IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1963

JERONE HUNTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

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

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PREFACE

This is an appeal from a judgment and sentence imposing the death penalty from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, the Honorable William A. Parsons presiding. Jerone Hunter 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)].

NOTICE OF SIMILAR CASE

A co-defendant who was also sentenced to death in this case has a pending appeal in this court. Victorino v. State, SC06-2090. The cases were consolidated below.

STATEMENT OF THE CASE AND FACTS

The defendant is a black male and was 18 years-old when the crimes at issue occurred. He is the youngest person on Florida's death row.

On August 6, 2004, six people asleep in their home and a dog were beaten and killed with baseball bats or other blunt objects. The victims of the crime were Erin Belanger (22), Michelle Ann Nathan (19), Anthony Vega (34), Roberto "Tito" Gonzalez (28), Francisco Ayo Roman (30), Jonathan Gleason (18), and the dog was a Dachshund named George. Tr. 1795-96; 2944.

The alleged ringleader of the murders was Troy Victorino. It was alleged that Victorino, the defendant and others were squatting in victim Erin Belanger's grandmother's home and using it as a party house. Victorino was imprisoned on an unrelated charge and when he was in jail Belanger removed Victorino's clothes, some documents and an X-Box video game system from her grandmother's home.

Belanger's removal of Victorino's property and failure to return it when Victorino was released from jail angered Victorino and served as the impetus for the crimes at issue. Victorino enlisted the help of the defendant, Michael Salas and Robert Cannon to commit the killings. Cannon pled guilty and was not tried with the others.

Victorino, the defendant and Salas were all convicted of first degree murder. Victorino and the defendant were sentenced to death while Salas was sentenced to life imprisonment.

The defendant was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence), first degree and felony murder of all six victims, abuse of the dead human bodies of three victims, and armed burglary of a dwelling with a weapon. Tr. 4021-4022.

THE GUILT PHASE OF THE TRIAL

On the morning of August 6, 2004, Christopher Carroll went to the residence at 3106 Telford Lane in Deltona, Florida. No one answered the door bell and Carroll noticed that the door had been kicked in. Carroll looked inside, saw blood and bodies, and called 911. Tr. 1976-1798, 1806.

Investigator Anthony Crane of the Volusia County Sheriff's Office was dispatched to the scene and observed six dead bodies: Two dead males in the living room (one on the floor and one on the couch), a male and a female in the master bedroom, a male in the northwest bedroom, and a female in the southwest bedroom. The dog was not immediately visible, but was there. Tr. 1815-16, 1875.

FDLE crime scene technician Stacey Colton collected a knife handle and a knife blade from the residence because there was blood on them and the victims appeared to have stab wounds. Tr. 1861. Colton testified that some of the blood stain patterns were consistent with being a contact blood pattern, as opposed to being blood spatter. Tr. 1874-1875.

Robert Cannon testified that he was indicted along with the three men on trial and that he pled guilty to murdering all six people and for abusing the dead bodies of five of the victims and pled guilty to cruelty to an animal for the death of the small Dachsund named George. He was promised a sentence of life imprisonment. Tr. 1936-1939.

Cannon then said he did not want to testify any further. The jury was removed and he told the court that he was not guilty and he will face a death sentence in lieu of testifying. Tr. 1941-1942. The jury was brought back in and Cannon said he was not guilty and that he did not want to say any more. Tr. 1948.

Cannon then said that he and Salas had to go with Victorino on the night in question because they were in fear of their lives and they had no choice. Tr. 1952. Cannon testified that Victorino, the defendant, Salas and himself were in the house that night with baseball bats. Tr. 1954. He said his attorneys made him plead guilty and implicate the others. Tr. 1963.

Cannon repeatedly refused to answer questions on cross-examination and the defense moved for a mistrial as a result. The prosecutor was allowed to lead the Cannon into saying that he went over there with the defendants with the intent to kill the people.

Further, the defense was prohibited from a proper cross-examination because he would not answer any questions. The defense was sandbagged and then handcuffed in its response. The trial court ordered Cannon to answer the defense's questions. Cannon ignored the court. Tr. 1948-1963; 2226-2242.

Brandon Graham testified that he is a friend of Robert Cannon's and Michael Salas. He also knows Troy Victorino and the defendant, whom he met on August 1, 2004. Tr. 1971-1972. On that day they all went to pick up Victorino's belongings from the Telford house. Victorino said that he wanted to fight some kids so he could get his stuff back. They all had bats. Tr. 1974-1975.

The defendant yelled for the occupants of the home to come out and fight. One of the occupants showed the defendant Victorino's CD case. Someone yelled that the police were on the way and they all left. Tr. 1976-1977.

On August 4, 2004, Victorino and the group went to a park to fight some other kids, but the other kids did not show up. The defendant had a bat. Tr. 1981-

1982. They later saw the group they had intended to fight and Victorino shot into their vehicle. Tr. 1983.

On August 5, 2004, Victorino was saying that he wished he had a group of niggers to help him kill people with lead pipes. Cannon and Salas said that they also wanted to do it. Victorino said that the defendant was also down with it because they took the defendant's stuff too. The defendant shook his head in agreement. Tr. 1986, 2012.

Victorino then started mapping out the Telford house and started to plan how to split up in order to kill the people. Victorino said he wanted to kill the guy Flaco and kill the bitches because they talked shit. The defendant suggested that they wear masks but Victorino said no because they were not going to leave any evidence behind. Tr. 1986-1987, 2032. Graham said was he was too afraid of Victorino to say anything to him when he was planning the murders. Tr. 2089.

Graham, Victorino, the defendant, Salas and Cannon were all together in Cannon's car and they all had bats. Tr. 1989. Graham asked to be dropped off at Kristopher Craddock's house and Graham did not rejoin the group later that night. He was suppose to rejoin them around 9:00 pm, because they were going to kill everyone between 9:00 pm and 10:00 pm. The group tried to call him, but he did not answer. Tr. 1992-1993.

