IN THE SUPREME COURT OF FLORIDA

NORMAN B. MCKENZIE,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC07-2101
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The record on appeal comprises eight volumes. Volume I, II, and III contain 487 pages numbered consecutively. Beginning with Volume IV, the clerk began renumbering the 603 pages contained in Volumes IV, V, VI, VII, and VIII. Counsel will refer to the record on appeal using a Roman Numeral to designate the appropriate volume and Arabic numbers designating the pertinent page.

STATEMENT OF THE CASE

On October 17, 2006, the spring term grand jury, in and for St. Johns County, Florida, returned an indictment charging Norman Blake McKenzie, the appellant, with two counts of first-degree murder. (I 3-4) The indictment alleged that appellant killed Randy Wayne Peacock and Charles Frank Johnston by striking each with a hatchet and also by stabbing Peacock with a knife. The state filed its notice of intent to seek the death penalty on March 2, 2007. (I 12) On March 22, 2003, the Office of the Public Defender, Seventh Judicial Circuit, filed a notice of appearance as counsel for appellant. (I 16-19) On that same day, newly-appointed counsel filed a motion to continue the previously set pretrial and, in the process waived appellant's right to a speedy trial. (I 20-21) The grounds cited were that appellant had been transported to another county jail, and counsel had made no contact with appellant. Authorities subsequently transported appellant to the St. Johns County jail on May 14, 2007. On August 10, 2007 appointed counsel orally moved to continue the case. Appellant personally objected and refused to waive his speedy trial rights. (I 39-40)

Appellant subsequently chose to represent himself prior to trial. The trial court conducted a inquiry pursuant to ***Faretta v. California***, 422 U.S. 806 (1975). (III 385-437) The court found appellant competent to waive counsel. At

appellant's request, the trial court appointed the Office of the Public Defender as standby counsel. (III 436-37)

On August 20, 2007, this cause proceeded to a jury trial before the Honorable Wendy Burger. Following deliberations, the jury returned with verdicts of guilty as charged on both counts of murder in the first degree. (I 83-84)

Immediately after the verdict at the guilt phase, appellant accepted the trial court's offer of counsel for the penalty phase. (VI 380-81) The trial court appointed the Office of the Public Defender to represent appellant at the penalty phase, and counsel's motion for continuance was granted. (I 85; VI 382-403) Subsequently, appellant changed his mind and requested to represent himself which the trial court granted. The trial court appointed two lawyers at the Office of the Public Defender as standby counsel. (I 86; VII 407-37)

Following the penalty phase, the jury returned with a recommendation to the court that the death penalty be imposed for each of the two murders. Both counts were decided by a ten to two vote. (I 94-95) The trial court ordered a presentence investigation report. (I 163)

On August 27, 2007, the trial court held a perfunctory hearing pursuant to ***Spencer v. State***, 615 So.2d 688 (Fla. 1993). Appellant again denied the trial court's offer of counsel. Neither side presented any witnesses or evidence. (III

444-60)

The trial court utilized one order that set forth the findings of fact in support of the two death sentences imposed. (I 183-196) The court considered a total of three aggravating factors that had been proved by the state. The trial court found that:

> (1) Appellant had previously been convicted of another capital offense or of a felony involving the use of violence to some person [assigned great weight];
>
> (2) The crime was committed while appellant was engaged in the commission of the crime of robbery [assigned great weight];
>
> (3) The crime was committed for financial gain (the trial court concluded that this factor merged with the prior aggravating factor) [no added weight];
>
> (4) The crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification [great weight].

(I 185-190)

After considering all of the evidence, the trial court rejected appellant's contention that he committed the murders while under the influence of extreme mental or emotional disturbance, specifically that he was high on cocaine at the time. (I 190-91) The trial court considered seven nonstatutory mitigating circumstances. The court found that the evidence reasonably established the

following circumstances:

> (1) Appellant suffers from cocaine addiction [little weight];
>
> (2) Appellant suffered abuse as a child [little weight];
>
> (3) Appellant displayed good behavior during the course of all court proceedings [some weight];
>
> (4) Appellant expressed remorse [some weight];
>
> (5) Appellant cooperated with police and was instrumental during his own conviction [some weight];
>
> (6) Appellant was gainfully employed and earned substantial income at the time of the crimes [very little weight];
>
> (7) Appellant is currently serving a sentence of life in prison and will never be paroled [little weight].

