a witness to the first murder.

However, the reality of the evidence fails to support the State's theory. The State could not prove that Appellant entered the home without consent.[12] The state could not prove that appellant had any intent to commit an offense upon entry. The State could not prove any motive for the murders of Cheryl Williams and Carol Bareis. The State could not even prove which of the two victims was killed first. Nor could the State prove any of the circumstances surrounding the murders.

Appellant's sworn testimony clearly established a reasonable hypothesis of innocence. Namely, that he went to his neighbor's home as he had done many times before; that he found the front door unlocked; that he entered the home only to find Cheryl Williams already stabbed to death; that he picked up the body in a

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[12] The State unsuccessfully attempted to introduce hearsay to show lack of consent on the part of the victims. (IX 760-67) Ultimately, over objection, they presented improper ***Williams*** Rule evidence of Appellant's trespass/burglary of the home seven months prior to the murders. ***See*** Point V.

futile attempt to rouse Williams; that he picked up the knife that he found at the scene because he feared that the murderer might still be in the home; that he got blood on his clothes from picking up Cheryl Williams' body; that he tracked blood through the house as he searched for the real culprit; that he found Carol Bareis already stabbed to death in the other part of the house; that he panicked and fled the home without calling police because he was an illegal immigrant who feared deportation. Appellant's panic further led him to initially lie to the police. His fear of deportation caused him to omit the fact that he picked up the knife, that he walked through the house, and that he threw the knife away after he left the house.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING SAMANTHA TO TESTIFY THAT APPELLANT HAD TRESPASSED OR BURGLARIZED THEIR HOME SEVEN MONTHS PRIOR TO THE MURDERS.

Appellant was a neighbor and friend of the victims. As such, he had been a guest in their home on several occasions. (IX 772-73, 781-82) Since no one could establish the circumstances of his presence at the home that evening, the state needed to bolster their argument that appellant entered the home without permission and was therefore guilty of felony murder.[13] To further this end, the state presented the testimony of Samantha Williams, the daughter/granddaughter who lived with the victims.[14] She had socialized with the appellant at their home on several occasions. Following a proffer and argument (IX 758-67), and over timely and specific objections, the trial court allowed the state to present evidence that, approximately seven months before the murders, she woke up in the middle of the night to find appellant standing over her bed.

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[13] It is unclear what offense therein that the state would have alleged that appellant intended. (SR I 881)

[14] The state filed the requisite notice of similar fact evidence pursuant to Section 90.404(2), Florida Statutes. (II 216; XVII 690-96)

BY MR. CARTER(prosecutor):

Q. Now, do you have any personal knowledge of the D4efendant being in your house uninvited.

A. Yes, sir. [Defense objection on same grounds overruled.]

Q. Tell the jury about the Defendant being in your home that you have personal knowledge of.

A. Yes, sir.

Q. Uninvited.

A. I woke up about two o'clock in the morning and he was standing over my bed about a year to a year-and-a-half, no, I'm sorry, about seven months before this had happened. I woke up and he was standing over my bed....I yelled at him and told him to get out of my house but in some not so nice words....I told him to get the fuck out of my house.

Q. Okay. And did he seem to understand what you were saying?

A. Yes. He understood what I said.

Q. Okay. And did he leave?

A. Yeah. And then I locked the door behind him.

Q. The next day did you have any conversations with the Defendant?

A. Yes, I did.

Q. And what was that conversation concerning?

A. Uhm, basically I just said to him that it wasn't right to go around walking into people's houses after dark, that's not the way it's supposed to go. You know, if you're invited, you're welcome. If you're not, you don't just come over after dark basically is what I told him, unless he's invited over to the house. I asked him not to come over again.

Q. Now, the Defendant's primary language is?

A. Spanish.

Q. Okay. And do you understand and speak Spanish?

A. No, sir.

Q. Okay. Did he seem to understand English?

A. A little bit. He understood enough where he . . . we could still converse, but I'd have to say short words and, you know, type . . . kind of talk him through what I was trying to say, but he did understand enough English, and plus the way that I said it I wasn't like come on, you know, leave. I was really angry when I found him there.
Q. Okay. The next day when you were talking to him were you emphatic about telling him not to come into the home unless he was invited?
A. I'm sorry, would you repeat the question?
Q. Were you emphatic? Were you --
A. Yeah. I depicted to him that I didn't want him there again.
Q. Okay. And did he seem to understand what you were saying?
A. Yes, sir, he seemed to.

(IX 773-76)

The Florida Evidence Code sanctions the introduction of evidence of uncharged crimes or bad acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." §90.404(2)(a), Fla. Stat. However, to be admissible, these facts must be material to the State's prosecution and are nonetheless subject to exclusion if the danger of unfair prejudice substantially outweighs its probative value. ***See Steverson v. State***, 695 So.2d 687, 688 (Fla. 1997); ***Henry v. State***, 574 So.2d 73, 75 (Fla. 1991); §90.403, Fla. Stat. The concern with such evidence is that "the jury may choose to punish the defendant for similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate law. ***Snowden v. State***, 537 So.2d

1383, 1384(Fla. 3rd DCA)[quoting ***Huddleston v. United States***, 485 U.S. 681, 686 (1988)]. Stated differently, evidence of uncharged crimes or bad acts "would frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense, thereby predisposing the mind of the juror to believe the defendant guilty." ***Bush v. State***, 690 So.2d 670, 673(Fla. 1st DCA 1997)(citations omitted). It implicates a defendant's right to a fair trial. ***See U.S. Const., Amend. XIV.*** In a close case where the state relies on circumstantial evidence to prove their case, appellant's submits that the danger is even greater.