The next morning Graham heard about the murders and he met up with the group. Graham noticed that Victorino had a Game Boy and a bunch of stuff in his truck that he had wanted back. Tr. 1995-1996. A few days later Graham told the police about everything. Tr. 1997. Kristopher Craddock confirmed Graham's version of events. Tr. 2164-2188.

Deputy John McDonald testified that on July 30, 2004, he responded to 1590 Providence Boulevard. The owner of the home lived in Maine. The owner was victim Erin Belanger's grandmother. Belanger called in and reported that there was suspicious activity at the home. Two people were found in the home who did not have permission to be there. It looked like someone was living there. Tr. 2094-2098. One of the persons said that Victorino gave her permission to be there. Tr. 2099.

Deputy Taylor D. Sierstorpff testified that on July 31, 2004, he responded to 1590 Providence Boulevard. Erin Belanger was there with Franciso Roman (both eventual victims). They reported some items missing from the residence. The deputy noticed some papers in a box and they had Victorino's name on them. Tr. 2104-2107. Belanger told the deputy that Victorino was staying in the home. Tr. 2109.

Kimberly Jenkins testified that she knew the six victims and worked with five of them at Burger King. Tr. 2115-2116. She was at Belanger's home on Telford Lane on July 31, 2004 when Victorino knocked on the door and asked for Belanger. Victorino was hostile and said that he wanted his property back. Tr. 2119-2120.

Belanger said whatever she had she would give back. Victorino said that he wanted his stuff back and by any means he would get it back. Tr. 2120-2121, 2131. Victorino said he had an X-Box, some receipts and some clothes at her grandmother's house. Tr. 2122, 2126, 2131, 2139.

Victorino had previously called the police to report that he had items stolen from him at 1590 Providence Boulevard. Tr. 2138. He could not verify that the items were actually stolen so the officer did not make a report. Victorino told the officer not to worry about it and angrily said that he would take care of this himself. Tr. 2141.

A 911 call placed by Belanger from the Telford house on the night of August 1, 2004, was played where Belanger said that men were in the house and that she needed help and this was probably from a dispute she had earlier in the day about the men wanting to retrieve their belongings. Tr. 2266-2286. Two hours

later a second 911 call was made and Belanger said the same people were back banging on her door. Tr. 2296-2299, 2308.

Law enforcement discovered a box containing papers with the name Victorino on them from Cannon's car, the vehicle allegedly used in the crime. Tr. 2452-2453, 2357.

Over repeated defense objections based on the previously denied motion to suppress [Tr. 2518, 2520], major case detective Lawrence Horzepa, testified that he interviewed the defendant. The defendant got more nervous as they continued to talk and the defendant even started to cry and shake. Tr. 2518-2519.

The defendant said he went to the house at Telford Lane on the Saturday before the night in question to find out about his missing belongings. The defendant also said he was there on the night of the murders, and he got there in Cannon's vehicle. Tr. 2523-2524. The defendant said he had an aluminum baseball bat with him and that he went inside the house. Tr. 2525.

The defendant said he saw a white male sitting in a recliner in the living room and the defendant screamed about where his stuff was and the white male said he did not know. The defendant said that he then hit the man with the bat because the defendant thought he was lying. Tr. 2526-2527.

The man tried to get up and the defendant hit him again. The defendant did not recall how many swings he took but he thought it was more than three but less than twelve. The defendant's statement corresponded to the crime scene and the condition of that victim Tr. 2526-2527. This victim was identified as Jonathan Gleason. Tr. 2529.

The defendant then saw a guy run to one of the back rooms. The guy tried to hit the defendant with a stick. The defendant swung at him and missed, but then swung again and hit the guy in the shoulder and the guy dropped the stick. The defendant then hit the guy with the bat three or four more times. The victim was later identified as Roberto Gonzalez. Tr. 2529-2530. The defendant said he looked for his missing belongings and that he did not hit anyone else in the home. Tr. 2532.

Detective Horzepa also interviewed co-defendant Mike Salas, and he said that he was also in the home and he had a baseball bat with him. Tr. 2541. Salas said that he hit the victim in bedroom two three or four times in the leg and on the arms. Tr. 2542-2543. The defendant drew a map as to where the baseball bats they used could be found. Tr. 2544. A law enforcement dive team recovered the four bats in a retention pond in the DeBary area. Tr. 2481, 2544-2545.

Corrections Officer Eunice Williams testified that Salas said he did not know how he got caught because he tied up his hair and he did not get any blood on him, and that he used a bat. Tr. 2906.

Glass fragments found in the vehicle generally matched the broken lamp found in the second bedroom in the Telford Lane home. Tr. 2610, 2623. A pair of sunglasses was found in the vehicle that had the fingerprints of victim Franciso Roman on them. Tr. 2470-2474, 2650.

No fingerprints found in the home matched any of the defendants. Tr. 2640. Fingerprints were lifted from one of the bats but none of them matched the defendants. Tr. 2659. DNA samples taken from the bats matched victims Gonzalez, Belanger and Roman. Tr. 2809-2810; 2814-2815. A hair taken from a bat matched victim Nathan. Tr. 2888-2889.

Law enforcement found a box for size 12 Lugz boots in the vehicle that had Victorino's fingerprints on them. Tr. 2454-2457; 2642. Law enforcement attained a footwear impression from a pay stub found in the home and it matched Victorino's left boot. Tr. 2679. An impression from a bed sheet also matched the boot. Tr. 2693.

Law enforcement also took an impression from the front door that was kicked in which matched the right boot. Tr. 2705. A DNA sample taken from the

boots matched Victorino. Tr. 2786. Blood found on Victorino's boots matched victims Belanger and Roman. Tr. 2794; 2801-2802.

A shoelace tested by law enforcement contained a mixture of DNA from the defendant and victim Gonzalez, indicating that the defendant was in a place where Gonzalez's blood was shed. Tr. 2890-2892.

On the night of the murders, Miranda Torres saw all of the defendants and Cannon together in Cannon's vehicle. Cannon said he could not talk because they had to handle something real quick. Tr. 2928-2929.

The defense stipulated that the Daschund died of blunt force trauma. Tr. 2944, 2947, 2951. The dog had a crushed skull. Tr. 2956.

