IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1903

STEPHEN SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On direct review from a decision of the Circuit Court of the Twentieth Judicial Circuit

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PREFACE

This is an appeal from a judgment and sentence imposing the death penalty from the Circuit Court of the Twentieth Judicial Circuit in and for Charlotte County, Florida, the Honorable William L. Blackwell presiding. Stephen Smith was the defendant in the trial court and will be referred to as "defendant" in this brief.

The State of Florida was the plaintiff in the trial court and will be referred to as "State" in this brief. The defendant is appealing his convictions and sentence of death. The record will be cited as [R. (page number)]. The trial transcripts will be cited as [Tr. (page number)]. The penalty phase transcripts were labeled by the clerk as supplemental so they will be referred to as [Sr. (page number)].

NOTICE OF SIMILAR CASES

A co-defendant who was also indicted in this case, but was tried separately, has a pending appeal in this court. Dwight T. Eaglin v. State, SC06-760.

Furthermore, the case of co-defendant Michael Jones, lower court case number 03-1527 is hereby incorporated by reference. There was no appeal filed in the Jones case.

STATEMENT OF THE CASE AND FACTS

The defendant was indicted on December 3, 2003, along with Dwight T. Eaglin (lower court case no. 03-1526) and Michael Jones (lower court case no. 03-1527) for two counts of first degree murder for the deaths of Darla K. Lathrem and Charles B. Fuston, which were committed on June 11, 2003 [R. 1].

It was alleged that the defendant was a prisoner in Charlotte Correctional Institution when Lathrem, a correctional officer, and Fuston, a fellow prisoner, were killed during an escape attempt. The State eventually entered a nolle prosequi against the defendant on count two for the death of Charles B. Fuston [R. 3758, 3798; Tr. 3-4].

Co-defendant Dwight T. Eaglin went to trial first and was convicted and sentenced to death. Eaglin was the one who actually killed both victims [R. 4759; Tr. 401-403]. He killed them with a sledgehammer. It was alleged that the defendant was an accomplice, but the State never claimed that the defendant actually struck any type of blow on either victim. Co-defendant Michael Jones was sentenced to life imprisonment.

CONSTITUTIONAL CHALLENGES TO FLORIDA'S DEATH PENALTY SCHEME

The defense moved to declare Florida's death penalty scheme unconstitutional under *Ring*, *Apprendi* and related constitutional provisions [R. 123; 4438, 4515-17]. The trial court denied the motion [R. 350]. The defense requested that the jury be required to make a unanimous finding of death and as to the existence of the underlying aggravating factors in the penalty phase [R. 3678, 4515-17]. The trial court denied the motion [R. 3867].

The defense also moved to declare Florida's lethal injection procedures unconstitutional [R. 3644, 4528]. The trial court ruled that the motion was "not timely" and refused to consider it because it was pre-trial, and the case was not at the point of an execution [R. 3857, 4528-29].

The trial attorney stated that he did not want to waive the issue and stated on the record that he was going to present the judge with an order deeming the motion denied [R. 4529].

The defendant's attorney did not re-raise the issue after the guilt phase concluded. The issue was never considered by the trial court. The trial court reiterated in its sentencing order that it did not consider the defendant's challenge to Florida's lethal injection procedures [R. 3961-3962].

MOTION TO SUPPRESS INCULPATORY STATEMENTS

The defense moved to suppress four different statements the defendant made to law enforcement which detailed his participation in the crime and included a videotaped walkthrough of the crime [R. 1896, 3683, 4553]. The defense alleged that the statements were involuntary and a product of coercion because of the physical and psychological torment the defendant suffered at the hands of the prison guards as punishment for him allegedly killing a fellow guard.

The State sought admission of statements the defendant made to FDLE agents on June 12, 2003 (at Charlotte Correctional Institution), June 23, 2003 (at Florida State Prison), June 27, 2003 (at Florida State Prison), and July 31, 2003 (at Charlotte Correctional Institution) [R. 4556].

Charlotte Correctional Institution Officers Stephen Haszinger, Tommy Wood, Ursula Mimms, Ronald DeKeyser and Samuel Windlin testified that no one threatened the defendant, abused him, or made any promises to him in order to get him to confess [R. 4561, 4566, 4570, 4573, 4576].

FDLE Agent Steve Uebelacker testified that while at Charlotte Correctional Institution he read the defendant his Miranda rights and the defendant waived his rights freely and was not coerced in any way. The defendant never made any

complaints to him [R. 4580-83]. Agent Uebelacker testified that Miranda was also read when they were at Florida State Prison [R. 4585-89].

Agent Uebelacker said he first met with the defendant at 6:15 a.m. on the morning of June 12, 2003 [R. 4739]. Uebelacker did not know if the defendant had been up all night long. The defendant was brought in wearing only his boxer shorts and he did not even have any shoes on [R. 4740-41]. The defendant complained about the uncomfortableness of his cuffs [R. 4741].

The defendant had been secretly tape recorded on a previous occasion. The defendant was placed in a holding cell near his co-defendants, Eaglin and Jones. Agent Uebelacker listened to the tapes. The defendant complained about his living conditions and treatment on Q-wing [R. 4741-42].

The defendant said that he was not given toilet paper, was not given enough clothes, all he had was boxer shorts, he did not have a blanket or a mattress, and he was being fed infrequently [R. 4742]. Correctional officers told the defendant that they were waiting for the defendant to snap so they could take some sort of action against him. Correctional officers put handcuffs on the defendant in a special way which caused numbness in the shoulders and arms [R. 4743].

Agent Uebelacker said that after he listened to the defendant and his co-defendants complain about all of this he contacted the Prison Inspector's Office so that the complaints could be investigated [R. 4746].

Co-defendant Dwight T. Eaglin testified that after the escape attempt he was not given a mattress and had to wear the same pair of boxer shorts for 34 days. He was not given soap or toothpaste. He was not properly given toilet paper. He was not given eating utensils. The only thing in his cell was his body and a pair of boxer shorts. He was forced to stand-up and identify himself every 15 minutes 24 hours a day. He could not sleep [R. 4751-53].

Defense counsel argued that the defendant's statements were coerced due to the threats and living conditions the defendant endured while he was incarcerated, which included denial of the basic necessities of human dignity. The best verification of this was Agent Uebelacker's own testimony that he took the complaints seriously and reported them to prison officials [R. 4767-70].

The prosecutor argued that the tapes speak for themselves and that the defendant was not coerced in them, and that the defendant should be used to bad living conditions. The defense countered that the threats were not coming from the persons making and observing the defendant's statements, but rather the threats

were coming from DOC officials [R. 4771-72]. The trial court denied the motion to suppress without comment [R. 3866].

THE GUILT PHASE OF THE TRIAL

The defense opened with its theory of the case that the murders were the independent act of Dwight T. Eaglin and that their plan was that no one was going to get hurt. The defendant just wanted to escape. Tr. 407. The defense was forced to partially concede guilt due to the trial court's pre-trial rulings.

Correctional Officer Mark Pate testified that he worked at Charlotte Correctional Institution on June 11, 2003. Tr. 413. At around 10:00 p.m. that night he received a red alert for zone five. Tr. 415. When he arrived he saw a ladder and co-defendant Dwight T. Eaglin was standing in-between two fences. Tr. 417.

The defendant and co-defendant Michael Jones were inside the first fence. One of them was on the ladder and the other was next to the ladder. Tr. 417. The defendant and Jones ran back inside when Pare arrived. Eaglin continued trying to climb the next fence. Tr. 417. Pate tried to contact Officer Lathrem, who was working that part of the facility. Tr. 421.

Pate searched for Lathrem and eventually found her lying in a pool of blood in a mop closet. Tr. 423, 425. She had injuries to her head. There was a sledgehammer nearby. Tr. 425-426.

Corrections Officer Robert Williams testified that Eaglin had his shirt off, was agitated and was screaming as he tried to climb the fence which was topped with razor wire. Tr. 459, 485. Williams then went and secured and handcuffed the defendant and Jones. Tr. 461, 475.

Williams then noticed that inmate Charles B. Fuston was injured in a cell. He was holding a rag up to his head. Tr. 462-463. There was a massive amount of blood around him. Tr. 464. He later died of cranial cerebral injuries. Tr. 1017.