The prosecutor made the objectionable evidence a feature of his closing argument:

> The killings took place inside the home, so there had to be an entry. Did not have the permission or the consent. You heard Samantha testify that she had found the Defendant standing over her at two o'clock in the morning prior to this, these deaths, and she told him in no uncertain terms to get the F out of here. She took him to the door, locked the door, and the next day explained to him, you can't come in here like that. The Defendant testified the last time he saw Samantha Williams she had told him you can't come in here. The Defendant testified that he knew he was not permitted just to go into the home. You also heard Samantha testify that her mother and grandmother didn't invite the Defendant over to the house. When he was invited, he was invited by Samantha. Samantha wasn't home. Samantha did not invite him. The only evidence in this case is that the Defendant did not have any consent to be in the home.

* * *

> Samantha Williams, seven months before said, I don't want you to come in the house in the middle of the night if we're asleep. You need to knock. All of the evidence in the trial that you've heard is consistent with the fact that that's not what he did on June 17, 2004. He didn't show up in the middle of the night when he'd been told not to go there. But that's certainly not a reason to kill her mother and her grandmother. He had no reason. And whoever did this was pissed.

(XIII 1511-12, 1550) The jury was allowed to consider irrelevant, prejudicial evidence that appellant had entered the home in the middle of the night without permission a full seven months prior to the murders. On cross-examination, Samantha admitted that appellant visited the house subsequently for social occasions. (IX 784) Nothing happened on the night Samantha woke up, however the jury was undoubtedly affected by this powerful and unfairly prejudicial testimony. They likely imagined what might have happened that night to Samantha, if she had not awakened when she did.

The evidence in this case was far from overwhelming. This Court cannot say that this unfair evidence of this irrelevant, remote incident did not contribute to the verdict. A new trial is necessary. ***Amends. VI, VIII, & XIV, U.S. Const.; Art. I, §9, 16 & 17, Fla. Const.***

POINT VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE WHERE IT WAS NOT SUPPORTED BY ANY QUANTUM OF EVIDENCE AND WAS ULTIMATELY REJECTED BY THE TRIAL COURT.

During the charge conference at the penalty phase, defense counsel strongly urged the trial judge to omit the heightened premeditation instruction in his charge to the jury. The state was urging, and the trial court was considering the aggravating factor only for the murder of Carol Bareis and not for the murder of Cheryl Williams. Defense counsel contended that the evidence did not support the instruction. (XIV 93-95) The trial court overruled the objection and ultimately instructed the jury that they could consider that the murder of Carol Bareis was cold, calculated and premeditated without any pretense of moral or legal justification. (XIV 387-88) The jury subsequently recommended death for the Bareis murder by a substantially larger (9 to 3) margin, than for the murder of Cheryl Williams (7 to 5). (II 318-19)

A trial court may give a requested jury instruction on a aggravating circumstance if the evidence adduced at trial is legally sufficient to support a finding of that circumstance. ***Diaz v. State***, 860 So.2d 960 (Fla. 2003).

Aggravating circumstances must be proven beyond a reasonable doubt. ***Fla. Std. Jury Instr. Crim.*** 7.11. Although aggravating circumstances can be proven by circumstantial evidence, the evidence must be competent and substantial. ***Hunter v. State***, 660 So.2d 244 (Fla. 1995). Additionally, incomplete and misleading jury instructions on elements of the crime, similar to the aggravating factors in a capital case, is reviewed as fundamental error. ***See, e.g., Hubbard v. State***, 751 So.2d 771 (Fla. 5th DCA 2000).

In ***Espinosa v. Florida***, 505 U.S. 1079, 1082 (1992) the Supreme Court held that a capital case is neither sentencing authority (advisory jury or trial judge) may weigh an invalid aggravator. There, the Supreme Court held that the "especially wicked, evil, atrocious or cruel" aggravator was unconstitutionally vague. Appellant is not contending that the standard jury instruction given in this case is unconstitutionally vague, however it is abundantly clear that the jury in this case considered an invalid aggravating factor. The trial court instructed the jury on this particular circumstance. The prosecutor argued that the aggravating factor was present in this case. Nevertheless the trial court subsequently found the factor had not been proved.