Chief Medical Examiner Thomas Beaver testified that Vega died of blunt force trauma to the head after about two blows to the head which were consistent with a baseball bat. Tr. 3011-3013. Gleason died of blunt force trauma after at least three blows to the head by a cylindric object consistent with a baseball bat. Tr. 3027-3028.

The medical examiner testified that Gonzalez died of blunt force trauma to the head. Tr. 3048. Nathan died of blunt force trauma after three or four blows to the head. Tr. 3058-3059. Roman died of blunt force trauma and had post-mortem stab wounds. Tr. 3063, 3066.

The sixth victim, Belanger, also suffered from blunt force trauma, Tr. 3073, had post-mortem stab wounds, Tr. 3070, and was impaled with an object consistent with a baseball bat up through her vagina and into her abdominal cavity. Tr. 3071-3074.

The medical examiner opined that the baseball bat blows on the victims were pre-mortem and were painful. Tr. 3091. The State then rested. Tr. 3100.

The defense moved for a judgment of acquittal in that the State did not meet its burden of proof on all 14 counts charged in the indictment and renewed all of the defendant's oral and written motions. The trial court denied the motions. Tr. 3104-3105.

The defense made its opening statement after the prosecution rested. The defense argued that the defendant was taken in by Victorino and Victorino bullied and threatened him into committing the murders and feared for the safety of himself and his family. Tr. 3330-3333. The defendant then testified in this regard.

The defendant said he was born on 5/31/86 and was 18 years-old on the day in question. Tr. 3343-3344. The defendant said that he did not kill anyone, he did not hit anyone in the head, and they were only there to rough them up. Tr. 3343-3441.

Victorino also testified that the defendant was 18 years-old at the time of the crime. Tr. 3234. Subsequently, all of the defendants rested their case.

VERDICTS

In summary, all three defendants were convicted of conspiracy, burglary of a dwelling with a weapon, and the murders of all six victims. In addition, Victorino was found guilty of killing the dog and abusing the dead body of Belanger. The defendant was convicted of abusing the dead bodies of Gonzalez, Gleason and Vega. As for the specific findings as to each defendant:

Troy Victorino was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); abuse of the dead human body of Erin Belanger (count eight); armed burglary of a dwelling with a weapon (count thirteen); and cruelty to an animal (count fourteen). Victorino was found not guilty on counts nine through twelve. Tr. 4017-4019.

The defendant was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); abuse of the dead human bodies of Roberto Manuel Gonzalez, Jonathan W. Gleason and Anthony Vega (counts ten through twelve); and armed burglary of a dwelling with a weapon (count thirteen). The defendant was found not guilty on counts eight, nine, and fourteen. Tr. 4021-4022.

Michael Salas was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); and armed burglary of a dwelling with a weapon (count thirteen). Salas was found not guilty on counts eight through twelve and count fourteen. Tr. 4024-4026.

THE PENALTY PHASE OF THE TRIAL

The defense asked that the defendant be deemed incompetent to proceed before the trial began. The trial court ruled in favor of the State's experts and found him competent.

During the testimony of the State's last witness, the medical examiner, the defendant's attorney apprised the court that the defendant was not able to meaningfully participate in his defense. The defendant had been given paper to communicate to his attorneys with and this has often been gibberish – and not even in the English language. The defense asked that he be examined again. Tr. 3031-3037. The defendant was re-evaluated and the defense said it was satisfied that the defendant could proceed. Tr. 3341-3342.

Dr. Alan S. Berns testified that he is a board certified clinical psychiatrist. Tr. 4597, 4599. The defendant's father was diagnosed with paranoid schizophrenia. There is a history of mental illness on both the paternal and maternal sides of the family. The mother had been hospitalized for depression and suicidal ideation, and she may also be schizophrenic because she hears voices too Tr. 4603-04.

The defendant also had a maternal uncle and a maternal aunt with mental problems. Tr. 4604-05. The defendant was interviewed and he suffered from depression and a history of alcohol and marijuana abuse. He once had a premonition about the future. Tr. 4606. The defendant is schizophrenic. Schizophrenia is one of the more debilitating mental illnesses. It is a disorder of thought. People can hear voices and become delusional with paranoid themes. Tr. 4608, 4614.

Schizophrenics have difficulty solving problems and when combined with alcohol and marijuana abuse, it only increases the impairment. Tr. 4609. In some cases schizophrenics attach themselves to figures of authority or leadership. Tr. 4610. The defendant has heard voices. Tr. 4612. The defendant had not been diagnosed with schizophrenia before and has never received treatment for it. Tr. 4613.

The defendant's mother testified that the defendant's father abused her mentally and physically, and the defendant would observe this. Tr. 4633-34. The defendant's stepfather was addicted to crack. Tr. 4635. Both parents would inflict corporal punishment and beat the defendant until he was 13 years-old. Tr. 4636. The defendant started talking to himself and some other imaginary person, when he was 3 or 4 years-old. The defendant was a loner. Tr. 4637-38.

The defendant had an identical twin brother who passed away, and the defendant would speak with him. Tr. 4638-39. The defendant also has an older brother, Elisha Hunter, Jr., who testified that the defendant used to talk to his dead twin brother and play with his dead twin brother. Tr. 4651. The step-father would whip the defendant with a belt. Tr. 4654.

The defendant's uncle, Johnny Bowles, testified that defendant still talks to his twin brother today. Tr. 4662. The defendant's father was locked up in a mental institution. Tr. 4664.

Dr. Eric Mings, a forensic psychologist specializing in neuropsychology, testified that he would have to repeat his questions to the defendant and the defendant took a long time to answer his questions. Tr. 4685. The defendant could not express himself and appeared confused. Tr. 4698.

The defendant thought about killing himself in the past. He admitted that he has heard voices. Tr. 4685-86. The defendant has an IQ of 91, which is at the lower end of average. Tr. 4688. The defendant has elevated depression, paranoia, and schizophrenia. He has a psychotic mental disorder. Tr. 4694-95.

The defendant's mother admitted to a family history of mental illness. Tr. 4700. The mother said that the defendant's father was extremely violent. Tr. 4702.