(I 191-194)

On October 30, 2007, appellant filed a timely notice of appeal. (II 328) This brief follows.

STATEMENT OF THE FACTS

The two victims in this case, Randy Peacock and Charlie Johnston, shared a home in a small neighborhood tucked away in a wooded area in St. Johns County, Florida. Charlie Johnston was retired. Randy Peacock, age forty-nine, worked in the pulmonary function lab at Flagler Hospital. On October 5, 2006, Peacock failed to show up for his 7:00 a.m. shift at the hospital. (II 2 135-140) Peacock's co-workers were unsuccessful in their attempts to reach him on his home phone as well as his cellular phone. (II 137) They also tried, without success, to reach Charlie Johnston, Peacock's roommate. (II 138-139) Since it was highly unusual for Peacock to miss work, Perry Privette and Julie Aubrey, two of his co-workers, drove out to his home during their lunch hour. (II 135-139) They noticed that Peacock's green, Chrysler, convertible was nowhere in sight. (II 139-141)

Privette and Aubrey knocked loudly on both the front and back doors without response. They also looked for Peacock in the converted garage out back. They found no one. (II 141-43) As they left the garage, several dogs ran up to them. Finding this peculiar, Peacock tried the back door and found it unlocked. (II 144) They found that lights, a television, and a computer had been left on.

They discovered the body of Randy Peacock on the floor of the kitchen. (II 144-146) Because of his medical training, Privette could tell immediately that

Peacock was dead. (II 146) Fearing that the assailant might still be in the house, Privette and Aubrey left the house and called 911. (II 146-149)

Police responded to the scene and found Peacock dead in the kitchen. They found Charlie Johnston dead in a shed located right behind the back porch area of the house. Law enforcement secured the crime scene. (II 175-180)

Police interviewed neighbors during their investigation. Prior to their murders, Peacock's and Johnston's next-door neighbor, Patrick Michael Anderson, had been working on Johnston's car. On October 4, 2006, Anderson went to his neighbors' house to finish the brake job that he had started the day before. (II 164-166) When Anderson arrived that day, Johnston was not home. Peacock was there and the appellant was visiting. (II 166-170) Appellant and Peacock were talking as they stood under the carport sometime between 4:30 and 7:00 p.m. (II 170) The next day, Anderson learned that Peacock and Johnston had been murdered. (II 170-171) Police subsequently showed a photographic array to Anderson. Anderson identified appellant as the man he saw conversing with Peacock that afternoon. (II 171-173) Appellant then became the focus of the investigation.

Appellant's Confessions

Appellant was subsequently arrested for offenses committed in other parts of the state. On October 5, 2006, appellant gave a statement at the Citrus County

Sheriff's Office in Inverness, Florida. (V 209) After waiving his constitutional rights, appellant explained the events of October 4, 2006. Appellant arrived at Johnston's house near dusk. When he arrived, Randy Peacock was home, but Johnston was in town getting an automobile part. Mr. Anderson, a neighbor was working on Johnston's car. Johnston returned around dusk. Mr. Anderson eventually went home, leaving appellant alone with Peacock and Johnston. (V 209-12)

Appellant explained that he had gone to Charlie and Randy's house "because of his addiction."[1] (V 212) Appellant asked Johnston for a hammer and a block of wood to hammer out a dent in his Kia that he had driven to the house. Johnston did not have a hammer, but gave appellant a hatchet instead. (V 212) Appellant then struck Johnston in the head using the blade side of the hatchet. Appellant struck Johnston several times. (V 213) Johnston fell into the shelving and caused a loud noise. (V 213-14)

Appellant returned to the house where he walked up behind Randy Peacock, who was standing at the stove. Appellant stuck Peacock in the back of the head approximately three times using the blunt side of the hatchet. After Peacock was on the floor, appellant returned to the shed where he removed Johnston's wallet

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[1] Appellant was addicted to cocaine.

from his person. (V 214) When appellant returned to the house, he found Peacock staggering up on his feet. Believing that Peacock might have been blinded from the earlier trauma to the head, appellant grabbed a butcher knife from the kitchen counter and stabbed Peacock multiple times. Appellant stabbed him once in the rib cage, once to the neck, and once in the stomach using an upward motion in an attempt to hit a major organ. (V 215) Appellant then located Peacock's wallet in a small lunch box in the dining room area. Taking both wallets and leaving his Kia behind, appellant left in Peacock's car.