The trial court began challenging the prosecutor on this particular aggravating circumstance even prior to the guilty verdicts. After the conclusion of

all of the evidence, the trial court conducted an informal, preliminary charge conference:

> THE COURT: My question is do you have listed on there cold, calculated and premeditated?
>
> MR. CARTER (prosecutor): Yes, I do.
>
> THE COURT: Where is the evidence of that?
>
> MR. CARTER: It's in the evidence of the second killing, that's where I was gonna argue it, that the first one may not have been, but the second one, after he killed the first one after the long struggle, he goes in and kills the helpless person in a wheelchair. That would rise to the level of cold, calculated.
>
> THE COURT: Well, I'd like to see some case law on that.
> If you are going on both the premeditated theory and the felony murder theory, then I would like the jury to indicate on the verdict form what they think, because I'm not gonna know . . . I'm not gonna know whether to give you cold, calculated and premeditated unless they agree that it's at least premeditated murder.
>
> MR. CARTER: Well, before I make total comment on that or anything, because I know where the Court's coming from on that, as far as the burglary side of it, clearly, you know, if they convict him of the burglary, you know that twelve of them found it.
>
> THE COURT: Well, I'm not . . . That's true, but see what happens is you run into this problem when you've got the two theories and you haven't elected which one you're going under, especially if you're wanting to have cold,

> calculated and premeditated as an aggravating factor, because if you don't get twelve votes for that, then __
>
> MR. CARTER: Well, I don't believe the law __
>
> THE COURT: If you can't even convince the jury that it was premeditated, then I don't know how you can convince me it was cold, calculated.
>
> MR. CARTER: I understand where the Court's coming from, but I would like to consult with some other members of my office before I make my final argument and you make a fast ruling in that fashion.

(XIII 1449-51)

Subsequently, the trial court rendered his findings of fact in support of the death sentenced he imposed for the murder of Carol Bareis. In considering the heightened premeditation factor, the trial court wrote:

> This aggravating circumstance was not proven beyond a reasonable doubt. The jury verdict did not indicate whether the murders were premeditated, felony murders, or both. The court has independently found that the murders were premeditated. However, the heightened premeditation needed to establish this aggravator has not been proven beyond a reasonable doubt. ***Fennie v. State***, 648 So.2d 95 (Fla. 1994); ***Jackson v. State***, 648 So.2d 85 (Fla. 1994); ***Walls v. State***, 641 So.2d 381 (Fla. 1994).

(III 424) The trial court's conclusion is spot on. As he repeatedly told the prosecutor, we really do not know what spurred the brutal attacks in that mobile home during those early morning hours of June 17, 2004. Nor do we know the

precise sequence of events. We cannot even know which of the two women was killed first. To do so would be the height of speculation.

In spite of the trial court's ultimately correct decision, the jury was instructed that they could consider this powerful aggravating factor. The prosecutor hammered it home during his final summation:

> The next aggravator the State is presenting to you is that the murder for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner.
>
> This is more than your basic premeditation that it takes to convict somebody of first degree murder. This is referred to as heightened premeditation. We have to prove that it was cold, that it was a product of calm and cool reflection. He killed Cheryl.
> First of all, I might even forget it. He comes to the house armed with this big old knife. Why was he coming there with a big knife? He was coming there to kill people. You don't come to a house with a big knife like that unless you mean business. But even then, after he cuts up Cheryl Williams, he calmly, coolly, remember there was no running, the footprints show steps as he walks from one location to the next, didn't show hurry, he stabs her in the heart. You heard Dr. Riebsame testify about this, that this was one of the areas is the reason he feels that the Defendant appreciated the criminality of his conduct is because of the difference in the homicides. One shows a rage, you know, you're getting into the anger, the other one is just cool, calm and collected, boom, right in her heart.

(XV337-338)

Because the jury was permitted to consider an aggravator that the court later concluded was not applicable, its recommendation is tainted by Eighth

Amendment error because an extra thumb was placed on the death side of the scale and this Court "may not assume it would have made no difference..." in the jury's recommendation. ***Springer v. Black***, 503 U.S. 222, 232 (1992).[15] ***Accord Clemons v. Mississippi***, 494 U.S. 738 (1990). Because this extra "thumb" was placed on death's side of the scale, and in light of the mitigation that was presented as well as the relatively close vote for death, this error cannot be harmless beyond a reasonable doubt. Appellant did not receive an individualized sentencing and relief in the form of a new jury sentencing in warranted.

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[15] Unfortunately, this Court lacks the benefit of knowing the extent of which the jury relied on or even found the CCP factor due to the repeated defense requests for a special verdict form at the penalty phase which was denied by the court. (XV 222-23)

POINT VII

IN CONTRAVENTION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL, THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF CAROL BAREIS WAS COMMITTED TO ELIMINATE HER AS A WITNESS.