Having two parents with mental illness dramatically increases the likelihood that a child will have mental illness. Tr. 4704.

The defendant said he has a history of hearing voices and he communicated with his twin dead brother who died at 5 months of age. Tr. 4706. The defendant had a PET scan which revealed an abnormality with the structure of his brain, as well with the functioning of his brain. Tr. 4713.

The defendant has a chronological age of 18, but his emotional age is less because of significant abnormalities with his development. He does not function how a normal 18 year-old functions. The defendant knows right from wrong, but his schizophrenia impairs his ability to conform his behavior to what is right or wrong. Tr. 4714-15.

Dr. Ruben Gur testified that he is board certified in neuropsychology and that the defendant's brain has left frontal lobe damage that is quite pronounced. This area relates to verbal memory and the ability to interpret the emotional relevance of the information, especially with regard to whether or not things are threatening. Tr. 4847-48. It is the primary area for impulse control. Tr. 4869.

The defendant has brain damage, auditory hallucinations and a fairly elaborate delusional system. Tr. 4851-53. The defendant has a smaller than normal brain, and the defendant had the smallest parietal area than any individual in their

sample. The chances of this small area appearing in another human is "literally nil." Tr. 4860-61.

The defendant also has an abnormally low metabolism in the corpus callosum, which indicates that the two sides of the brain have a difficult time communicating with one another, and results in strange phenomena in such individuals. Tr. 4864. The defendant has brain damage and this causes him to be more susceptible to the dominating influence of someone else. Tr. 4868-4870.

The State's expert, Dr. Holder, testified that the defendant's PET scan and MRI were normal. Tr. 4912. Holder did not administer any tests himself on the defendant. Tr. 4920. Holder could not testify that the defendant was not schizophrenic, and was only interpreting the PET and MRI scans. Holder is only saying that Dr. Gur should not be relying on the scans for his opinion. Tr. 4920-25.

SENTENCING

The jury recommended a sentence of death for Victorino for his murders of Belanger, Roman, Gleason, and Gonzalez. The jury recommended life for his murder of Nathan and Vega. Tr. 5051-5053. The trial court imposed a sentence of death.

The jury recommended a sentence of death for the defendant for his murders of Gleason (10-2 vote), Gonzalez (9-3 vote), Nathan (10-2 vote), and Vega (9-3 vote). The jury recommended life for his murders of Belanger and Roman. Tr. 5059-5061. The trial court imposed a sentence of death [R. 2277-78]..

The jury recommended a sentence of life imprisonment for Salas for all six murders. Tr. 5056-5068. The trial court imposed a sentence of life for Salas. Tr. 5079, 5087-89. The defendant timely filed his notice of appeal and his 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.

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

It is not clear whether this Court has considered all of these arguments within the context of the principle that Florida's Constitution provides more rights and protections to persons accused of committing a crime than the Federal Constitution.

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

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

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

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

The court in M.E.K. v. R.L.K., 921 So.2d 787, 790 (Fla. 5th DCA 2006), held

that the Florida Constitution provides higher standards of protection for parents in termination of parental rights proceedings than its federal counterpart due to the fundamental liberty interests at issue.

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

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

ARGUMENT 2: THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO SUPPRESS THE INCULPATORY STATEMENTS HE MADE TO LAW ENFORCEMENT

When reviewing a motion to suppress the standard of review for the trial court's factual findings is whether competent, substantial evidence supports the findings, while the trial court's application of the law to the facts is reviewed de novo. State v. Irizarry, 948 So.2d 39, 42 (Fla. 5th DCA 2006).

The defendant invoked his right to remain silent and law enforcement still continued to question him. Further, law enforcement intentionally failed to read the defendant his Miranda rights even though it was clear he was a suspect.

The defendant filed a motion to suppress [R. 1209; 1213]. The defendant argued that he was in custody when he was "voluntarily asked" to go with police to answer some questions, that he should have been Mirandized earlier in the interrogation, and that he invoked his right to remain silent and questioning by law enforcement still continued, ultimately resulting in a confession.

The trial court denied the motion to suppress, finding that the defendant went voluntarily with law enforcement and that he was not on custody. That while there is no magical moment as to where Miranda rights must be read during an

interrogation, law enforcement properly read Miranda in this case. Finally, that the defendant did not invoke his right to remain silent [R. 1253].

The suppression hearing took place on March 24, 2006. When the defendant was being interrogated at the station he said he did not have anything else to say on several occasions. Law enforcement said they would only stop interrogating the defendant if he asked to leave [3/24/06 at 89-90; 103-105]. Law enforcement was obliged to honor the defendant's clear invocation of his right to remain silent.

Law enforcement also strategically waited and intentionally delayed reading the defendant his Miranda rights until well after it was clear that he was an actual suspect – in a calculated effort to attain his confession [3/24/06 at 103-112]. This whole scheme by law enforcement violated the defendant's Fifth And Sixth Amendment rights of the U.S. Constitution and Article 1, Section 9 of the Florida Constitution.

A person is in custody when a reasonable person would believe that his or her freedom of action or movement was curtailed to a degree associated with an actual arrest. Traylor v. State, 596 So.2d 957 (Fla. 1992). See also Caso v. State, 524 So.2d 422 (Fla. 1988) (simply stating that a person is not under arrest is not dispositive of the question).

The defendant was reasonable in his belief that he was not free to leave.

Considering the circumstances as to how he was brought to the station and his circumstances in the station, the manner in which law enforcement began making accusational statements as if he was a suspect, and the fact that his pleas to remain silent were ignored.

For example, on page 89 of the transcript of the interrogation a police officer states, "I don't think he is going home unless he wants to help." The interrogation is filled with comments like this which increased as the interrogation progressed. A reasonable person would have felt that law enforcement's prior statements that he was free to leave were mere lip service and no longer applied.

On pages 69, 90 and 92 of the transcript of the interrogation the defendant tells law enforcement that he has nothing else to say and when asked if that was the end of his statement, the defendant said yes. The defendant was ignored. This was error.