Corrections Officer Mary Polisea testified that on the night in question the defendant was in dorm A. It was under construction. The defendant and Jones were inmate plumbers. Tr. 420, 494-495. Inmates Charles B. Fuston, John Beaston and Eaglin were working as welders in the area earlier that day. The defendant and Jones were nearby. Tr. 498, 510, 520.

The defendant and Jones told Polisea that they were working that night. Tr. 500. Officer Lathrem was in that area. Tr. 502. Polisea also noticed ladders nearby. Tr. 505. Corrections Officer Kenneth George testified that he spoke with Officer Lathrem in dorm A around 8:55 p.m. on the night in question. Tr. 536.

Nurse Robert L. Colgan testified that he and other medical personnel responded to an emergency call of an injured officer in dorm A. Tr. 545. Lathrem was lying in a pool of blood and she had no pulse. She had a bad head injury to her right temple. She was rushed to the emergency room. Tr. 549. The roof of her mouth and her whole face was caved. Her teeth were split apart. Tr. 550-551.

The medical examiner testified that Officer Lathrem would have lost consciousness immediately with the blow to the right side of her head. However, she would not have lost consciousness with the blow to the front of her head. Tr. 1020-1021. The medical examiner could not tell which blow came first. Tr. 1019-2020.

Officer Lathrem was never conscious and never had any respirations. Tr. 552. Nurse Colgan said Lathrem was dead before they even opened up the closet. Tr. 552, 773. Officer Lathrem's blood was found on Eaglin's pants. Tr. 1074-1075.

Nurse Marsha Denardo testified that she responded to inmate Fuston on the night in question and he was lying on the floor and was extremely seriously injured. He was full of blood, there was blood all over, and his head was cracked open. Tr. 647-658. He had a whole in the center of his forehead. Tr. 660.

Inmate Kenneth Lykins testified that he worked with the defendant on the plumbing crew and that he heard the defendant talking about escaping. Tr. 585, 590. The defendant said he was going to try before the construction project ended and that he was going to take co-defendant Michael Jones with him. Tr. 593.

Lykins then overheard the defendant and Jones talking about going over the fence with a ladder, and that Eaglin was also going to go with them. Tr. 595. Eaglin was going to hop the fence, hide in the ditch until the gun truck drove by, and then he would hit the driver through his open window with a sledgehammer. Tr. 596-597. The defendant wanted to try to escape when there was a female officer supervising them. Tr. 603.

The prosecutor then asked Lykins whether the defendant said he wanted to kill anyone. The defendant said he wanted to kill inmate John Beeston with a sledgehammer because he was a snitch. He also said that he would kill anyone in the building because they would need time to assemble the ladder. Tr. 603-604.

The defendant said that he would rape any female guard and specifically said, “I’m gonna get me a piece of pussy before I leave because if I get out there and die, at least I know I gotta a shotta ass before I left.” Tr. 604-605. The defendant’s trial attorneys did not object.

Lykins testified that the night before the actual escape he learned that the defendant, Eaglin and Jones would try to escape. They all plotted it together. The defendant told Lykins to stay away from the dorm A area on June 11, 2003 (the night in question). Tr. 605-606.

Corrections Officer Frank Kozdra testified that on the night in question he found inmate Beaston in his cell bleeding from his head. Tr. 733. He had a large area caved in in the center of his forehead and had a swollen right eye. Tr. 757. Beaston was taken out in a wheelchair. Tr. 758. He was alert and oriented. Tr. 778.

Eaglin had attacked Beaston as part of a pre-arranged plan to make it look like Beaston was hurt during their escape, but in actuality Beaston helped the group try to escape. Tr. 1159-1160. Law enforcement could not discern whether Beaston was a victim or a co-defendant. Tr. 1272.

Inmate Jessie Baker testified that he was on the plumbing squad with the defendant. Tr. 665. The defendant told him about his escape attempt and that he would kill anyone in his way. Jones and Eaglin were present at the time. Tr. 673. The defendant also told him how he was going to use a ladder to do it. Tr. 675.

Corrections Officer Andrew Ciofani testified that on the night in question he saw the defendant, Eaglin and Jones sitting at a table with the pieces of material that were later assembled into a ladder and used in the escape attempt. Tr. 711.

FDLE Agent Steve Uebelacker testified that the defendant made four different statements to him admitting his participation in the escape. Tr. 1106-1108. The first three were audio recorded and the fourth was videotaped. Tr. 1111. The recordings were played to the jury.

The defense did not object to the recordings being admitted into evidence. Tr. 1113-1116. The defendant told Jones to open inmate Fuston's cell door and Eaglin went in with his sledgehammer and hit him. Tr. 1130-1132.

The defendant then wanted to lock Officer Lathrem in the mop closet. Tr. 1142. Eaglin showered off after his attack on inmate Fuston. Tr. 1142-1143. The defendant and Jones got Lathrem to open up the mop closet. Eaglin hid nearby when she was opening the door. Eaglin came out and hit her with the sledgehammer. Tr. 1143-1148.

Significantly, the defendant said, "what the fuck did you do that for," referring to Eaglin's attack on Lathrem. Tr. 1152. Eaglin then pulled her into the closet. Tr. 1163. They did not have a plan to kill her. Tr. 1186-1188.

The State rested. Tr. 1285. The defense moved for a judgment of acquittal arguing that there was insufficient evidence of premeditation. As for the felony murder part of the charges, the State failed to prove that the defendant was lawfully incarcerated and that he was serving a lawful prison sentence. There was

no evidence submitted that the defendant was previously convicted of a crime. Tr. 1286-1288.

The defense also argued that the State also failed to prove that the defendant resisted an officer with violence, as the other part of the felony murder charge. Tr. 1286-1288. The trial court denied the motion. Tr. 1296. The defense rested without presenting any witnesses. Tr. 1297-1298. The defense renewed is motion for judgment of acquittal, which was denied. Tr. 1318.

In closing argument the defense argued that the defendant only wanted to escape and that he did plan, want, or intend for Officer Lathrem to die. The defendant planned to escape, but he did not plan on killing anyone. The murder was the independent act of Eaglin. Tr. 1319-1333.

The State acknowledged in closing that Eaglin killed Lathrem. Tr. 1347. The prosecutor also argued that the defendant was going to get a piece of you know what out of the female officer and if he died he wanted to be in that position. Tr. 1354. The prosecutor repeatedly argued that all of this was the defendant's plan. Tr. 1352-1353, 1360-1361.

The jury returned a finding of guilt. Tr. 1392- 1393. Specifically, the jury found that the defendant committed first degree premeditated murder, that it was a

felony murder committed during an escape, and that it was a felony murder committed while resisting an officer with violence [R. 3852].

THE PENALTY PHASE OF THE TRIAL

The State sought to prove five different statutory aggravating factors for imposition of the death penalty. Sr. 9-11, 26-27. See Fla. Stat. § 921.141(5). The aggravating factors are:

(1) the crime at issue was committed after a previous conviction of a felony and under a sentence of imprisonment;

(2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to some person;

(3) the crime at issue was committed for the purpose of affecting an escape from custody;

(4) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification;

(5) the victim was a law enforcement officer engaged in the performance of the officer's official duties.

The following was adduced at the penalty phase hearing: The State introduced into evidence the defendant's March 9, 1990 convictions for first degree murder, armed burglary with an assault, and armed robbery. Sr. 46-47. The defendant broke into a home with the intent to rob it thinking that no one was home. He killed a woman in the home. Sr. 74-80.

On another occasion the defendant broke into a residence and sexually battered a 12 year-old girl at gun point. Sr. 115-119. The defendant was also convicted of raping his sister where they lived in Rhode Island. Sr. 134-138. The defendant was serving a life sentence in Florida. Sr. 205.

Before trial the defense filed a motion in limine arguing that there should be no reference to the defendant's prior penalty phase [R. 84]. The motion was granted but the prosecutor elicited this testimony. The prosecutor who prosecuted the defendant's prior case mentioned that the defendant faced a prior penalty phase. Sr. 88.

The defense objected and moved for a mistrial, arguing that letting the jury know that the defendant already had one shot at this was grossly prejudicial. The trial court denied the motion for a mistrial. Sr. 88-96.

The medical examiner testified that Officer Lathrem did not see the attack coming and she had no defensive wounds. The blows she received would have rendered her unconscious upon impact. Sr. 209.