Despite repeated efforts by the state, the trial court absolutely refused to instruct the jury that Carol Bareis was killed to eliminate her as a witness. The trial court refused to accept the prosecutor's argument that the circumstantial evidence supported the instruction. The prosecutor and the judge debated what possible motive existed for the commission of both murders. The court concluded:

> THE COURT: Well, your theory is at least as good as mine.
>
> * * *
>
> THE COURT:...Well, the problem with circumstantial evidence is that it has to eliminate any reasonably hypothesis of something else.
> MR. CARTER (prosecutor): And I believe we've done that.
> THE COURT: I don't think you have. I'm sorry. Ya know, I've got to decide this case based on really hard evidence. I'm not gonna decide this case guessing. And-
> MR. CARTER: It's not guessing. It's common sense.
> THE COURT: It's not. Well, you know what Ernie Jones used to say at the University of Florida, common sense is something you worry about because that's the

> same stuff that told us the world was flat, but I just don't think...I don't think it's strong enough. I'm gonna strike the witness elimination. I think the rest of them are at least arguable...

(XIV 87, 89-90) The trial court even limited the testimony of a mental health professional concerning this issue:

> A. He makes a decision in a controlled fashion to kill the second victim, probably not because he has any type of altercation with her or argument...You might assume that that might be the decision that he reaches in his head, that his second victim has witnessed or observed or heard what's going on between him and Miss Williams, and then in a controlled fashion stabs her in the heart.

(XV 266) At that point, appellant moved for a mistrial pointing out that the judge had ruled "that witness elimination is no part of what this jury is going to be considering...". (XV 267) After hearing argument, the trial court stated:

> THE COURT: Look, my only problem with it is that I think it's speculation. I just . . . I don't know what happened, Dr. Riebsame doesn't know. That's his theory.... I understand what he's doing, I just . . . the only thing that bothered me was his explaining, I also think it's speculation, but I'm gonna deny your motion for mistrial, but I'm not gonna allow him to tell them anything about elimination of a witness during your final arguments or anything.

(XV 267-68)

The trial court maintained his position and did not instruct the jury on the witness elimination aggravator. The state renewed their argument at the ***Spencer***

hearing. (XVIII 779-84)

> THE COURT: You want me to consider an aggravating circumstance that I didn't let the jury consider?
>
> MR. CARTER: Yes, based on new case law that has come out that helps clarify it. I disagree with the court's ruling originally.
>
> THE COURT: Maybe you do but, it's hard to disagree with [Ring] versus Arizona and Aprendi (sic). How can I possibly with the Sixth Amendment assurance consider an aggravating circumstance that wasn't presented to the jury?

(XVIII 780-81)

The trial court obviously had a change of heart. In his sentencing order, the trial court finds that the murder of Carol Bareis was committed for the purpose of avoiding or preventing a lawful arrest. The trial court writes:

> This aggravating circumstance was not presented to the jury because the court was of the impression that there was insufficient evidence to justify having the jury consider it. The state urged the Court to reconsider the existence of this aggravating circumstance at the ***Spencer*** hearing. Such practice is constitutionally suspect under the decision of ***Ring v. Arizona***, 536 U.S. 584 (2002). However, it is part of the Florida death penalty scheme established by the Supreme Court of Florida, and the Court will consider the evidence that may establish it.
>
> The "avoid arrest" aggravator is difficult to prove. Where the victim is not a police officer, the evidence supporting this aggravator must prove that the sole or dominant motive for the killing was to eliminate a witness. ***Zack v. State***, 753 So. 2d 9 (Fla. 2000); ***Urbin v. State***, 714 So. 2d 411 (Fla. 1998); ***Consalvo v. State***, 697 So.2d 805,

819 (Fla. 1996) (speculation not enough); ***Preston v. State***, 607 So.2d 44 (Fla. 1992) (the fact that it may have been one of the motives is not enough); ***Davis v. State***, 604 So.2d 794 (Fla. 1992); ***Connor v. State***, 803 So.2d 598 (Fla. 2001). Mere speculation on the part of the State that witness elimination was the dominant motive cannot support this aggravator. ***Connor v. State, supra***. However, this aggravator may be established through circumstantial evidence for which the motive for the murder can be inferred. The fact that the victim and the Defendant knew each other, without more, is generally insufficient. However, evidence that the Defendant used gloves, wore a mask, made incriminating statements about witness elimination, whether the victim resisted, and whether the victim was confined or was in a position to pose a threat to the Defendant are factors that may be considered. ***See, Renolds (sic) v. State***, ____So.2d ___2006 WL 1381880(Fla. May 18, 20296); ***Buzia v. State***, 926 So.2d 1203 (Fla. 2006).

In this case, direct evidence of motive is lacking. The circumstances of the killing lead the Court to independently find that whatever motive the defendant had to stab Cheryl Williams to death in such a brutal manner did not transfer to Carol Bareis. That being the case, the only motive for her murder was to eliminate her as a witness. The Defendant had no other reason to kill her. She was partially paralyzed and in a wheelchair, thereby posing no threat to him.

The court independently finds this aggravating circumstance has been proven beyond a reasonable doubt and **assigns great weight** to it.

(III 421-23)[Emphasis added.]