The court in State v. Sawyer, 561 So.2d 578 (Fla. 2d DCA 1990), held that when police fail to seriously honor a defendant's request to cut off questioning in violation of Miranda, and make persistent efforts to wear down his resistance and make him change his mind the statement must be suppressed.

Law enforcement obtained a confession from the defendant during the interrogation. The defense objected when this evidence was introduced at trial. Tr.

2518, 2520. The State cannot prove beyond a reasonable doubt that this error was harmless. especially since the admission of this evidence forced the defense to change its entire strategy.

ARGUMENT 3: THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE OBTAINED BY LAW ENFORCEMENT

The defendant filed a motion to suppress the seizure of the defendant's shoelaces which had blood on them and implicated the defendant in the crime [R. 1140]. The defendant asserted that the affiant who obtained the search warrant made false and reckless statements in the search warrant affidavit and that the actual warrant failed to specify the parameters of the search.

Investigator Laloo, the affiant for the search warrant, took an inadequate oath, had no personal knowledge of the facts supporting the affidavit, failed to corroborate most of the information, misrepresented information on the affidavit, and failed to advise the magistrate that she had no personal knowledge even though she swore to the contrary in her oath.

"A person who manifests an intention to be under oath is in fact under oath .

. .” United States v. Brooks, 285 F.3d 1102 (8th Cir. 2002).

The requirement that a search warrant particularly describe the things to be seized is an integral basis of Fourth Amendment law and the most scrupulous exactitude is required in drafting the warrant so that the executing officer reading the description of the warrant would reasonably know what items are to be seized. United States v. Hall, 142 F.3d 988 (7th Cir. 1998).

The affiant improperly implied that she personally garnered all of the information. In State v. Marrow, 459 So.2d 321 (Fla. 3d DCA 1984), the motion to suppress was properly granted where the affiant implied that the critical conversation discussed in the affidavit was between the confidential informant and him, even though the affiant did not expressly state that he “personally” spoke to the informant. See also State v. Beney, 523 So.2d 744 (Fla. 5th DCA 1998) (the affiant must state that he is relying on others)..

The fact that probable cause existed and could have been shown by a readily truthful affidavit does not alter the result. It is the truth of the affiant’s statement, noh the truth of the confidential informant’s statement that is material to the decision to issue the warrant. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.ed.2d 667 (1978).

The suppression hearing took place on March 27, 2006. The trial court ruled

that the actual owner of the residence consented to the search. Further, even though the affiant for the search warrant had no personal knowledge of the facts, she is not required to. She learned of information from a wide array of sources. Also, the identified citizens who provided information were not anonymous tipsters that needed their information corroborated. Lastly, the affiant did not misrepresent anything [R. 1283].

ARGUMENT 4: THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AFTER A CO-DEFENDANT IMPLICATED THE DEFENDANT IN THE MURDERS AND THEN REFUSED TO BE CROSS-EXAMINED BY DEFENSE COUNSEL

This issue was preserved for review by the defense. Robert Cannon was indicted along with the three other co-defendants. He implicated the defendant when he testified at trial and also confirmed just about every part of the State's theory of the case. Tr. 1936-1970; 2226-2242.

The defendant's Sixth Amendment right to confrontation/cross-examination and his due process right to a fair trial under the United States and Florida

Constitutions was violated when Cannon refused to be cross-examined.

The defendant was prejudiced because this was an alleged eyewitness and the defense was prevented from impeaching him and discrediting his credibility. His testimony was left fully intact and unfettered in the eyes of the jury. The defendant's attorneys had no questions to ask Cannon because he would not answer any questions.

A defendant has a right to conduct a full and fair cross-examination. This is especially necessary when the witness being cross-examined is the key witness on whose credibility the state's case relies. Docekal v. State, 929 So.2d 1139 (Fla. 5th DCA 2006).

ARGUMENT 5: THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN HIS ATTORNEYS FAILED TO MOVE TO STRIKE THE TESTIMONY OF THE CO-DEFENDANT WHO REFUSED TO BE CROSS-EXAMINED

Trial counsel should have moved for a mistrial based on the co-defendant's refusal to testify, should have moved to strike the testimony after Cannon refused to answer questions, should have asked for a limiting instruction, and/or should

have asked the trial court to use measures to compel Cannon to testify.

This error is apparent on the face of the record. Cannon's testimony was 100% against the defense and was not helpful in any possible regard. The failure of trial counsel to seek to exclude this testimony is deficient performance.

There is no possible excuse for allowing this testimony to stand unfettered. Cannon was clearly ripe for impeachment and trial counsel simply gave up on any cross-examination because Cannon was not going to answer any questions.

The defendant was prejudiced because this was the State's key witness and was the only eye witness. Cannon's testimony was left unimpeached. It was the most damaging testimony in the entire case. If the trial court was not going to grant a mistrial trial counsel should have moved to strike the testimony and let the trial proceed.

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. 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.

By analogy to the issues herein: **A claim of ineffective assistance of counsel for failing to move for a judgment of acquittal is cognizable on direct appeal because the record is sufficiently developed.** United States v. Almaguer, 2007 WL 2455291 at *1 (5th Cir., August 23, 2007); United States v. Greer, 440 F.3d 1267, 1272 (Fla. 11th Cir. 2006); In re Parris W., 770 A.2d 202, 207 (Md.

2001); People v. West, 719 N.E.2d 664, 680 (Ill. 1999); State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999); State v. Denis, 678 N.E.2d 996, 998 (Ohio 6th Dist. 1996); Holland v. State, 656 So.2d 1192, 1197-98 (Miss. 1995); United States v. Rosalez-Orozco, 8 F.3d 198, 199 (5th Cir. 1993).

The appellate court should evaluate the sufficiency of the evidence as if counsel had moved for judgment of acquittal. Almaguer at *1; Rosalez-Orozco at 200. By analogy, this is what this Court should do herein – simply review this case as if trial counsel had properly made all of the arguments in this brief to the trial court. No evidentiary hearing is necessary because there is no possible strategic excuse.

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 sum, if this Court would have granted the defendant relief under a de novo standard of review on an issue, then the defendant was prejudiced.