On February 6, 2007, two detectives from the St. Johns County Sheriff's Department interviewed the appellant. After waiving his constitutional rights, appellant gave a second statement. He explained that he went to the residence on October 4, 2006, with the intent of borrowing money from Charles Johnston. (V 192-95) When appellant arrived at the house, Patrick Anderson was there working on a car. Anderson left sometime before dark. (V 195-96) Appellant asked Johnston for a hammer and a block of wood to knock a dent out of the side door of his automobile. Johnston could not locate a hammer, so he gave appellant a hatchet instead. When they went to the shed to get a block of wood, appellant struck Johnston in the head with the blunt end of the hatchet. (V 196-97) Johnston fell into some shelving inside the shed before falling down. (V 196) Appellant

struck Johnston one or two more times before leaving the shed. (V 196-97)

Appellant entered the house where Peacock was cooking in the kitchen. Appellant hit Peacock in the back of the head with the same blunt side of the hatchet. (V 197) Appellant became concerned that the attacks were audible to an elderly woman who lived in a small cottage on the property. (V 197)

After attacking Peacock in the kitchen, appellant went back to the shed where he found Johnston still alive and moving. He used the hatchet to strike Johnston a couple more times. Appellant then retrieved Johnston's wallet which was in his pants pocket. Appellant placed the hatchet on top of a bucket inside the shed and returned to the house. (V 197-98)[2]

When appellant returned to the kitchen, he was surprised to see Peacock attempting to stand up. Appellant grabbed a butcher knife from the kitchen drainer on the counter and stabbed Peacock with it two, possibly three times. (V 199) Appellant explained that he was trying to stab Peacock's jugular vein. When he did not see much blood, he assumed that he had missed the jugular. He then began an attempt to stab Peacock in the heart. He also stabbed Peacock in the stomach, in an upward motion, attempting to strike his heart. (V 200) After stabbing Peacock, appellant searched for and found Peacock's wallet in a lunch box in the

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[2] Authorities later found the hatchet exactly where appellant had left it. (V

dining room. Appellant then took Peacock's keys and drove away in Peacock's automobile.[3] (V 201) Prior to leaving the house, appellant washed the butcher knife and placed it in the kitchen sink where authorities later recovered it. (V 202)

The Autopsies

An autopsy revealed that Randy Peacock suffered six stab wounds to the chest, abdomen, back, and neck. These wounds caused extensive bleeding and blood loss which Dr. Steiner cited as the cause of death. A contributory cause of death were the four areas of blunt trauma to the back of Peacock's head. These blows to the head fractured Peacock's skull and caused swelling of the brain. (VI 278-79) Dr. Steiner concluded that Peacock's death was the result of a homicide. (VI 279) While all the wounds were inflicted while Peacock was still alive, the doctor could not determine whether Peacock was conscious or not. (VI 280)

An autopsy of Charles Johnston revealed extensive trauma to the head caused by four chop wounds to the front of the head. The wounds cut through the skin, crushed the underlying tissue, and fractured the skull in six to eight places. This caused extensive damage to the brain. The resulting massive head trauma caused Johnston's death. (VI 288-92) Dr. Steiner testified that it was almost impossible to determine the order of the infliction of the various wounds to each

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198)

victim. (VI 289) Johnston would have lost consciousness before eventually dying. (VI 292)

Penalty Phase

Appellant presented no witnesses at the subsequent penalty phase. The trial court allowed appellant to introduce bank records immediately prior to his closing argument at the penalty phase. The records indicated large withdrawals from his checking account in the weeks leading up to the murders. Appellant offered this evidence ostensibly to show that his cocaine addiction was draining his finances. Appellant sought to prove that his cocaine addiction caused him to act without thinking.