A. The Factor was not Submitted to the Jury in Violation of Appellant's Sixth Amendment Rights.

This Court dealt with this precise issue in ***Williams v. State***, 967 So.2d 735 (Fla. 2007). This Court concluded that the trial court's finding of the CCP

aggravator (which was not advanced by the state or instructed for the jury) was "not improper in the abstract." ***Williams v. State***, 967 So.2d 735, 751 (Fla. 2007) In reaching that conclusion, this Court relied on precedent that predated the United States Supreme Court's decision in ***Ring v. Arizona***, 536 U.S. 584 (2002), requiring that the facts essential to the imposition of the punishment be found by a jury beyond a reasonable doubt. ***Id.*** at 589. Even more importantly, the ***Williams*** trial court expressly stated that the imposition of the sentence was not contingent on the court's finding of the statutory aggravator of cold, calculating, and premeditated. ***Williams v. State***, 967 So.2d at 751.

In the instant case, appellant's trial court independently found the avoid arrest aggravator without any input from the jury. Additionally, appellant's trial judge assigned **great weight** to this particular aggravating circumstance. (III 423) This would seem to fly in the face of this Court's holding in ***Williams v. State***, 967 So.2d 735 (Fla. 2007). In a concurring opinion (with Justice Quince also concurring), Justice Pariente wrote:

> I concur in the affirmance of Williams' death sentence, and write only to address the implication of ***Ring v. Arizona,***... on our precedent that had authorized a trial court to find an aggravator on which the jury was not instructed. As the majority correctly notes, the precedent that allows a trial judge to consider and find an aggravator on which the jury was not instructed and

> states that a judge is not bound by the jury's recommendation predates the United States Supreme Court's decision in ***Ring***....

Williams v. State, 967 So.2d 767-68(Fla. 2007) Justice Pariente concluded that the error was harmless beyond a reasonable doubt because the trial court expressly stated that it did not consider this aggravator in imposing the death sentence. However, Justice Pariente cautioned trial courts in the future not to consider or find aggravators on which the jury was not instructed:

> It is clear after ***Ring*** that under the Sixth Amendment right to a jury trial, the jury is charged with the responsibility of finding the facts, other than the existence of a prior felony conviction, essential to the imposition of the death penalty. ***See Ring***, 536 U.S. at 589, 122 S.Ct. 2428 ("Capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Most recently, in ***Cunningham v. California***, --- U.S. ----, ---- - ----, 127 S.Ct. 856, 863-64, 166 L.Ed.2d 856 (2007), the United States Supreme Court reiterated that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." The jury's responsibility to find such facts includes the "aggravating circumstances that make a defendant eligible for the death penalty." ***Sattazahn v. Pennsylvania***, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (plurality opinion). ***Williams v. State***, 967 So.2d 735, 767-68 (Fla. 2007).

Id. Not only did appellant's trial judge find an aggravator on which the jury was

not instructed, **he also gave it great weight in imposing the death penalty**. (III 423) This violates appellant's constitutional rights guaranteed by the United States and Florida Constitution. ***Amends. VI, VIII, & XIV, U. S. Const.; Art. I, §§9, 16 & 17, Fla. Const.*** A new penalty phase is required. At the very least, this Court must remand for reconsideration of the sentence by the trial court.

B. The Evidence Does not Support the Trial Court's Finding that the Murder of Carol Bareis was Committed to Eliminate her as a Witness.

The trial judge was steadfast in his refusal to instruct the jury on this particular factor. He rightly concluded that the evidence did not support a jury instruction nor a finding of this aggravating circumstance. The trial judge persisted in his rejection of the prosecutor's repeated attempts to justify a jury instruction on this aggravating factor.

The aggravating circumstance provided for in Section 921.141(5)(e), Florida Statutes, that the homicide was committed for the purpose of avoiding arrest, is applicable in cases where the victim's is not a police officer only where the dominant motive for the crime was to eliminate the victim as a witness. ***See, e.g., Urbin v. State***, 714 So.2d 411 (1998); ***Menendez v. State***, 368 So.2d 1278 (1979). No such dominant motive exists, and the trial court erred in finding and weighing this aggravating circumstance in the sentencing process. As a result,

appellant's death sentence was imposed in violation of the United States and Florida Constitutions. ***Amends. V, VI, VIII, & XIV, US Const.; Art. I, §§9, 16, & 17, Fla. Const.***

For an aggravating circumstance to be affirmed on appeal, they must be substantial competent evidence upon which the court could find the existence of the circumstance proved beyond a reasonable doubt. ***See, e.g., Geralds v. State***, 601 So.2d 1157, 1164 (Fla. 1992); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). When the proof relies on circumstantial evidence, the circumstances must be consistent with the existence of the circumstance and inconsistent with any reasonable hypothesis that the circumstance does not exist. ***See, Geralds v. State***, 601 So.2d at 1163; ***Eutzy v. State***, 458 So.2d 755, 758 (Fla. 1984) The avoiding arrest aggravating circumstance is proved, when the victim is not a law enforcement officer, only if there is strong evidence establishing avoiding or preventing an arrest as the dominant motive for homicide. ***See, e.g., Urbin v. State***, 714 So.2d 411 (Fla. 1998); ***Menendez v. State***, 368 So.2d 1278 (Fla. 1979); and ***Riley v. State***, 366 So.2d 19 (Fla. 1976). Evidence in this case does not meet the standard required to support this aggravating factor. The state's evidence and the trial court's findings do not support the avoiding arrest circumstance. Although the trial court correctly recognized the high burden of proof that the

state must meet in proving this particular aggravating factor, the trial court clearly misapplied the law to the evidence presented.