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

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

The State failed to prove that the defendant conspired with the other co-defendants. The State failed to prove that the defendant committed first degree murder. The State failed to prove that the defendant committed a burglary with a weapon and abused three dead bodies.

No hair, fingerprints or semen were found at the murder scene. Nothing linked the defendant to the murder weapons. The defendant had a reasonable hypothesis of innocence that was not overcome.

ARGUMENT 7: THE TRIAL COURT ERRED IN REFUSING TO SEVER THE DEFENDANT'S TRIAL FROM THAT OF HIS CO-DEFENDANTS IN BOTH THE GUILT AND PENALTY PHASES

The defense filed a motion to sever the defendant's trial from that of his co-defendants [R. 570]. The trial court denied the motion [R. 590]. The trial court should have severed the defendant from his co-defendants in both the guilty and penalty phases of this case.

Allowing all of the co-defendants to be tried together prejudiced the defendant. Statements made by the co-defendants were allowed into evidence when said statements would not have been admissible against the defendant had he been tried alone. This resulted in evidence that was not able to be cross-examined, which deprived the defendant of a fair trial. See Bruton v. United States, 391 U.S. 123 (1968).

For example, the defense could not cross-examine Salas on what he said about the bats because it was the defendant that allegedly gave the bats to him. Tr. 2567.

The failure to sever also resulted in jury confusion given the mass of evidence presented in this case and the length of the trial. The defendants put forth

inconsistent and antagonistic defenses which deprived them of a fair trial because said defenses would be deemed inherently incredible by the jury and would be impossible for them to decipher. The defendant was also forced into testifying as a result.

Where a defendant accused his co-defendants of being solely responsible for the murders, where the trial court is aware of such a position, the trial court should grant the motion to sever. See Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981).

Even if the trial court properly refused to sever the defendant during the guilt phase, it erred when it did not give the defendant a separate and individualized penalty phase – where there would be no chance of confusion or distraction.

The convenience of trying co-defendants together is not in and of itself a sufficient reason to deny a motion to sever. See Miller v. State, 694 So.2d 884 (Fla. 2d DCA 1997); United States v. Donawali, 447 F.2d 940 (9th Cir. 1971).

ARGUMENT 8: THE TRIAL COURT ERRED WHEN IT ALLOWED THE CONJUNCTION AND/OR TO BE INSERTED BETWEEN THE DEFENDANT'S NAME AND THE NAME OF HIS CO-DEFENDANTS IN THE JURY INSTRUCTIONS

This argument was preserved by timely objection below. Even if there was not a proper objection, it is fundamental error.

The conjunction and/or between the names of co-defendants under circumstances like the case herein is error because it creates a situation in which the jury may have convicted a defendant solely upon a finding that the co-defendant's conduct satisfied an element of the offense. Brown v. State, 2007 WL 2316773 (Fla. 3d DCA, August 15, 2007); Harris v. State, 937 So.2d 211 (Fla. 3d DCA 2006); Davis v. State, 895 So.2d 1195 (Fla. 2d DCA 2005).

The defendant could have been convicted of murder, and the other crimes he was convicted of, based upon the intent and on the acts of Victorino and Salas. The State cannot prove that this was not the 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 assigned improper weights to the mitigating factors and improperly balanced the aggravating factors against the mitigating factors. The defense filed a sentencing memorandum, which is hereby incorporated by reference [R. 1550].

The trial court erred in giving the defendant's age only "some weight" as a

statutory mitigator [R. 1590]. See Section 921.141(6)(g). Similarly, the trial court gave "little weight" to the non-statutory factor of the level of the defendant's maturity [R. 1595]. This was error. The trial court should have given each of these factors, or the combination of these factors, at least "great weight."

The closer a defendant is to the cut-off for death eligibility, the weightier the age mitigator becomes. See Argument 11 below, which is hereby incorporated by reference. When you couple the fact that the defendant was barely 18, with the fact that he had the emotional maturity of someone even younger, the trial court should have assigned much more weight to these factors.

The United States Supreme Court has explicitly held that the age mitigator is to be given "great weight." Eddings v. Oklahoma, 455 U.S. 104, 116 (1982). This is especially true in the case at bar because the defendant, on an emotional level, was not even constitutionally eligible for the death penalty. The trial court should have applied at least great weight to these factors, standing alone or coupled together. See Bell v. State, 841 So.2d 329, 334-35 (Fla. 2003).

This court held in Ramirez v. State, 739 So.2d 568, 582 (Fla. 1999), that because there was no evidence of unusual maturity the trial court should not have assigned "little weight" to the age mitigator, especially since Ramirez's youth was linked not only with his intellectual and emotional immaturity, but also with his

unrebutted history of huffing. This situation is directly analogous to the case at bar.

The trial court also found that the defendant was under the substantial domination of Victorino. See Section 921.141(6)(e). Victorino was a violent bully who was twice the size of the defendant and also a repeat felony offender. Tr. 3865, 3869, 3889-93, 4048. The trial court assigned "some weight" to this factor [R. 1591-92].

The trial court found that the defendant exhibited good conduct during his incarceration and during trial, and gave each of these factors "little weight" [R. 1596-97].

The trial court assigned "little weight" to the fact that the defendant had no prior criminal activity. See Section 921.141(6)(a). The trial court should have found "some weight" or more, for this factor.

This crime was aberrant behavior for the defendant and a direct byproduct of his very young emotional age, and his substantial mental problems that allowed him to be led down this path by Victorino. The trial court also should have assigned more weight to the cumulative effect of the defendant's mental health problems and upbringing.

Assuming arguendo this Court upholds the weights the trial court assigned to the mitigators in this case – the trial court still misapprehended the legal effect of

the amount and extent of the mitigation.

The defendant's young emotional age and crippling mental health issues place the defendant in an unparalleled class of mitigation. The aggravating factors were substantial, but they were outweighed by the extreme mitigation in this case. The trial court came to the wrong legal conclusion when it held otherwise.