The state introduced judgments and sentences establishing appellant's several prior violent felony convictions. The state also recalled Timothy Rollins, a law enforcement officer who elicited appellant's October 5, 2006 statement. On that date, appellant told Rollins that he went to the victims' house that day with the intent to kill them for money. (VIII 517-30)

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[3] Peacock's car was later recovered in Alachua County. (V 201)

Victim Impact Evidence

The state also presented victim impact evidence. By all accounts, Charlie Johnston was a wonderful father to his daughter and son. He went out of his way to make their childhoods something very special. He was also a very good friend to those around him. Johnston's daughter called him the most giving, understanding, nonjudgmental, and kind-hearted person one could ever hope to meet. (VIII 530-35)

Randy Peacock's sister described him as very loving and tender hearted. Because of his nature, Peacock was an ideal caregiver. He worked as a respiratory therapist for more than twenty years and was a favorite of the hospital patients. He meant the world to his five brothers and sisters as well as his numerous nieces and nephews. Randy's younger brother, Len, had mental and emotional problems. Randy had served as Len's primary caregiver since 1987. He provided complete support, including food, clothing, shelter, and medical attention.

Randy's sister described her irrational guilt for her failure to sense Randy's murder that fateful day. She had called Randy after his murder, but before his body had been discovered.

Randy had a plan to retire in ten years at the age of sixty so that he could travel with Charlie Johnston, who was not in the best of health. Randy's sister

described her anger over Randy's death. She also described how she scattered the ashes of Randy and Charlie in Jackson Lake at Grand Teton National Park. (VIII 535-40)

SUMMARY OF THE ARGUMENT

Appellant represented himself throughout the proceedings below. He was dissatisfied with his court-appointed lawyers because they waived his speedy trial rights when they requested a continuance prior to any communication with the appellant. After complaining on several occasions about his court-appointed lawyers' waiver of his right to speedy trial, appellant asked to be allowed to represent himself. After conducting a ***Faretta***[4] inquiry, the trial court granted appellant's request. The trial proceeded with the appellant *pro se* and the two lawyers from the Office of the Public Defender acting as standby counsel.

Appellant submits that the inquiry pursuant to ***Faretta*** was insufficient. Specifically, the trial court failed to explore the appellant's experience with the criminal justice system. Other than determining that appellant had never represented himself during a legal proceeding. The trial court's inquiry on this subject matter was nonexistent.

Appellant also contends that the trial court limited his right to counsel. Specifically, the trial court appointed standby counsel to assist appellant's *pro se* venture. Nevertheless, the trial court improperly restricted standby counsel from helping appellant during the charge conference. Standby counsel's participation

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[4] ***Faretta v. Sate***, 422 U.S. 806 (1975).

and assistance was undoubtedly chilled throughout the proceedings below.

Additionally, it is clear from the record that appellant was dissatisfied with his trial counsel's performance. This was the only reason that he requested to represent himself. The trial court's inquiry pursuant to ***Nelson v. State***, 274 So 2d 256 (Fla. 1973), on trial counsel's deficient performance was also inadequate.

Fundamental error occurred when the trial court *sua sponte* excused juror Schultz for cause. In addition to departing from the neutral position that a trial court should maintain at all times, the cause challenge was not supported by the record on appeal. Ms. Schultz testified under oath that she could consider either a life sentence or a death sentence. She did not hesitate nor equivocate. Her cause for excusal was unwarranted.

Additionally, appellant contends that the trial court committed reversible error by writing one sentencing order containing findings of fact as to both first-degree murders and resulting death sentences. Although the trial court discussed the individual facts relating to each of the two murders, the trial court did so in one seamless order. Appellant contends that this lack of individualized sentencing in the death penalty context violates Eighth Amendment to the United States Constitution as well as the Constitution of the State of Florida.

Only three aggravating circumstances were found and weighed by the trial

court. Two of these are present in almost every first-degree murder. The mitigation found and weighed by the trial court was substantial. A proper weighing of the mitigating circumstances against the aggravating factors should result in two life sentences without possibility of parole.

Finally, appellant challenges Florida's death-sentencing scheme as unconstitutional. The procedure violates ***Ring v. Arizona***, 536 U.S. 584 (2002), and the Eighth Amendment to the United States Constitution. Appellant recognizes the futility of raising this issue in this Court, but feels compelled in an effort to avoid procedural bar.