As the trial court candidly admits in his findings of fact, "In this case, direct evidence of motive is lacking." (III 423) However, the trial court then inexplicably leaps to the illogical conclusion that witness elimination was the only possible motive to kill Carol Bareis. The trial court writes:

> The circumstance of the killing leave the Court to independently find that whatever motive the Defendant had to stab Cheryl Williams to death in such a brutal manner did not transfer to Carol Bareis. That being the case, the only motive for her murder was to eliminate her as a witness. The defendant had no other reason to kill her. She was partially paralyzed and in a wheel chair, thereby posing no threat to him.

(III 423) The trial court not only reaches this conclusion but also assigns the aggravating factor great weight. (III 423)

As the trial court candidly admits, no one knows why Carol Bareis or Cheryl Williams were killed. The circumstances surrounding the murders that night remain known only to the murder. Appellant maintains his denial that he killed the women. At no point did he admit his culpability. There is simply no evidence of motive. Although the jury found guilty of burglary of a dwelling, the offense therein was an assault of battery that subsequently ended in murder. There was no

evidence of any property removed from the premises. Appellant never exhibited any ill will toward his neighbors. There was no ongoing dispute of any kind. Indeed, appellant had socialized with Samantha Williams and had been a guest in the victim's home. It remains a mystery to this day why both Cheryl Williams and Carol Bareis that night. The improper inclusion of this aggravating circumstance renders the death sentence invalid and in violation of appellant's constitutional rights to due process, a fair trial, and to be free from cruel and unusual punishment. ***Amend V, VI, VIII, & XIV, US Const.; Art. I, §§9, 16, & 17, Fla. Const.***

POINT VIII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF CAROL BAREIS WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In finding this particular aggravating circumstance, the trial court wrote:

> The Court independently finds that the evidence established the murder of Cheryl Williams occurred first. Carol Bareis was wheel chair bound in the room next to, and in close proximity with, the entrance way where Williams was murdered. She must of been aware of the violence and brutality directed towards her daughter. The incident must have terrified her. The Defendant then came at her with the same knife he used to murder Williams and plunged it into her heart. The fear, emotional strain, and terror she suffered prior to the fatal blow are sufficient for the court to find the murder of Carol Bareis was (sic) heinous, atrocious, or cruel. ***Lynch v. State***, 841 So.2d 362 (Fla. 2003). **The court assigns great weight to this aggravating circumstance.**

(III 423)[Emphasis added.] Under the most favorable standard of review for the state, the evidence simply does not support the trial court's finding of this aggravating factor.[16]

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[16] At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993). Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. ***Clark v. State***, 443 So.2d 973, 976 (Fla. 1983). This Court has stated that it will not reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for

The trial court's conclusion that Carol Bareis was the second victim killed is based on pure speculation and is not grounded in the evidence presented at trial. The state presented a variety of witnesses in an attempt to establish that Bareis was the second victim to die. However, all the state was able to produce was a suggestion. The physical evidence establishing the order in which the victims were killed is far from conclusive.

The evidence at trial established that Carol Bareis died from a single stab wound while she was sitting in her wheelchair. The testimony of the medical examiner revealed that she felt no pain. Her death occurred quickly. Dr. Beaver testified that Bareis would have lost consciousness very quickly and never regained it. There is no evidence that she was aware the impending attack. (XII 1335-36, 1389-94)

The trial court based his finding on his conclusion that Carol Bareis heard the attack on her daughter, Cheryl Williams, whom the trial court concluded was killed first. Even the state conceded that HAC did not apply if Bareis was killed first. (XV 333) There is simply no evidence to support this theory. To accept this conclusion, one must engage in rank speculation.

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each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." ***Willacy v. State***, 696 So.2d 693, 695 (Fla. 1997) (Footnote omitted). ***See also, Way v. State***, 760 So.2d 903, 918 (Fla. 2000).

Additionally, other evidence refutes this conclusion. Samantha Williams testified that her grandmother sometimes slept in her wheelchair. If so, she might have well have slept through the attack on her daughter, if indeed that attack occurred first. Even if she had heard the attack, it is certainly unclear that she would have been able to tell what was happening in the other room. (XII 1395-96) The state has failed in its burden to prove that Carol Bareis was awake, conscious, and aware at the time. Once again, that would hinge on the unproven predicate that Cheryl Williams was killed first.

Furthermore, the bloody footprint evidence appears to contradict the conclusion that Cheryl Williams was killed first. There were no bloody footprints leading to Carol Bareis' body. Although there were bloody footprints, there were none that far into the room. The prosecutor attempted to argue that Ms. Bareis might have wheeled her chair in an attempt to block the door to her room. Their theory then opined that she and her wheelchair were knocked away from the door, when the assailant entered the room. That would account for the lack of footprints near Bareis' body. There is simply no evidence that that was the actual scenario.