The defense presented the video depositions of several witnesses from the defendant's home state, Rhode Island. Joseph Houlihan testified that the defendant grew up in a government subsidized housing project in Newport, Rhode Island. Sr. 225. The defendant's father was a heavy drinker and was very confrontational when he was a child. Sr. 228. Social Services had to come to the home. The Smith household had a reputation for incest. Sr. 230.

When the defendant's father grew up he was drunk all of the time. He was obnoxious and had something to say to everyone who walked by. He was known as a violent man who was well known to the Newport police. Sr. 238, 246. The defendant's brother was convicted of murder for raping and killing his step-daughter. Sr. 239, 244, 264.

The defendant was in the Rhode Island Training School, which was rough like prison, when he was a juvenile in 1973. Sr. 253-254. The defendant was sent to Avalon School in the mid-1970's, a private psychiatric hospital because he needed serious help. Sr. 259-260.

The defendant's brother was deposed while in prison. The defendant's brother was always institutionalized growing up. Sr. 269-270. The defendant had one brother and five sisters. Sr. 270. The defendant's father was very violent and he would get drunk and hit the defendant every day. He would hit the defendant with a closed fist. The father would abuse all of the children and the defendant's mother. The defendant would take the brunt of the abuse. Sr. 270-272.

On one occasion the father threw the mother to the ground and made her give him a blow job. He grabbed her by the head and said "suck this, bitch." Sr. 274-276. The mother never protected the children and she was beaten too. Sr. 281. On another occasion the father threw a knife at the defendant and hit him in the ankle. Sr. 292.

The defendant drank and smoked marijuana when he was little. Sr. 309. The defendant had a romantic love affair with his Aunt Anna, his mother's sister. He got her pregnant. Sr. 310-312. He also officially married her. Sr. 795.

Prison expert Lance Henderson and testified about all of the failures of the Department of Corrections that led to the vulnerability of Officer Lathrem. Sr. 383-394. Daryl McCasland from the Florida Department of Corrections Office of Inspector General relayed DOC deficiencies on the night in question. Sr. 404-427. Lathrem had inadequately supervised inmates in the past. Sr. 565.

Ernie Smith testified that he is the defendant's uncle. Sr. 433. The defendant used to drink a lot and he was abused by his father. Sr. 441-442. The defendant did not do well in school due to the abuse he suffered. Sr. 445. The defendant grew up hard, learned to fight and his feelings became tight because of all of the alcohol. Sr. 449-450.

Oryann Lima a caseworker from the Rhode Island Department of Children & Families testified that she had contact with the defendant's family at least twice a month. Sr. 464-465. The mother did nothing to ensure that the defendant went to school. She was withdrawn and gave the appearance of one who carries a heavy burden who has lived in fear for a long time. She did not participate in many activities with her children. Sr. 469.

Lima testified that when the defendant was placed in a foster facility he would run away. Sr. 477-478. The defendant was also truant from school. Sr. 499. The family home was marred by abuse, instability, frequent marital separations, an alcoholic father and a manic depressant mother. Sr. 491. The defendant's father raped the defendant's sister. Sr. 497, 555.

It was unusual for a Rhode Island child to be placed in private out-of-state schools but that is what happened with the defendant due to his psychological and psychiatric problems. Sr. 504-505, 518.

Due to the defendant's history of neglect, physical abuse, and emotional abandonment he was in a powerless position and he learned to internalize his anger as a survival tactic. He had a pulse of acting out in an uncontrolled expression of his internal violence. Psychotherapy in a well-controlled environment was recommended. Sr. 515.

Madeline Budlong testified that she is the defendant's mother. Sr. 603. She said that the defendant's father would drink a bottle of whiskey in an hour and that he would be abusive. Sr. 604-605. The father would threaten to kill her in front of the children. Sr. 606-607, 615. The mother then relayed a litany of horrible events that she and the children suffered at the hands of the father. Sr. 603-645.

Doctor Frederick Schaerf was deemed an expert in forensic psychiatry and he testified that the defendant suffers from several psychiatric diagnoses. He has a history of major depression, episodes of irritability for two weeks or more, a profound mood disorder that dates back several generations, attention deficit disorder, antisocial personality disorder, and substance abuse problems. Sr. 781-783, 786, 788, 792.

The defendant huffed glue and paint as a child and ended up abusing crack cocaine as an adult. Sr. 783. The defendant had oppositional defiant and conduct disorder as a child and as an adult this is called intermittent explosive disorder. Sr.

784. The defendant grew up conditioned by his institutionalization. Sr. 785, 804. There has also been generations of incest in the family. Sr. 796-797. The defendant never had any supervision or accountability. Sr. 798. The defendant has an IQ of 80, which is the bottom end of normal. Sr. 787.

The defendant ran away from every State placement he was put in. Sr. 804-806. The only thing the defendant could control in his life was escaping. This is similar to the actions of cancer patients who sometimes yell at their nurses about their medicines because that is the only thing they can control. Trying to escape from prison in Florida was a continuation of that behavior. Sr. 806. The parties then rested.

In closing argument, the defendant's attorney told the jury that they should not kill this man because he has a prior criminal record. The prosecutor objected and the trial judge instructed the jury that they are not the instrument of death in this case and that they are only giving a recommendation to the court. The defendant's attorney said he was doing nothing that was inaccurate. Sr. 952-954.

The prosecutor repeatedly argued in his closing, as he did in the guilt phase, that all of this was the defendant's plan. Sr. 904-905, 909, 917-918, 920.

The defense objected to the penalty phase jury instruction that states whether sufficient mitigating circumstances exist to outweigh any aggravating

circumstances found to exist. This improperly shifts the burden of proof to the defense. Sr. 661. The defense requested an instruction that requires the jury to make unanimous findings. Sr. 669.

The defense renewed its request for a unanimous jury verdict and renewed its request for the defense's list of non-statutory mitigating factors to be given to the jury. Sr. 980. The trial court denied the requests and barely mentioned the issue of mitigating evidence in its instructions to the jury. Sr. 973.

The jury returned an advisory sentence of death, with a vote of 9 to 3 [R. 3909; Sr. 984].

At the *Spencer* hearing in this case the defendant apologized to the victim's family and said that she was not supposed to die [R. 1000]. Significantly, the defendant also apprised the court that it was not fair that the State argued in Eaglin's trial that Eaglin was the ringleader and mastermind of the escape and in his trial the State argued that he was the ringleader and mastermind [R. 1000].

The trial court filed its sentencing order [R. 3961] and sentenced the defendant to death [R. 3968, 3972]. The defendant timely filed his notice of appeal [R. 3984]. The State filed a notice of cross-appeal [R. 3985]. The defendant's initial brief follows.

SUMMARY OF ARGUMENTS

Death is different. The defendant's due process rights to a fair trial and a fair penalty phase were violated by numerous errors of the trial court and his own trial counsel.

The defendant is raising numerous claims of ineffective assistance of counsel on direct appeal because the errors are apparent on the face of the record. In this regard, there are too many rulings in Florida that defendants have procedurally defaulted their claims – thus depriving defendants from having the actual merits of their case reviewed. This is unacceptable.

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

ARGUMENT 1: THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACTS AND CONCLUSIONS OF LAW IN ITS ORDER DENYING THE DEFENDANT'S MOTION TO SUPPRESS

The trial court's order on the defendant's motion to suppress merely states "denied" [R. 3866]. The trial court made a brief oral pronouncement during trial, but it did not address the defendant's underlying claim. Tr. 1079. This violated the defendant's due process rights under the Florida and United States Constitutions.

The federal right to due process of law requires specific findings of facts and conclusions of law by the trial court. See Gardner v. Florida, 430 U.S. 349, 357 (1977). See also Monge v. California, 524 U.S. 721 (1998); Beck v. Alabama, 447 U.S. 625 (1980).

The petitioner has a liberty interest under the due process clause to a meaningful appeal of his death sentence. There is a heightened due process concern on this issue due to the gravity of the interests at hand and the consequences borne from inaccurate appellate review. Simply put, death is different.

The court in Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), held that "[t]his court has repeatedly said that under the Eighth Amendment the qualitative

difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (citation omitted).

This holding applies with equal force to pre-trial rulings that can fundamentally alter the course of a capital trial. Heightened protections are to be given to capital defendants.