ARGUMENTS

POINT I

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT EXCUSED POTENTIAL JUROR IRENA SCHULTZ FOR CAUSE IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY A NEUTRAL MAGISTRATE.

Juror number 246, Irena Schultz, is the wife of a retired police officer in New York. The couple had five children ranging in age from thirteen to thirty. Ms. Schultz revealed in voir dire that one of her five children had been killed as a result of a criminal offense approximately seven months prior to appellant's trial. (I 31) Ms. Schultz also revealed that her oldest daughter had spent five years in the military as a police officer in Germany. Ms. Schultz worked a few hours a week outside the home trying to learn about interior design. (I 31-32)

Subsequently, the prosecutor asked Ms. Schultz how she felt about the death penalty.

> MS. SCHULTZ: I would be able to vote for either one of them.
>
> MS. COREY [prosecutor]: You will?
>
> MS. SCHULTZ: Yeah.
>
> MS. COREY: And can you be fair and impartial to this defendant, even though you've just suffered

> the loss of one of your children?
>
> MS. SCHULTZ: Uh-huh.
>
> MS. COREY: I need you to answer out loud because our court reporter has to take it down.
>
> MS. SCHULTZ: Yes, I will.

(I 80-81) Appellant conducted his own *pro se* voir dire and further questioned Ms. Schultz:

> MR. McKENZIE [appellant]: As painful as it may be, ma'am, I need to ask you a question, okay? The child that you lost, was it a victim or a suspect?
>
> MS. SCHULTZ: A victim.
>
> MR. McKENZIE: Okay, thank you.
>
> MS. COREY: I didn't hear Ms. Schultz.
>
> THE COURT: She said victim.

(I 92) At the conclusion of the questioning of the panel, the parties conducted individual and sequestered voir dire of four potential jurors who indicated knowledge of the case through the media. (I 93-101) Ms. Schultz was not one of those. The trial court then entertained challenges for cause. The state successfully challenged Ms. Richards and Mr. Banta, apparently based upon their attitude about the death penalty. When asked by the trial court, appellant stated he had no objection to Richards and Banta being excused for cause. Appellant then

challenged Mr. Clayton for cause, to which the state had no objection. (I 102-103) The state then exercised a peremptory challenge on Mr. Pellicer. Then it was appellant's turn:

> THE COURT: Okay. Mr. McKenzie, do you have any additional strikes through Mr. Neal?
>
> MR. McKENZIE: No, ma'am, I don't.
>
> THE COURT: Okay. So then that would bring up Mr. Rhodes. Does the State have any objections to, I guess it would be Mr. King, Ms. Schultz, Ms. Lake, Mr. Barry, Ms. Davis, Ms. Green, Mr. Reames, Mr. Sweet, Ms. Brooks, Mr. Parsons, Mr. Neal, Mr. Rhodes?
>
> MS. COREY: Your Honor, we're concerned about Ms. Schultz, based on her loss of her son as a murder victim, so --
>
> THE COURT: That's true.
>
> MS. COREY: -- I think we're going to go --
>
> THE COURT: **I'm going to strike her for cause. Although she indicated that she could be fair, she has a child that was recently murdered, and I'm going to strike her.**
>
> MS. COREY: We're fine then, Your Honor.
>
> THE COURT: Then that brings in Ms. Normington.
> MS. COREY: Yes, ma'am.
>
> THE COURT: Any objections?

MS. COREY: No, ma'am.

THE COURT: Mr. McKenzie, any objections or any strikes for now? We've got Mr. King, Ms. Lake, Mr. Barry, Ms. Davis, Ms. Green, Mr. Reames, Mr. Sweet, Ms. Brooks, Mr. Parsons, Mr. Neal, Mr. Rhodes, and Ms. Normington.

MR. McKENZIE: No, ma'am, no objections.

THE COURT: No objection? Okay. How many alternate jurors do we need?

(I 104-105)(Emphasis added.)