To the contrary, the evidence suggests that it is much more likely that appellant killed Carol Bareis first by stabbing her in the back from behind, probably while she slept. Bareis likely never knew what hit her. She certainly

was never aware of the attack on her daughter Cheryl Williams, which occurred after Bareis was dead. The trial court's finding of this particular aggravating circumstance is not supported by the record and must be stricken.

POINT IX

APPELLANT'S DEATH SENTENCE FOR THE MURDER OF CHERYL WILLIAMS, WHICH IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (7-5), IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[17]

Prior to trial, appellant unsuccessfully challenged the constitutionality of Florida's statute on this very ground. (I 110-111; XVI 515) The Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. ***Grossman v. State***, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. ***See Sochor v. Florida***, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare-majority jury

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[17] Strict scrutiny is called for in the examination of statutes that impair fundamental rights explicitly guaranteed by federal or state constitutions. ***T.M. v. State***, 784 So.2d 442 (Fla. 2001).

recommendations. ***See, e.g., Jones v. State***, 569 So.2d 1234, 1238 (Fla. 1990). However, Appellant maintains that allowing a bare majority of the jury to determine Appellant's fate violates the ***Sixth, Eighth, and Fourteenth*** Amendments to the United States Constitution as well as ***Article I, Sections 2, 9, 16, 17, 21, and 22***, of the Florida Constitution.[18]

In addressing the number of jurors[19] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." ***Williams v. Florida***, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. ***Johnson v. Louisiana***, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

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[18] Additionally, Appellant notes that the constitutional landscape of capital sentencing has changed dramatically in the last few years, ***See Ring v. Arizona***, 536 U.S. 584 (2002), although not appreciably in Florida as yet. ***See, e.g., Williams v. State***, 967 So.2d 735 (Fla. 2009).

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

Appellant's jury recommended **by the slimmest of margins**, that he be executed for the murder of Cheryl Williams. **One single solitary vote** ultimately made the difference in whether Appellant lives or dies for this crime. Such a result makes Florida's death penalty scheme arbitrary and capricious in violation of ***Furman v. Georgia***, 428 U.S. 238 (1972).

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

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a **different** aggravating factor. Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. The trial court also noted this flaw in Florida's death penalty scheme. (III 414-17)

Appellant's death sentence for Cheryl Williams' murder, which is based on a bare majority (7-5) vote of the jury, is unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. ***Amends. V, VI, VIII, and XIV***, U.S. Const.; ***Art. I, §§ 2, 9, 16, 17, 21, and 22***, Fla. Const.

POINT X

PLACING A HIGHER BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS.

Whether Florida's death penalty and standard jury instructions deny due process and fundamental fairness under the ***Fifth***, ***Sixth***, ***Eighth*** and ***Fourteenth*** Amendments to the United States Constitution and ***Article I, §§ 2, 9, 16, 17 and 22*** of the Florida Constitution is a pure question of law subject to *de novo* review.

Appellant moved to have §921.141, Fla. Stat., found unconstitutional because it cast on the defense a higher burden of persuasion to obtain a life sentence than was on the State initially to obtain a death sentence. (I 112-13, 130-31; XVI 515). The defendant was prejudiced because his jury recommended death after receiving the standard "outweigh" jury instructions over objection and because the trial court applied the statutory mitigation outweigh the aggravation test to sentence appellant to death.

At first blush, this issue appears to have been decided in ***Arango v. State***, 411 So.2d 172, 174 (Fla. 1982), and its progeny under the generic heading of

"burden shifting." ***Arango*** is not controlling for two reasons. It does not address the higher burden of persuasion on the defendant, and the superficial analysis in ***Arango*** is otherwise incorrect. Specifically, the entire analysis of this issue in ***Arango***, at 174, states:

> In ***Dixon*** we held that the aggravating circumstances of §921.141(6) were like elements of a capital felony in that the state must establish them. In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in ***Mullaney*** and ***Dixon***. A careful reading of the transcript, however, reveals that the burden of proof never shifted. *The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.* These standard jury instructions taken as a whole show that no reversible error was committed. (emphasis added)[20]

The test set forth in §921.141, Fla. Stat. and the standard jury instructions, given here over unsuccessful objection, clearly and repeatedly state that the mitigation must outweigh the aggravation. Even taken as a whole, the standard jury instructions cannot reasonably be construed otherwise:

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[20] An instruction that **the state prove** the aggravation must outweigh the mitigation is not contained in the standard jury instructions, but it mirrors dicta from this Court. See ***Alvord v. State***, 322 So.2d 533, 540 (Fla.1975)("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.")

The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances*, if any.

* * *

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an *advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.*

* * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine *whether mitigating circumstances exist that outweigh the aggravating circumstances*.

* * *

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without parole. *Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances*.

* * *

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. *You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations*.(emphasis added)

Fla. Std. Jury Inst. (Crim.), "7.11. Penalty Proceedings, Capital Cases".