THE FLORIDA DUE PROCESS CLAUSE PROVIDES MORE PROTECTION TO CRIMINAL DEFENDANTS THAN THE FEDERAL DUE PROCESS CLAUSE

Article I, Section 9 of the Florida Constitution provides higher standards of protection than the United States Constitution. See Traylor v. State, 596 So.2d 957, 961-966 (Fla. 1992); Hlad v. State, 585 So.2d 928, 932 (Fla. 1991) (Kogan, J., dissenting); Brown v. State, 484 So.2d 1324, 1328 (Fla. 3d DCA 1986).

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

The criminal defendant is also protected by a fundamental liberty interest and therefore the Florida Constitution provides more protection than the federal

constitution when this interest is infringed upon.

In sum, if the federal constitution does not require findings of fact and conclusions of law in an order denying a motion to suppress, than the Florida Constitution most assuredly requires it.

THE DEFENDANT HAS BEEN DEPRIVED OF ACCURATE APPELLATE REVIEW

Remand is required when a trial court omits factual and credibility findings in an order resolving a suppression hearing. State v. Moore, 791 So.2d 1246, 1250 (Fla. 1st DCA 2001).

In this case the trial court failed to make any findings as to whether it believed the testimony concerning the defendant's treatment at the hands of prison officials when he was in his cell. This testimony was unrebutted.

This Court should not be permitted to guess as to what findings the trial court could have made. The trial court could have believed the defendant's testimony and made an error applying the law to the facts of this particular case.

The standard of review for an appellate court to apply to a motion to suppress is whether the trial court's findings of fact are supported by competent substantial evidence. A trial court's application of the law to the facts is reviewed

de novo. State v. Kindle, 782 So.2d 971 (Fla. 5th DCA 2001). See also Ornelas v. United States, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

This Court is not able to accurately review either prong of the standard of review because the trial court failed to make findings of fact and failed to make conclusions of law.

Specific and detailed findings of fact are essential to the administration of justice because it is the only way an appellate court can determine error. Appellate review of an "order" this vague is impossible. This is not constitutionally permissible given the constitutional interests at issue. See Mendoza v. State, 2007 WL 1498954 at *2-3 (Fla., May 24, 2007) (requiring factual and credibility findings in 3.850 order); Collucci v. Department of Health & Rehabilitative Services, 664 So.2d 1142, 1444 (Fla. 4th DCA 1995) (due process requires a trial court to make findings of fact before parental rights can be terminated).

Allowing this order to stand insulates the trial court from appellate review by effectively forcing this Court to do its work for it and guess as to what findings the trial court could have made to support its order. A defendant's due process rights are violated if this Court assumes that the trial court decided every single question of credibility against the defendant. Remand is required.

ARGUMENT 2: THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO PRESERVE FOR APPELLATE REVIEW THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS WHERE HE FAILED TO OBJECT TO THE EVIDENCE WHEN IT WAS INTRODUCED AT TRIAL

The trial attorney rendered deficient performance by failing to object to the inculpatory statements he unsuccessfully sought to exclude at the suppression hearing from being introduced into evidence. See Hutchins v. State, 795 So.2d 1014 (Fla. 2d DCA 2001).

There is no excuse for pursuing a motion to suppress and then failing to object when the evidence is introduced at trial. This nullified the entire suppression hearing and prevented appellate review. The defendant's right to appellate review should not be nullified by the ineffective actions of his trial attorney.

PREJUDICE: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE DEFENDANT'S STATEMENTS WERE COERCED DUE TO THE THREATS AND PSYCHOLOGICAL TORTURE INFLICTED ON HIM BY PRISON GUARDS

The standard of review was relayed in Argument 1. However, there is no meaningful order for this Court to review.

The State offered testimony which established that no one threatened the defendant during the four times he waived Miranda and made inculpatory statements.

However, the testimony was undisputed that the defendant was being threatened, tormented, tortured and deprived of the most basic necessities of life before and after each interrogation. The State only offered testimony as to the immediate circumstances of each interrogation. The State failed counter the testimony as to what the defendant was enduring back at his cell. The FDLE Agent himself was concerned enough to initiate an investigation.

The State bears the burden of proof. It does not matter that the defendant's statement appears voluntary at the scene of the interrogation if it is the result of behind the scenes torture. There was no finding by the trial court on this issue.

The cruel and inhumane treatment the defendant suffered rendered his confessions involuntary and therefore violated his Fourth, Fifth and Sixth Amendment rights [R. 3683]. See State v. Sawyer, 561 So.2d 278, 281 (Fla. 2d DCA 1990).

THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED IN THIS BRIEF CAN BE RESOLVED ON DIRECT APPEAL

Claims of ineffective assistance of counsel in criminal cases may be addressed on direct appeal where the error is apparent on the face of the record. See Massaro v. United States, 538 U.S. 500, 508 (2003); Forget v. State, 782 So.2d 410, 413 (Fla. 2d DCA 2001). This is the case herein.

If this Court holds that any of the arguments presented in this brief were not sufficiently preserved for this Court's review, then the defendant received ineffective assistance of counsel. The issues presented are not ones of trial strategy where the trial attorney gets deference – they are objectively verifiable legal errors which no trial strategy could justify.

No evidentiary hearing on these issues is necessary. The defense had nothing to lose and all to gain on these strictly legal issues. All this Court has to do is apply the law to the facts of this case.

The court in Barber v. State, 901 So.2d 364 (Fla. 5th DCA 2005), held that the issue of ineffective assistance of counsel could be addressed on direct appeal because the failure to file a dispositive motion could not be considered a matter of trial tactics. See also Lambert v. State, 811 So.2d 805, 807 (Fla. 2d DCA 2002).

This is the exact case herein.

Further, all of the arguments in this brief should be reviewed de novo by this Court, as if they were fully preserved below. The defendant should not be handcuffed with a less favorable standard of review. All of the arguments in this appeal are hereby incorporated by reference for the sake of brevity.

The defendant should not be penalized for the ineffective assistance of his counsel. The defendant is entitled to a ruling on the actual merits of his claims – without this Court applying a fundamental error standard of review.

Consistent with Strickland v. Washington, 466 U.S. 668, 686 (1984), and the Sixth Amendment, the trial counsel in this case rendered deficient performance by failing to contemporaneously object or otherwise preserve for appellate review all of the issues raised in this brief.

The defendant was prejudiced because he should not have these issues procedurally defaulted due to the ineffective assistance of his attorney. The defendant was further prejudiced because he would have prevailed on these claims in the trial court, on direct appeal in this Court or in the United States Supreme Court had all of these issues been raised in the trial court.

In a similar vein, had any one of the arguments made in this brief been made below there is a reasonable probability that the defendant would have been

acquitted or the defendant would not have been sentenced to death.

ARGUMENT 3: THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO OBJECT TO THE TESTIMONY THAT THE DEFENDANT WANTED TO RAPE A FEMALE PRISON GUARD DURING HIS ESCAPE ATTEMPT

This error is apparent on the face of the record and there is no possible trial strategy that could justify allowing this harmful information to stand. Inmate Kenneth Lykins testified that the defendant said that he would rape a female prison guard during his escape.

Specifically, the defendant said, "I'm gonna get me a piece of pussy before I leave because if I get out there and die, at least I know I gotta a shotta ass before I left." Tr. 604-605. There was also a similar statement by the defendant during his taped confession. Tr. 1173. The prosecutor also reiterated the statement in closing argument. Tr. 1354.

The defendant's trial counsel did not object to any of this and did not move for a mistrial or a limiting instruction. This was deficient performance.

The defendant was prejudiced because if the trial attorney objected the objection would have been sustained and the trial court would have either granted a mistrial or would have given a limiting instruction. Instead, the jury was allowed to fully consider this "evidence" unfettered and this deprived the defendant of due process and a fair trial.

Not only did this testimony concern an uncharged act, but it concerned an act that never even took place to begin with. There was no evidence of a sexual attack on Officer Lathrem and the State did not even allege that the defendant or any of his co-defendants raped or attempted to rape Lathrem. Even if there was some type of minimal relevance of this testimony it was substantially outweighed by its unfair prejudice and clearly inflammatory impact. See Fla. Stat. § 90.403.

The testimony was a blatant attack on the defendant's character. It cast a dark shadow over him and deprived him of a fair trial. The impermissible character attack also impaired his presumption of innocence and formed an improper basis for the jury to render its verdict against him. It told the jury that the defendant was disgusting, very dangerous, a sexual threat to women, and had a bad character.