A. THE TRIAL COURT DEPARTED FROM ITS NEUTRAL POSITION BY THE *SUA SPONTE* EXCUSAL FOR CAUSE OF JUROR SCHULTZ.

It is clear from the portion of the record quoted above that the trial court departed from her neutral role as an unbiased magistrate. Appellant was given a chance to challenge potential jurors for cause. Appellant chose to successfully challenge Juror Clayton for cause. Appellant pointedly declined the trial court's offer to challenge any other jurors, including Ms. Schultz, for cause. Before the state could raise a cause challenge of juror Schultz, the trial court elected to *sua sponte* excuse Schultz. In doing so, the trial court crossed the line and became an advocate for the prosecution.

The trial court should always remain neutral in all matters. "The requirement of judicial impartiality is at the core of our system of criminal justice."

McFadden v. State, 732 So.2d 1180, 1184 (Fla. 4th DCA 1999). "[T]he trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving 'tips' to either side." ***Evans v. State***, 831 So.2d 808, 811 (Fla. 4th DCA 2002) (quoting ***Chastine v. Broome***, 629 So.2d 293, 295 (Fla. 4th DCA 1993)). In these and other cases, the trial court departed from its position of neutrality by prompting the State to present evidence to prove the offense alleged. ***See also Lyles v. State***, 742 So.2d 842, 843 (Fla. 2d DCA 1999); ***Lee v. State***, 789 So.2d 1105, 1107 (Fla. 4th DCA 2001); ***Asbury v. State***, 765 So.2d 965, 966 (Fla. 4th DCA 2000); ***Sparks v. State***, 740 So.2d 33, 36-37 (Fla. 1st DCA 1999). "When [judicial] neutrality is breached, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict." ***Simmons v. State,*** 803 So.2d 787, 789 (Fla. 1st DCA 2001). ***Lyles*** and ***Sparks*** went so far as to treat a departure from judicial neutrality as fundamental error.

It remains unclear why the trial court, and perhaps the prosecutor, wanted Ms. Schultz excused. The record does not reflect her race nor ethnicity. Their reason is of little importance. The fact remains that the trial court departed from its neutral position and became an advocate for the state. ***See e.g., Webb v. State***, 454 So.2d 616 (Fla. 5th DCA 1984). Justice requires a new trial.

B. The record on appeal does not justify the granting of a challenge for cause on Juror Schultz.

Although the trial court excused Juror Schultz for cause, the record on appeal does not support the cause challenge. Juror Schultz testified under oath that she could consider both a death sentence as well as a life sentence. She did not hesitate nor vacillate. There was simply no basis for either side to pose a successful challenge for cause.

The validity of a cause challenge is a mixed question of law and fact, on which a trial court's ruling will be overturned only for "manifest error." ***Fernandez v. State,*** 730 So.2d 277, 281 (Fla.1999). "Manifest error" is tantamount to an abuse of discretion. ***See Kimbrough v. State***, 700 So.2d 634, 638-39 (Fla.1997) (stating that court's determination of juror's competency "will not be overturned absent manifest error" and concluding that trial court did not abuse its discretion in excusing a juror for cause). "The trial judge has the duty to decide if a challenge for cause is proper, and this Court must give deference to the judge's determination of a prospective juror's qualifications." ***Castro v. State***, 644 So.2d 987, 989 (Fla.1994) (citing ***Wainwright v. Witt***, 469 U.S. 412, 426, (1985).

A potential juror may be excused "for cause" if the juror has a state of mind regarding the case "that will prevent the juror from acting with impartiality." § 913.03(10), Fla. Stat. (2006). In a capital case, this standard is met if a juror's

views on the death penalty "prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions or oath." ***Fernandez***, 730 So.2d at 281. "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." ***Ault v. State***, 866 So.2d 674, 683 (Fla.2003).

Juror Schultz was qualified to serve on appellant's jury. She readily admitted that she could consider both potential sentences (death or life). She did not equivocate. The trial court committed reversible error by *sua sponte* excusing Ms. Schultz. This Court should reverse and remand for a new trial.

POINT II

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT'S RULINGS DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHTS.