ARGUMENT 10: THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL

PRESERVATION

This issue was preserved for appellate review and therefore it is subject to de novo review [R. 636-661, 1995, 2005-06]. To the extent that this issue may not have been preserved for appellate review, the defendant received ineffective assistance of counsel.

It is not clear if trial counsel would even be required to raise this issue below, because the circuit court would have no authority over how this Court reviews its capital cases. Regardless, the defendant should not be penalized for his

trial attorney's oversight and this Court should review this issue de novo. The defense had nothing to lose by making this challenge. See Argument 5 above.

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

CONSTITUTIONALITY

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

This Court must consider the totality of the circumstances and compare it with other capital cases. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. Woods at 990. See also Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003).[1]

[1] However, it appears that this Court has conducted proportionality reviews by comparing the number of aggravators to the number of mitigators. See Walker v. State, 957 So.2d 560, 585 (Fla. 2007) (cataloging and comparing cases by number of

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

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

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

All of this criteria must be utilized to achieve both statewide and national uniformity, to ensure that death is not "unusual," and to ensure that a death sentence is not arbitrary. The failure to engage in this multi-faceted analysis deprives every capital defendant of a meaningful proportionality review.

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aggravators and mitigators).

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

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

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

The ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme

Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 211.

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

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

If this Court increased the body of evidence in its proportionality review, as suggested above, it would reverse the sentence of death in this case. This case is not consistent within Florida. See Lanzafame v. State, 751 So.2d 628 (Fla. 4th DCA 1999) (no death sentence for first degree premeditated murder where the defendant, without provocation, hit the victim in the head with a baseball bat in excess of ten times).

This case is also not consistent with other states. See In re Elkins, 144

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

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

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

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

the Constitution, and in particular, the due process clause).

ARGUMENT 11: THE DEFENDANT'S SENTENCE OF DEATH WAS DISPROPORTIONATE

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

The arguments made in Argument 10 above are hereby incorporated by reference. If this Court declines to increase the extent of its proportionality review the sentence of death in this case is still disproportionate under this Court's existing review.

The sentence of death is internally inconsistent as compared to the co-defendants in this case and the sentence of death is externally inconsistent as compared to other cases.

CO-DEFENDANTS

Victorino was the leader of the group. He kicked the door down, was the mastermind, and the instigator of the murders. Victorino was sentenced to death. The defendant's sentence of death was disproportionate to the life sentences received by Michael Salas and Robert Cannon. The defendant had an equal role in the murders as compared to Salas and Cannon.

A co-defendant's sentence may be relevant to a proportionality analysis where the co-defendant is equally or more culpable. Cardona v. State, 641 So.2d 361, 365 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 468-69 (Fla. 1992); Hayes v. State, 581 So.2d 121, 127 (Fla. 1991); Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987).

Salas entered the home and killed with a baseball bat just like the defendant did. Tr. 2541-2543; 2906. The State itself proclaimed that they all killed everyone. Tr. 3870. The conduct of Salas was not differentiated by the State. Salas also had significant premeditation. Tr. 4118. Salas also murdered with a bat. Tr. 4567, 4570.

Salas pursued Roberto "Tito" Gonzalez back to the bedroom and hit him 20 or 30 times with a bat, disintegrating his skull. Tr. 4581-82. The prosecutor himself summarized the issue:

> All that's left is you look at the comparisons . . . [the defendant] was engaged in or an accomplice to a burglary. . .your verdict has already proven that. . . [c]old calculated. Heinous, atrocious, cruel. The same as Mr. Salas's. There's really not much difference between the two; they're even close in stature.

Tr. 4950.

Sentencing the defendant to death for the same exact conduct as Salas does not pass constitutional muster. This disproportionate 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.

"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 arbitrary and cannot stand.

OTHER FLORIDA CASES

In addition to being internally inconsistent, the sentence is disproportionate to death sentences in other cases. The statutory aggravators were offset by the unparalleled mitigating factors that are not present in other cases.

The first factor is the defendant's young age. The defendant is the youngest man on Florida's death row. The term man is used loosely since the defendant cannot even be legally entrusted with alcohol. The defendant was 66 days shy of being constitutionally ineligble for the death penalty [5/31/86 date of birth and 8/06/04 crimes].

The cases of Roper v. Simmons, 543 U.S. 551 (2005) (execution of individuals under 18 prohibited), and Urbin v. State, 714 So.2d 411, 418 (Fla. 1998) (the closer a defendant's age to where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes), warrant vacating the death sentence in this case. See also Henyard v. McDonough, 459 F.3d 1217, 1246-49 (11th Cir. 2006) (J. Barkett concurring).

This Court has held that for a defendant's young age to be considered a mitigating factor, it must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems. Hurst v. State, 819 So.2d 689, 698 (Fla. 2002). In the case at bar, the defendant's young age has been linked to both significant emotional immaturity and substantial mental problems.

The defendant has significant mental health issues. The defendant has untreated schizophrenia, elevated depression with suicidal ideation, paranoia, and

brain damage. The defendant hallucinates and communicates with people that do not exist.

The defendant's use of marijuana and alcohol exacerbated these problems. The defendant is only 18, but significantly, has an emotional maturity of much less than an 18 year-old. This places the defendant below the cut-off line for death eligible defendants and is virtually a dispositive mitigating factor. The defendant, for all practical purposes, is a child.

The defendant was physically abused as a child and a teenager and also witnessed domestic violence. Observing domestic violence has a well documented detrimental effect on children. D.D. v. Department of Children & Families, 773 So.2d 615, fn2 (Fla. 5th DCA 2000).

The defendant's young emotional age coupled with his significant mental health issues hindered his ability to conform his conduct to what is right and wrong. The trial court itself found that the defendant was under the substantial domination of Victorino, which further impaired the defendant's moral compass. In fact, the murders were senseless and would not be committed by any rational person.

The defendant expressed remorse and voluntarily confessed, and the confession was used against him at trial. He has no prior criminal record of any

kind. His actions were aberrant behavior. The defendant was a model prisoner throughout his incarceration and during the trial.

The trial court's failure to address each and every one of the above-listed mitigating factors, and assign them at least some weight, was legal error. All of the foregoing factors were established and should have been part of the sentencing equation.