Had defense counsel properly objected there is a reasonable probability that the defendant would not have been convicted and/or received the death penalty. This is especially true when considered in conjunction with the other errors in this

case. This testimony was extremely prejudicial.

ARGUMENT 4: THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO MOVE FOR A JUDGMENT OF ACQUITTAL BASED ON THE STATE'S FAILURE TO PROVE THAT THE MURDER WAS NOT THE INDEPENDENT ACT OF CO-DEFENDANT EAGLIN

The trial attorney rendered ineffective assistance when he failed to move for a judgment of acquittal based upon the fact that the murder was committed by the independent act of co-defendant Eaglin. This error is apparent on the face of the record and therefore cognizable on direct appeal. See United States v. Greer, 440 F.3d 1267, 1272 (11th Cir. 2006).

Similarly, the court in Corzo v. State, 806 So.2d 642, 645 (Fla. 2d DCA 2002), held that the failure to move for a judgment of acquittal when the State has not proved an essential element of its case may sometimes be adequately addressed from the record on direct appeal.

(It is hard to imagine under what circumstance this issue may not be raised on direct appeal when the entirety of the State's evidence is before the court in the

record and all the court has to do is apply the law to the facts of the case. No 3.850 evidentiary hearing would ever be needed to flush-out additional facts on a JOA issue).

The trial attorney committed an objectively verifiable legal error by not making this argument below. No trial strategy could ever justify failing to make a meritorious argument in a motion for judgment of acquittal. The defense had nothing to lose and all to gain.

The defendant was prejudiced because had the argument been made the trial court would have entered a judgment of acquittal. The State failed to prove that the murder was not the independent act of co-defendant Eaglin.

A de novo standard of review applies to the denial of motions for judgment of acquittal. The trial court's order will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict. Arnold v. State, 892 So.2d 1172, 1173 (Fla. 5th DCA 2005). See also Pagan v. State, 830 So.2d 792, 803 (Fla. 2002) (holding the same).

As perpetrators of the underlying felony, cofelons are principals in any homicide committed to further or prosecute the initial common criminal design. Dell v. State, 661 So.2d 1305 (Fla. 3d DCA 1995). However, this Court has held that:

> The "independent act" doctrine arises when one cofelon, who previously participated in a common plan, does not participate in acts committed by his cofelon, which fall outside of the original collaboration . . . Under these limited circumstances, a defendant whose cofelon exceeds the scope of the original plan is exonerated from any punishment imposed as a result of the independent act.

Ray v. State, 755 So.2d 604, 609 (Fla. 2000) (citations and quotations omitted). See also Parker v. State, 458 So.2d 750 (Fla. 1984).

The State failed to prove that the murder of Officer Lathrem was part of the plan agreed to by the defendant and failed to prove that it was a foreseeable consequence of their agreed-upon plan. See also Fla. Std. Jury Instr. (Crim.) 3.6(l).

A guiding case on this issue is the decision in Yanez v. State, 744 So.2d 601 (Fla. 2d DCA 1999). The court held that the State's evidence in a felony murder prosecution failed to exclude beyond a reasonable doubt the defense's version of events and therefore the motion for judgment of acquittal should have been granted.

In Yanez, the State's theory was that one of the defendant's co-conspirators mistakenly shot and killed another co-conspirator during the commission of a burglary. However, the State failed to exclude beyond a reasonable doubt that someone else other than the co-conspirator shot and killed the other co-conspirator

as an independent act of the burglary.

Yanez fully applies by analogy to the case at bar. The State failed to prove that the murder was not an independent act of Eaglin. This was the theory of the defense. The State failed to prove that the defendant's version of events was wrong.

It may have been reasonably foreseeable that Lathrem had to be subdued, but the defendant wanted her locked in the closet. In actuality, Eaglin knocked Lathrem out with his first blow. Eaglin's follow-up blows were gratuitous acts meant to kill that were unnecessary to the plan and were not foreseeable. The defendant expressed shock when Eaglin did this. It was clearly not part of their plan. There was also no evidence presented that the defendant directed Eaglin to do this.

The court in Hodges v. State, 661 So.2d 107, 110 (Fla. 3d DCA 1995), reversed the trial court's denial of the appellant's motion for judgment of acquittal because it would be fundamentally unfair to impose criminal responsibility upon the appellant for the independent, irresponsible acts of another. This is also the case herein. The defendant's convictions should be reversed.

ARGUMENT 5: THE STATE FAILED TO PROVE THAT THE DEFENDANT COMMITTED FIRST DEGREE PREMEDITATED MURDER

The standard of review of a trial court's denial of a motion for judgment of acquittal is de novo. Fowler v. State, 921 So.2d 708, 711 (Fla. 2d DCA 2006), *citing* Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). This argument was preserved by the defendant's trial attorney.

The State failed to prove that the murder was premeditated. See Bedoya v. State, 779 So.2d 574 (Fla. 5th DCA 2001); Denmark v. State, 646 So.2d 754 (Fla. 2d DCA 1994).

There was no evidence of any plan or premeditation on behalf of the defendant as to the death of Officer Lathrem. In fact, the defendant was surprised when Eaglin killed her. This is not premeditation. What the State described as a "death march" during trial is in actuality only the defendant's plan to lock her in the closet. There was no proof to the contrary.

ARGUMENT 6: THE STATE FAILED TO PROVE THAT THE DEFENDANT COMMITTED FELONY MURDER

The jury found that the defendant committed felony murder under two different theories: felony murder committed during an escape and felony murder committed while resisting an officer with violence [R. 3852]. This argument was preserved by the defendant's trial attorney.

FELONY MURDER DURING AN ESCAPE

The State failed to prove that the defendant was lawfully confined in a State correctional facility. See Fla. Stat. § 944.40. The State did not move into evidence the defendant's prior conviction and resulting sentence. There was no proof that the defendant was lawfully confined.

The State bore the burden to prove that the defendant was lawfully confined. See Pons v. State, 278 So.2d 336 (Fla. 1st DCA 1973). The fact of a prior conviction is an essential element of proof. See Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979).

However, this Court held in State v. Williams, 444 So.2d 13 (Fla. 1984), that there is a presumption that lawful custody exists when the state proves that the

defendant is confined in any institution specified in the escape statute. This holding represents unconstitutional burden-shifting and should be reconsidered by this Court.

FELONY MURDER WHILE RESISTING AN OFFICER WITH VIOLENCE

The State failed to prove that the defendant resisted an officer with violence because he never actually "resisted". See Fla. Stat. § 843.01. The defendant did not defy any order or command by Officer Lathrem by acting as a principal in her attack. Lathrem never commanded or dircted the defendant to do anything – they merely walked to the mop closet.

ARGUMENT 7: THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE TOOK INCONSISTENT POSITIONS BETWEEN HIS TRIAL AND THE TRIAL OF HIS CO-DEFENDANT AS TO WHO PLOTTED AND LED THE ESCAPE

At the *Spencer* hearing in this case the defendant himself apprised the court that it was not fair that the State argued in Eaglin's trial that Eaglin was the

ringleader and mastermind of the escape and in his trial the State argued that he was the ringleader and mastermind [R. 1000].

This sufficiently alerted the trial court to the issue and therefore was sufficient to preserve the issue for appellate review. Alternatively, the defendant's trial attorney was ineffective for failing to raise it and this Court should review this glaring error on direct appeal. The defendant was prejudiced because had the issue been raised it would have resulted in a life sentence.

The State took the same evidence and argued in Eaglin's case that Eaglin was the mastermind and ringleader while in the defendant's case the State argued that it was the defendant that ran the show and directed the group and therefore should be given a sentence of death. The entire record on appeal in Dwight T. Eaglin v. State, SC06-760, is hereby incorporated by reference.

The prosecutor repeatedly argued in the guilt phase and in the penalty phase that all of this was the defendant's plan. Tr. 1352-1353, 1360-1361; Sr. 904-905, 909, 917-918, 920.

The defendant's due process rights were violated when the State took inconsistent positions on who the leader of the group was, as indicated in Bradshaw v. Stumpf, 545 U.S. 175 (2005) (holding that remand was warranted to determine if violation of the death penalty violated due process due to the

prosecutor's inconsistent theories as to the identity of the shooter). Compare Raleigh v. State, 932 So.2d 1054, 1065-66 (Fla. 2006).