A. Background

Appellant was disgruntled with his appointed counsel prior to even meeting them. At appellant's first appearance on February 7, 2007, appellant was found not indigent, and he stated that he would attempt to hire his own lawyer. (I 8) At the earliest opportunity, appellant announced his displeasure at appointed counsel's waiver of speedy trial prior to meeting or consulting with him. Appellant had been in custody in Gainesville, Florida prior to his transport to St. John's County to face these charges. Appointed counsel waived appellant's right to speedy trial prior to appellant's transport. This fact, combined with a disagreement on trial strategy and his desire to expedite the proceedings despite the outcome, led appellant to request that he be allowed to represent himself. The trial court proceeded with the ***Faretta*** inquiry. (III 385-437)

B. The *Faretta* Inquiry was Inadequate.

The trial court advised appellant of his right to counsel, the advantages of

having counsel, the disadvantages and dangers of proceeding without counsel, the nature of the charges and the possible consequences in the event of a conviction. The trial court also inquired about appellant's background, education, and mental history. Appellant reiterated that he "absolutely" wanted to represent himself. Although the trial court covered most of the appropriate areas required for a proper ***Faretta*** inquiry, the trial court omitted a critical area. The trial court failed to inquire about appellant's experience with the criminal justice system. The only exchange on this subject was:

> THE COURT: Do you understand that a lawyer appointed by the court will represent you for free?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Have you ever represented yourself in a trial?
>
> THE DEFENDANT: No, ma'am, I haven't.

(III 435) Although it may seem trivial, a *pro se* litigant's experience with the court system is part of the requisite inquiry. ***Hardwick v. State***, 521 So.2d 1071(Fla. 1988)[Appropriate inquiry includes lack of knowledge or experience in criminal proceedings.] ***See also Johnston v. State***, 497 So.2d 863, 868(Fla. 1986). Because the ***Faretta*** inquiry was deficient, this case should be reversed and remanded for a new trial.

C. Appellant's Sixth Amendment Rights were Violated when the Trial Court Illegally Restricted the Role of Standby Counsel.

Appellant did accept the trial court's offer of standby counsel. The court pointed out that standby counsel would be available "to you if you had any questions during the course of these proceedings." (III 436) The court warned appellant that he would be responsible for the organization, content, and presentation of his case. Appellant understood that he had responsibility for his own defense. The trial court pointed out that standby counsel would not act as paralegals or secretarys.

In spite of the prior promise, the trial court chastised standby counsel, when standby counsel attempted to help appellant during the course of the trial. During the charge conference at the penalty phase, the trial court and the prosecutor were running roughshod over the *pro se* appellant. In an apparent attempt to come to his aid, standby counsel obviously urged appellant to object to some of the jury instructions:

> MR. McKENZIE: Your Honor, I'd like to go on record saying that other than what I've already agreed to, I am unable to agree to the remaining jury instructions and jury recommendations.
>
> THE COURT: Okay. Why?
>
> MR. McKENZIE: Because it's a death penalty case.

THE COURT: All right. Because it's a death penalty case, you don't agree to the other standard instructions?

MR. McKENZIE: I just want to -- I have an objection in there, Your Honor.

THE COURT: Why is that your objection, though? What's your legal basis for that?

MR. McKENZIE: Well, the things I've asked about, I've wanted -- you did agree to review (b), which is number two, right, tonight?

THE COURT: Well, I'm not going to make any --I'm not going to agree to anything until I --including the State's -- on exactly what's going to -- the State's indicated what they believe they're going to prove up. You've told me what you think you're going to prove up. And I will read to the jury what I believe has been proven at the close of the evidence tomorrow. I'll make my ultimate decision on what instruction -- what mitigators and what aggravators are going to be given. Right now we're going through them based on, you know, what the evidence is showing.

(VII 496-92) At this juncture, appellant apparently looked to standby counsel for help:

MR. McKENZIE: Okay. I just -- I have no –

THE COURT: **He has to ask for your assistance**. **He's not entitled to dual representation. He's not entitled**. **He's representing himself. He's asked to represent himself. And if he has a question for standby counsel, he'll ask you a question, but –**

MR. McKENZIE: Well, I have this already written down, Your Honor, you know, and I had planned to say

these words, and he's --

THE COURT: I understand. **If you have a question, you ask your standby counsel questions, but --**

MR. McKENZIE: I really have nothing else to add to it.

(VII 497-98)(Emphasis added.) Appellant obviously was concerned that he might have angered the trial judge. After clarifying his "objections", appellant offered an apology:

MR. McKENZIE: I'm sorry if there was a misunderstanding.
THE COURT: No, I just wanted to make sure it was clear for the record what you were objecting to.
MR. McKENZIE: Okay.