The murders in these case were brutal, but the unique personal mitigating circumstances of the defendant render his death sentence disproportionate to other similarly situated defendants. A man is more than the worst thing he has ever done, especially when he is actually a child with substantial mental health issues.

This court held in Robertson v. State, 699 So.2d 1343 (Fla. 1997), that death was disproportionate even though the murder occurred during a burglary and it was heinous, atrocious or cruel, where the defendant was 19 at the time of the murder, he was impaired due to alcohol and drug use, he had a history of mental illness, and the murder was unplanned and senseless – the defendant murdered a young woman who befriended him. "This clearly is not one of the most aggravated and least mitigated murders for which the ultimate penalty is reserved." Id. at 1347.

Most of these factors are present in the case at bar, including the senselessness of killing 6 people because they kept some of a friend's belongings.

It is just not the act of a rational person.

Similarly, as in the case of Snipes v. State, 733 So.2d 1000, 1007-08 (Fla. 1999), the penalty of death was reversed because even though there were two aggravating circumstances, there was substantial mitigation in that the defendant was 17, he was sexually abused as a child, he abused drugs and alcohol at a young age, he had no prior violent history, he was raised in a dysfunctional, alcoholic family, he had positive personality traits, suffered from a personality disorder, he voluntarily confessed, he expressed remorse, and the state depended on his statements to obtain a conviction against him. This is also the case herein.

This court held in Offord v. State, 959 So.2d 187, 191 (Fla. 2007), that the sentence of death was disproportionate even though the trial court found that the murder was heinous, atrocious or cruel, where the defendant suffered from two serious mental illnesses, schizophrenia and bipolar disorder, that defendant's mental health significantly contributed to the murder, and that the murder was unaccompanied by any motivation such as pecuniary gain or avoiding arrest and without the aggravating circumstance of a prior violent felony.

In Crook v. State, 908 So.2d 350, 357-58 (Fla. 2005), this court held that the death sentence was not appropriate where the defendant was 20 years old, had substantial mental health mitigation, lacked any history of violent criminal

behavior, had a disadvantaged and abusive home and a substance abuse problem that aggravated his mental deficiencies. This is also the case herein.

This court held that death was disproportionate in Cooper v. State, 739 So.2d 82, 85-86 (Fla. 1999), where the defendant was 18, had a brutal childhood and suffered from brain damage, low intelligence, and mental illness. See also Hardy v. State, 716 So.2d 761, 766 (Fla. 1998) (death inappropriate where only aggravating factor was that victim was a law enforcement officer and defendant was 18 who has good behavior after he was arrested and had severe mental impairment from suicide attempt after the murder).

Lastly, and perhaps most significantly, a defendant who killed five people by dousing them with gasoline and lighting them on fire was given a life sentence because he was a paranoid schizophrenic and suffered from extreme mental illness. See Ferry v. State, 507 So.2d 1373 (Fla. 1987). In sum, the defendant's death sentence was disproportionate as compared to other cases.

ARGUMENT 12: FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL

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

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

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

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

determinations.

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

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

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

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

(C) The Florida Department of Corrections revision of its lethal injection protocols, promulgating "Execution by Lethal Injection Procedures",

signed by DOC Secretary James R. McDonough on August 16, 2006, and August 1, 2007;

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

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

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

i. Lack of supervision over personnel;

ii. Insufficient guidance to select personnel;

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

iv. Lack of a command structure over personnel;

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

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

vii. The current administration of lethal chemicals;

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

Final Report at p. 8-10.

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

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

Evidence not previously available to this Court when it decided Sims v. State, 754 So.2d 657 (Fla. 2000), and not considered by the Court in the cases, Hill v. State, 921 So. 2d 579 (Fla. 2006), Rutherford v. State, 926 So.2d 1100 (Fla.

2006) and Rolling v. State, 944 So.2d 176 (Fla. 2006), demonstrates that the existing procedure that the State of Florida uses in executions is unconstitutional in that there is an unduly high risk that the execution will inflict pain upon the defendant or otherwise go awry.

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

The dispostive standard on this issue should be whether the method of execution creates an unnecessary risk of suffering (as opposed to a substantial risk of the wanton infliction of pain). There are also other chemicals and procedures that can be used, as an alternative to Florida's current cocktail and procedures, which pose less risk of suffering. The least restrictive alternative is constitutionally required. Compare Baze v. Rees, 217 S.W.3d 207 (KY. 2007), *cert. granted*, 2007 WL 2075334 (U.S. Sup. Ct., September 25, 2007).

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.[2]

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[2] In Sims v. State, 754 So. 2d 657, 670 (Fla. 2000), this Court found that

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 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.

However, this Court's previous case law may not apply, because DOC cannot get it right, and amended their protocol again on August 1, 2007.

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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.

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 based upon a finding of probable cause by a grand jury and found by the jury beyond a reasonable doubt.

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

ultimate question of whether death shall be imposed.

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

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

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

F. The sentencing statute fails to provide a necessary standard for determining that aggravating circumstances "outweigh" mitigating factors, does not

define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravating circumstances. The jury instructions are unconstitutionally vague which results in inconsistent findings of death.

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

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

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

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 how the murder was committed and whether the victims felt any pain (because they were knocked unconscious with the first blow of the bat). 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-a-vis 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).

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 of the United States Constitution. As for the Florida Constitution (which provides more protection than its federal counterpart), the scheme violates, equal protection, due process clause and the proscription against cruel and unusual punishment.

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

ARGUMENT 15: 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. See Suggs v. State, 923 So.2d 419, 441 (Fla. 2005) (this court considers the cumulative effect of evidentiary errors and ineffective assistance claims together). 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.

All of the arguments in this brief are hereby incorporated by reference. If this Court finds that any issues presented in this brief were not sufficiently preserved for this Court's review, those holdings are hereby incorporated by reference as

well. 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, JERONE HUNTER, respectfully requests this Honorable Court to reverse his convictions and release him forthwith or remand for a new trial/penalty phase, or reduce his sentence to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 on this _____ day of October 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 _____ day of October 2007.

_____
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