The State was allowed to use this duplicitous position to improperly attain a conviction based on a principal theory and to improperly prove that the murder was not the independent act of Eaglin. Further, it improperly elevated the defendant's role and improperly diminished Eaglin's role regarding whether the defendant should receive a death sentence.

This deprived the defendant of a fair guilt phase and a fair penalty phase and this Court should reverse for a new trial or a sentence of life imprisonment.

Prosecutors are supposed to be ministers of justice and are not supposed to "kill at all costs."

ARGUMENT 8: THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED AND HE WAS DENIED A FAIR PENALTY PHASE WHEN THE STATE VIOLATED AN ORDER IN LIMINE WHICH PROHIBITED IT FROM REFERRING TO THE DEFENDANT'S PREVIOUS PENALTY PHASE IN HIS PRIOR CONVICTION

Before trial the defense filed a motion in limine arguing that there should be no reference to the defendant's prior penalty phase [R. 84]. The motion was granted but the prosecutor elicited this testimony. The prosecutor who prosecuted the defendant's prior case mentioned that the defendant faced a prior penalty phase. Sr. 88.

The defense objected and moved for a mistrial, arguing that letting the jury know that the defendant already had one shot at this was grossly prejudicial. The trial court denied the motion. Sr. 88-96.

This was extremely prejudicial and it was impossible to "un-ring this bell." Letting the jury know that the defendant already survived a possible death sentence unfairly jaded the jury as to what the proper sentence should be based upon irrelevant facts. The testimony allowed the jury to improperly consider that the defendant already got one bite at the apple and he wasted the chance he got.

This Court's decision in Hitchcock v. State, 673 So.2d 859, 863 (Fla. 1996), is relevant in general terms. This court held that when resentencing a defendant who was previously sentenced to death, caution should be used when mentioning the defendant's prior sentence because it may precondition the present jury to a death recommendation. This general principle was violated in the case at bar.

The reference to the previous penalty phase also stands contrary to the jurisprudence prohibiting past crimes and acts from being offered into evidence because they are not relevant. This was also not relevant herein and it prejudiced the defendant by giving the jury an improper basis to render its verdict.

This error was preserved. The State cannot prove that this error was not harmless, especially when it is considered in conjunction with the other errors in this case.

ARGUMENT 9: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS CONCLUSION THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS IN THIS CASE

Whether a factor is mitigating is a question of law and subject to de novo review. Whether a mitigator is established or not is a question of fact and will be

upheld if there is competent substantial evidence to support it. The determination of the weight assigned to each aggravating element or mitigating factor is subject to the abuse of discretion standard of review. Campbell v. State, 571 So.2d 415 (Fla. 1990).

The case at bar follows the dictates and concerns espoused in Coday v. State, 946 So.2d 988, 1000-1006 (Fla. 2006). The concurring opinions of Justices Quince, Bell, Anstead, and Pariente are hereby incorporated by reference. Id. at 1009-1026.

The trial court in this case improperly balanced the aggravating factors against the mitigating factors. The defendant filed a sentencing memorandum and also itemized the mitigators, which are hereby incorporated by reference [R. 3944, 3919].

The trial court held in its sentencing order that: The dysfunctional family-life and brutalization the defendant suffered as a child was to be given "great weight"as a mitigating factor [R. 3963-3964].

The trial court held that the defendant's mental and emotional health issues were to be given "some weight." The defendant's expression of remorse and apology to the families and his statement that it "wasn't supposed to happen" was given "little weight." The failure of DOC officials to properly supervise the

inmates was rejected [R. 3964-3965].

First off, the trial court abused its discretion in only giving "some weight" to the defendant's mental health issues. The defendant has a borderline intelligence, suffers from depression, a profound mood disorder, attention deficit disorder, intermittent explosive disorder, substance abuse addiction and was negatively conditioned by his institutionalizations as a child. Sr. 781-783, 785-786, 788, 792, 804.

The trial court abused its discretion because the defendant's mental status was inextricably intertwined and a direct byproduct of his upbringing, which the trial court gave "great weight." See Ramirez v. State, 739 So.2d 568, 582 (Fla. 1999).

Assuming arguendo this Court upholds the weights the trial courts assigned to the mitigators in this case – the trial court still misapprehended the legal effect of the amount and extent of the mitigation.

The mitigating factors outweigh the aggravating factors because even though the trial court gave "great weight" to the defendant's upbringing, the nature of this mitigation was so substantial, that it is essentially a dispositive mitigator.

The defendant had a one-of-a-kind childhood that no person on the planet could endure and still become a functioning member of society. The mitigation in

this regard falls within the top 1% of cases on this issue. It is hard to imagine a more abusive environment in which to be raised.

The defendant's father tortured him and his family mentally and physically and there were was rampant incest as well. The defendant was institutionalized and his sordid and savage upbringing should make even the most battle-hardened of us wince.

As to the nature of the crime, the defendant was only an accomplice and he voluntarily confessed. He did not swing the sledgehammer. It takes a different kind of person to actually use this instrument to kill. This "other" type of person is not the defendant. Even though he did assist Eaglin in carrying this out, he is less culpable. Furthermore, the victim did not suffer. Sr. 209.

The trial court also failed to attach any weight as a non-statutory mitigator to the fact that the defendant was merely an accomplice and was not the "triggerman" [R. 3965-3966]. There is a difference between the culpability of the two. The trial court erred by rejecting this fact and giving this mitigator no weight at all. See Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982); Walker v. State, 707 So.2d 300, 318-19 (Fla. 1998).

The defense argued in its sentencing memorandum: "The defendant proved the following non statutory mitigators: Mr. Smith was an accomplice" [R. 3951].

The defendant is not arguing that being an accomplice makes him ineligible for the death penalty, but rather that him being an accomplice is a significant mitigating factor that the trial court simply ignored. This is a question of law, and it is an error of law that warrants remand.

In sum, the defendant should have been given a life sentence due to the extreme nature of the mitigation in this case, the fact that he was only an accomplice, and because the victim did not suffer. The trial court came to the wrong legal conclusion when it held that the aggravating factors outweighed the mitigating factors.

ARGUMENT 10: THE DEFENDANT'S SENTENCE OF DEATH WAS DISPROPORTIONATE

THIS COURT'S PROPORTIONALITY REVIEW IS LEGALLY INSUFFICIENT

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

This Court must consider the totality of the circumstances and compare it

with other capital cases. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. Woods at 990. See also Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003).

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

This Court's proportionality review should include a review of cases in which a death sentence was imposed, cases in which a death penalty was sought but was not imposed, and cases in which the death penalty could have been sought but was not. See Chapter 7 from the September 2006 ABA report, pages 207 to 212, which are hereby incorporated by reference.

The failure to engage in this multi-faceted analysis deprives every capital defendant of a meaningful proportionality review. The current review violates equal protection, violates the due process clauses of the Florida and United States constitutions, and results in "unusual" punishments in derogation of Article 1, Section 17 of the Florida Constitution. See Simmons v. State, 934 So.2d 1100, 1122 (Fla. 2006).

This Court's current review also presents an undue risk that death will be

imposed in an arbitrary and discriminatory manner.

In this regard, this Court should: (1) reconsider the extent of its proportionality review and (2) address whether this Court's current limited review passes constitutional muster – a subject which seems to be one of first impression for the Court.

The defendant's trial attorney rendered ineffective assistance by failing to preserve this issue for appellate review – if this would even be required because the circuit court would have no authority over how this Court reviews its capital cases. As such, the defendant should not be penalized for this oversight and this Court should review this issue. Alternatively, the current review constitutes fundamental error because it reaches into the very heart of meaningful appellate review in every capital case.

THE MERITS OF THE CASE AT BAR

It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first degree murders. Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

This Court has established that a co-defendant's sentence is relevant to a

proportionality analysis, where a co-defendant is equally or more culpable. See Cardona v. State, 641 So.2d 361, 365 (Fla. 1994). Co-defendant Michael Jones had an equal role in the escape and he received a life sentence. This is a disproportionate result.

Both the defendant and Jones were principals in Lathrem's death. There is no legally relevant distinguishing act that differentiates the conduct of each of them in this case. Both of them were right there when Lathrem died. Both of them lured Lathrem over to the mop closet. Tr. 402, 1143-1148; Sr. 919. Sentencing the defendant to death for the same exact conduct does not pass constitutional muster.