The statute and standard jury instructions create a **higher** burden on the

defense because first **and in the total absence of consideration of mitigation**, a determination must be reached as to whether sufficient aggravating circumstances justify imposition of the death penalty. From this point forward, the State has no further burden. A presumption that death is appropriate is created. Thereafter, to negate that presumption, the defendant must prove that "**sufficient** mitigating circumstances exist which **outweigh** the aggravating considerations found to exist" in order to receive a sentence of life. The focus is not on whether the death penalty is justified - the presumption already created - but instead on whether the mitigation totally outweighs the aggravation. Thus, requiring that the mitigation outweigh the aggravation places the burden of persuasion on the defense, and it is a higher burden than was on the State initially to obtain the death penalty.

In practice and as applied here[21] in sentencing appellant to death, the focus is on whether mitigation "outweighs" the aggravation. ***See State v. Dixon***, 283 So.2d 1, 9 (Fla.1973) ("When one or more of the aggravating circumstances is found, **death is presumed to be the proper sentence** unless it or they are overridden by one or more of the mitigating circumstances.") While neither the statute nor jury instructions use the term "presumption," it is clear that a

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[21] The trial court sentenced appellant to death because "the aggravating circumstances far outweigh the mitigating circumstances presented." (III 431)

presumption that death is appropriate exists in the absence of mitigation.[22] The ability of a defendant to negate that presumption does not save the statute and jury instructions, especially where the defendant's burden of persuasion to prove that a life sentence is justified (overall) is **higher** than was on the State to initially prove (in a vacuum) that the death penalty is the proper sentence.

Specifically, the initial determination made that death is appropriate is based **solely** on considering aggravating circumstances. The State has only to prove, in a vacuum, that the aggravation supports the death penalty. The presumption is created. Defendants then have the burden of proving that mitigation exists AND that the mitigation totally outweighs that aggravation. This is fundamentally unfair because defendants bear the burden of persuasion on the ultimate issue rather than having that of producing evidence.

The right to a jury trial, fundamental fairness and Due Process under the ***Fifth***, ***Sixth*** and ***Fourteenth*** Amendments require that the State ultimately bear the burden of persuasion that imposition of capital punishment is justified:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

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[22] ***See, e.g. Davis v. State***, 703 So.2d 1055, 1060-61 (Fla.1997); ***Elledge v. State***, 706 So.2d 1340, 1346 (Fla.1997); ***Valle v. State***, 474 So.2d 796, 806 (Fla.1985); ***Alford v. State***, 307 So.2d 433, 444 (Fla.1975).

> which he is charged." ***In re Winship***, 397 U.S., at 364. This "bedrock, 'axiomatic and elementary' [constitutional] principle," ***id.***, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis v. Franklin, 471 U.S. 307, 312 (1985).

Functionally, Florida's statute and standard jury instruction mirror the procedure condemned in ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), where the state had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. ***Mullaney***, 95 S.Ct. at 1883. It is proper to cast the burden of producing evidence on the defendant to place an ultimate fact in issue but, consistent with ***In re Winship***, 397 U.S. 358 (1970), due process and the right to a jury trial , the state must bear the ultimate burden of persuasion beyond a reasonable doubt. ***Mullaney***, 95 S.Ct. 1889-1890.

The requirement that the government bear the burden of persuasion beyond a reasonable doubt is a component of fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial. ***Mullaney***, 95 S.Ct.

at 1890. Due to the uniqueness in severity and finality of capital punishment, due process compels a heightened scrutiny of the procedures as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability under the Eighth amendment. ***Monge v. California***, 524 U.S. 721 (1998).

Over timely objection and express request for a proper instruction, an unconstitutional burden of persuasion was placed on this defendant contrary to the ***Fifth***, ***Sixth***, ***Eighth*** and ***Fourteenth*** Amendments, United States Constitution, and ***Article I, §§ 2, 9, 16, 17 and 22***, Florida Constitution, as explained in the holdings of ***In Re Winship***, and ***Mullaney v. Wilbur***. The death sentences erroneously imposed here must be reversed and the standard jury instructions setting forth the improper standard in § 921.141 must be ruled unconstitutional.

POINT XI

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. ***See, e.g.,*** (I 54-64, 105-6, 110-17) None of the challenges were successful and Appellant was ultimately sentenced to death on both murder convictions. Most challenges were based on a denial of Appellant's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied,***

537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

Appellant points out that neither jury recommendation for his death sentences was unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors[23], we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom***

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[23] This is so despite the fact that Appellant unsuccessfully sought interrogatory verdicts for the penalty phase. (I 54-56) The trial judge also seemed to recognize the folly inherent in the state of the law in this area. (III 414-17)

and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.***

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests the following relief:

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

As to Point IV, reverse and remand for discharge;

As to Points VI, VIII and IX, vacate appellant's death sentences and remand for a new penalty phase;

As to Point VII, vacate the death sentence imposed for the murder of Carol Bareis and remand for resentencing;

As to Point X, vacate appellant's death sentences and remand for imposition of life imprisonment with the possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Clemente Javier Aquirre Jarquin, DC#128074, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 9th day of April, 2007.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

CHRISTOPHER S. QUARLES
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