This result violates equal protection, due process and the basic equal right to proportionality in sentencing in accord with the Fourteenth Amendment, and Article I, Sections 9 and 17 of the Florida Constitution.

This Court held in Hazen v. State, 700 So.2d 1207 (Fla. 1997), that a non-triggerman accomplice could not be sentenced to death where the more culpable non-triggerman accomplice received a sentence of life. See also Brooks v. State, 918 So.2d 181, 208 (Fla. 2005); Foster v. State, 778 So.2d 906, 922 (Fla. 2000).

In the case at bar, both non-triggermen accomplices were equally culpable, but the defendant got death and Jones got life. "It has long been established that equally culpable codefendants should receive the same punishment." Ray v. State,

755 So.2d 604, 611 (Fla. 2000); Jennings v. State, 718 So.2d 144 (Fla. 1998); Scott v. Dugger, 604 So.2d 465 (Fla. 1992). As a result, the defendant's death sentence is disproportionate.

In addition to being internally inconsistent, the sentence is disproportionate to death sentences in other cases where the defendant was merely an accomplice. This case does not represent one of the most aggravated murders because the murder was not committed in a heinous, atrocious or cruel manner.

The fact that there are multiple aggravators is not dispositive. Lathrem was knocked out immediately and did not suffer and the defendant was not the one who actually killed her.

This case does in fact represent one of the most mitigated murders based upon the defendant's unparalleled childhood abuse and the mental health and other problems he was afflicted with as a result. See Argument 9 above.

The statutory aggravators were offset by the substantial mitigation and the fact that the defendant was only an accomplice. Furthermore, comparing the totality of the circumstances in this case to similar cases indicates that a sentence of death is disproportionate. Compare Strausser v. State, 682 So.2d 539, 542 (Fla. 1996); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988).

ARGUMENT 11: THE TRIAL COURT REVERSIBLY ERRED WHEN IT REFUSED THE DEFENSE'S REQUEST TO INSTRUCT THE JURY ON THE DEFENDANT'S LIST OF MITIGATING EVIDENCE

The defense requested that the jury be instructed that it could consider the defense's list of non-statutory mitigating evidence. Sr. 679-687, 980; R. 3919. This issue is fully preserved for this Court's review.

The trial court's refusal to allow this instruction deprived the defendant of due process and a fair penalty phase pursuant to the intervening United States Supreme Court decisions in Brewer v. Quartermain, 127 S.Ct. 1706 (2007), Smith v. Texas, 127 S.Ct. 1686 (2007), and Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007).

These decisions stand for the proposition that the defense should not be prevented from having the jury adequately consider its mitigating evidence. The trial court's failure to allow the requested instruction prevented the jury from giving a reasoned and moral response to the mitigating evidence.

The trial court merely allowed a brief and conclusory instruction to the jury as to the mitigating evidence it could consider. Sr. 973. This "judicial gloss" did not adequately inform the jury as to what specific factors it could have considered

in this particular case. This was error. The jury instructions failed to properly instruct the jury regarding the nature, meaning, and effect of mitigation.

The State is allowed to itemize every one of their aggravating factors and have the formally memorialized in writing. The trial court spent a lot of time laying the aggravators out for the jury. Fundamental fairness requires the same opportunities be provided to the defendant. The State cannot meet its burden to prove that this error was harmless, especially when considered with all of the other errors in this case.

ARGUMENT 12: THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S LETHAL INJECTION PROCEDURES

The trial attorney raised this issue before the trial began [R. 3644, 4528]. The trial court ruled that it was premature because the defendant had not yet been convicted [R. 3857, 4528-29]. However, the trial attorney did not re-raise the issue after the guilt phase concluded. The trial court expressly ruled that it did not

consider this issue. This is ineffective assistance of counsel.

There is no possible excuse for filing a motion and then failing to get the court to consider it. The trial attorney obviously thought it was a meritorious issue or the motion would not have been filed in the first place. This motion is also a hallmark of a proper capital defense.

The trial attorney in this case erroneously thought he had preserved the issue for appellate review. The defendant should not be penalized for the ineffective assistance of his attorney – especially when it results in a miscarriage of justice.

Lethal injection itself, Florida's lethal injection statute (Fla. Stat. § 922.105), and the existing procedure that the State of Florida utilizes for administering lethal injections violate numerous constitutional provisions, to wit: Article II, Section 3 and Article I, Section 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

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

All courts rendering adverse decisions on this issue are rendered obsolete due to new court rulings, new scientific evidence and other evidence that was not

in existence at the time those decisions were made.

Previously, courts have held that the possibility of a prisoner feeling pain and the possibility of mishaps during the execution were speculative. New court holdings and research as well as actual events require this court to re-assess these determinations.

This issue is fully illustrated by the Angel Diaz execution, the facts of which this Court has yet to formally consider. See Darling v. State, 2007 WL 2002499 at fn5 (Fla., July 12, 2007) ("This habeas claim was presented to the Court in connection with facts existing prior to the execution of Angel Diaz on December 13, 2006. No events that may have occurred in connection with the Diaz execution have been considered as part of this proceeding).

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

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

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

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

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

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

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

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

i. Lack of supervision over personnel;

ii. Insufficient guidance to select personnel;

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

iv. Lack of a command structure over personnel;

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

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

vii. The current administration of lethal chemicals;

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

Final Report at p. 8-10.

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

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

Evidence not previously available to this Court when it decided Sims v.

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

EVOLVING STANDARDS OF DECENCY

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

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

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

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

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

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

ARGUMENT 13: FLORIDA'S LETHAL INJECTION PROCEDURE VIOLATES THE SEPARATION OF POWERS DOCTRINE

This Court has previously rejected this argument. See Diaz v. State, 945 So.2d 1136, 1143 (Fla. 2006).

Florida's lethal injection statute is an unconstitutional delegation of legislative authority under the separation of powers doctrine and violates due

process because the legislature gave the Department of Corrections no intelligible principle by which to create a rule of lethal injection protocol.

The consequences of not having an intelligent principle is prominently displayed by the Diaz execution itself. Based upon this, and other mounting examples of prejudice throughout the nation, this Court should reconsider its position on this issue. The Department of Corrections is not doing its job properly.

In addition, because of the exemption of policies and procedures relating to the lethal injection method from the constraints and procedures of Florida's Administrative Procedure Act, without offering alternative procedures, the Department of Corrections is given unfettered discretion to create a lethal injection protocol.[1]

The checks and balances of the Administrative Procedure Act serve to ensure that agencies make rules in an informed, public manner. Section 922.105's

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[1] In Sims v. State, 754 So. 2d 657, 670 (Fla. 2000), this Court found that the legislature's failure to define the chemicals to be administered in the lethal injection did not necessarily render the statute unconstitutional, but this Court did not consider the argument that the legislature's exemption of the policies and protocols from the procedural safeguards of the Administrative Procedure Act gave the Department of Corrections unfettered discretion to legislate.

delegation of legislative power to the Department of Corrections to fashion a lethal injection protocol behind closed doors and by any method of its choosing cannot pass constitutional muster, especially since they have failed miserably in this regard. See Lewis v. Bank of Pasco County, 346 So.2d 53, 55-56 (Fla. 1976) ("The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.").

The problems with the arbitrary policies and implementation of those policies is fully illustrated by the March 1, 2007 report by the Florida Governor's commission, which is hereby incorporated by reference.

ARGUMENT 14: FLORIDA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT AND *RING v. ARIZONA* AND ITS PROGENY

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

The Sixth Amendment right to a jury trial and the right to due process of law

embodied in both the Florida and United States Constitutions is violated by the mandates and implementation of Florida's statutory scheme and case law on attaining a conviction and sentence of death in a capital case.

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

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

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

The concurring opinions of Justices Quince, Bell, Anstead, and Pariente in

Coday v. State, 946 So.2d 988, 1009-1026 (Fla. 2006), are hereby incorporated by reference. See also State v. Steele, 921 So.2d 538 (Fla. 2005).

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

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

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

C. A special verdict form should have been submitted to the jury so that they could have made specific findings on each of the aggravating factors in this case. See State v. Steele, 921 So.2d 538, 552 (Fla. 2005) (J. Pariente dissenting in part). Currently, Florida allows a jury to return a death recommendation without a majority of the jury agreeing on a single aggravating factor – thereby condemning some unknown fraction of criminal defendants to serve an illegal sentence.

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

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

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

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

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

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

J. The jury instructions violate Brewer v. Quartermain, 127 S.Ct. 1706 (2007); Smith v. Texas, 127 S.Ct. 1686 (2007); Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007), and Caldwell v. Missisippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

K. The jury instructions were deficient for failing to include a mandate that death may not be imposed if the individual juror has any residual or lingering doubt as to the nature of the murder. See Oregon v. Guzek, 546 U.S. 517 (2006).

Notions of fundamental fairness inherent in due process required this instruction to be given, and to be considered as a mitigating factor, because juries' findings of fact are never overturned on appeal and justice mandates that the

individual juror weigh the certainty of his or her own verdict, vis-avis the consequences of an irreversible mistake. See also ABA report at 308-309; Way v. State, 760 So.2d 903, 922-23 (Fla. 2000) (Justice Pariente concurring).

The dispositive testimony in this case came from the questionable testimony of inmates Lykins and Baker who were jailhouse snitches.

On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. See American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006. This entire report is hereby incorporated by reference.

Pursuant to all of the foregoing, Florida's death penalty scheme stands in violation of the Eighth Amendment, the Sixth Amendment, and the Fourteenth Amendment, the equal protection clause and the due process clause of the Florida constitution, which provides more protection than its federal counterpart.

It is not clear whether this Court has considered all of these arguments within the context of the principle that Florida's due process clause provides more protection to criminal defendants than the federal due process clause.

ARGUMENT 15: THE TRIAL COURT IMPROPERLY PREVENTED THE DEFENSE FROM TELLING THE JURY THAT IT WAS PRIMARILY RESPONSIBLE FOR SENTENCING THE DEFENDANT AND THAT IT NEEDED TO TAKE THIS RESPONSIBILITY SERIOUSLY

In closing argument, the defendant's attorney told the jury that they should not kill this man because he has a prior record. The prosecutor objected and the trial judge instructed the jury that it was not the instrument of death in this case and that they were only giving a recommendation to the court. The defendant's attorney said he was not doing anything that was not accurate. Sr. 952-954.

The trial court violated the defendant's due process rights when it improperly instructed the jury as to their role in determining the defendant's sentence – coupled with the already questionable jury instruction on this issue. See Dugger v. Adams, 489 U.S. 401 (1989); Caldwell v. Mississippi, 472 U.S. 320 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). The trial court left the jury with the erroneous impression that their recommendation had little weight.

This Court has upheld challenges to the constitutionality of instructing the jury that their vote is merely a recommendation. See Taylor v. State, 937 So.2d 590, 600 (Fla. 2006). However, the trial court's instruction went beyond the

standard instruction . It affirmatively misadvised the jury that it's recommendation did not really matter.

Furthermore, the defense was unduly prohibited from telling the jury, not that they were going to "pull the switch," but rather they must take this seriously as they are the most significant part of the sentencing process. The defense's argument was a fair comment on the jury's role and the trial court denied the defendant a fair penalty phase when it sustained the prosecutor's objection on this point.

In sum, this was a viable defense argument that was unduly abridged. The State cannot prove that this error was harmless. The trial court's act of diminishing the importance of the jury's role renders the ultimate sentence of death unreliable because of the resulting lack of responsibility/seriousness for the sentence by the individual juror.

ARGUMENT 16: THE DEFENDANT'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S CLEMENCY PROCEDURES

Either before a sentence of death was imposed or after a sentence of death was imposed the trial attorney should have challenged the legal sufficiency of Florida's clemency process. The defense had nothing to lose and all to gain. The defendant was prejudiced because the following is a meritorious argument which would have resulted in a sentence of life imprisonment had it been properly raised.

No evidentiary hearing is needed on this issue because the State cannot utilize an evidentiary hearing to create clemency guidelines that simply do not exist. The state of the existing clemency procedures will be the same whether there is an evidentiary hearing on this issue or not. Furthermore, the defendant should not be forced to procedurally default any of his claims.

Article 4, Section 8(a) of the Florida constitution provides the governor with the power to grant clemency (defined as an act of mercy), including full or unconditional pardons and commutations of death sentences, with approval of two members of the Board of Executive Clemency. See also Fla. Stat. § 940.01(1).

Clemency is a critical stage of the death penalty scheme. It is the only stage at which factors like lingering doubt of innocence, remorse, rehabilitation, racial and geographic influences and factors that the legal system does not correct can be considered. See Herrera v. Collins, 506 U.S. 390, 411-12 (1993).

However, the ABA assessment team found Florida's clemency process to be severely lacking and entirely arbitrary because there are no rules or guidelines delineating factors for the Board to consider regarding clemency. ABA report at vii. See also ABA report, Chapter 9, pages 243 to 263, which are hereby incorporated by reference.

The rules that do exist are not even binding on either the governor or the board members. See Fla. Admin. Code R. 27 app. (2006) (stating that the rules are not regulated by the Florida Administrative Procedure Act and are not binding on the clemency board or the governor).

The clemency process in Florida amounts to no more than a flip of the coin and this violates the defendant's state and federal due process rights and equal protection. The clemency process wrongly assumes that the merits of all of a defendants claims have been reached – when usually the claim is procedurally defaulted.

The process does not taken into account all factors that might lead the

decision-maker to conclude that death is not appropriate. The proceedings should also be formally held in public and include in-person meetings with defendants.

ARGUMENT 17: THE CUMULATIVE EFFECT OF THE DEFICIENT PERFORMANCE OF THE DEFENDANT'S TRIAL COUNSEL AND THE NON-REVERSIBLE ERRORS IN THIS CASE DEPRIVED THE DEFENDANT OF A FAIR TRIAL

The cumulative effect of the deficient performance of trial counsel deprived the defendant of a fair trial under the due process clause of the United States and Florida Constitutions, and the Sixth Amendment. The defendant was deprived of a fair guilt phase and a fair penalty phase.

It may be that no single instance of deficient performance prejudiced the defendant, but the cumulative and total effect of that deficient performance did in fact prejudice the defendant. See State v. Gunsby, 670 So.2d 920, 921 (Fla. 1996). This cumulative error argument also applies to all errors in this case that were preserved for appellate review by the defense but were deemed non-reversible by this Court.

"[T]he cumulative effect of the district court's errors, in addition to the prejudicial circumstances that hindered the presentation of his defense, resulted in a fundamentally unfair trial that violated his right to due process." United States v. Salameh, 152 F.3d 88, 157 (2d Cir. 1998), *citing* Taylor v. Kentucky, 436 U.S. 478, 487 & n.15 (1978).

The court in United States v. Rivera, 900 F.2d 1462, 1477 (10th Cir. 1990), held that, "[c]ourts have . . . found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances within the trial, even though such other circumstances may not individually rise to the level of error."

"A cumulative error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." Cargle v. Mullin, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (citations omitted).

The cumulative effect can so prejudice a defendant's right to a fair trial that a new trial is necessary in the interests of justice. United States v. Adams, 74 F.3d 1093 (11th Cir. 1996); United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995); United States v. Preciado-Cordobas, 981 F.2d 1206 (11th Cir. 1993); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984). This is certainly the case herein.

For example, the jury was allowed to hear disgusting testimony about how

the defendant wanted to rape a female prison guard, the State was allowed to argue that the defendant was the leader of the group when it already argued that Eaglin was the leader of the group in Eaglin's trial, the State violated an order in limine when it referenced the defendant's previous penalty phase, the trial court did not consider the fact that the defendant was merely an accomplice as a mitigating factor, the defendant's equally culpable co-defendant got a life sentence, the defense was not allowed a jury instruction on its list of mitigating factors, and the defense was prohibited from explaining the seriousness and impact of their decision to the jury,

In sum, this trial was not fair and therefore the defendant's convictions, and most certainly his sentence, should be vacated.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Appellant/Defendant, STEPHEN SMITH, respectfully requests this Honorable Court to reverse his convictions or remand for a new trial/penalty phase, or reduce his sentence to life imprisonment without the possibility of parole.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: THE OFFICE OF THE ATTORNEY GENERAL, Attn: Candance M. Sabella, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013 on this 4th day of August 2007.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 4th day of August 2007.

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