(VII 502)

A *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the ***Faretta*** right. Most of the case law on this subject deals with standby counsel's participation over the defendant's objection, not the trial court's. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the ***Faretta*** right is eroded. ***McKaskie v. Wiggins,*** 465 U.S. 168(1984). Second, participation by

standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy. ***Id.*** at 178. The Supreme Court also recognized that excessive involvement of standby counsel in front of the jury "will destroy the appearance that the defendant is acting pro se. This, in turn, may erode the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his own most effective defense." ***Id***. at 181-82.

The Supreme Court has acknowledged that "a State may ... appoint 'stand-by counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that the termination of the defendant's self-representation is necessary." ***Faretta v.California***, 422 U.S. 806, 834 n.46 (citing ***United States v.Dougherty***, 473 F. 2d 1113, 1124-26 (D.C. Cir. 1972)).

In the instant case, appellant requested to proceed *pro se*, but happily accepted the trial court's offer of standby counsel. However, the trial court subsequently instructed standby counsel to refrain from affirmatively offering

assistance to appellant in his defense. Specifically, the trial court put limitations on standby counsel's aid to appellant. The trial court clearly interrupted standby counsel's communication with appellant. The fact that this limitation of appellant's Sixth Amendment right occurred during the charge conference, outside the presence of the jury, is even more offensive. Appellant went to trial *pro se* secure in his knowledge that he would have help from standby counsel available. Such was not the case. Waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See ***Faretta***, 422 U.S. at 836; ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938); ***Fitzpatrick v. Wainwright***, 800 F.2d 1057, 1065-67 (11th Cir. 1986); ***United States v. Fant***, 890 F.2d 408, 409-10 (11th Cir. 1989). To later be deprived of such assistance negates his waiver of counsel. A limitation of this kind, without prior knowledge of the *pro se* defendant, without notice, and without an opportunity to be heard, particularly considering the defendant's pro se counsel status, failed to accord the most minimal requirements of eighth and fourteenth amendment due process, ***see Fuentes v.Shevin***, 407 U.S. 67 (1972), and, in a matter respecting counsel, those of the Sixth and Fourteenth Amendments. ***See generally Geders v. U.S.***, 425 U.S. 80 (1983); ***McKaskle v. Wiggins***, 465 U.S. 168, 174(1984) ("The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his

defense,' implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial.") (emphasis in original). While it may not be inherent in the Sixth Amendment that a *pro se* defendant has a fundamental right to the assistance of counsel, once the court appointed standby counsel to assist the defendant, a constitutionally protected right was created.

Appellant does not concede that the constitution neglects to provide a right to standby counsel. In fact, appellant asserts that, as a capital defendant, he had a constitutionally protected right to the assistance of standby counsel. The United States Supreme Court has repeatedly recognized that defendants facing a death sentence have heightened rights due to the finality and severity of a death sentence. ***See, e.g., Beck v. Alabama***, 447 U.S. 625 (1980); ***Eddings v. Oklahoma***, 455 U.S. 104 (1982). Sentencing a *pro se* defendant to death when he did not have the assistance of standby counsel, violates the Sixth, Eighth, and Fourteenth Amendments. ***See generally Woodson v. North Carolina***, 428 U.S. 280 (1976); ***Furman v. Georgia***, 408 U.S. 238 (1972). Cases assessing standby counsel's unsolicited participation have held that trial courts should allow standby counsel to participate even when the *pro se* defendant has not specifically requested such participation. ***See McKaskle***, 465 U.S. at 176. [N]o absolute bar on standby counsel's unsolicited participation is appropriate or intended. The right to appear

pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. These objectives can be achieved without categorically silencing standby counsel. ***See id.*** at 176-77. Such error is prejudicial per se. ***Perry v. Leeke***, 488 U.S. 272, 277 (1989) ("A showing of prejudice is not an essential component of a violation of the rule announced in ***Geders.***"); ***Crutchfield v.Wainwright***, 803 F. 2d 1103, 1108 (11th Cir. 1986) ("[A]ny deprivation of assistance of counsel constitutes reversible error.").

D. The Trial Court's Failure to Conduct a Proper Nelson[5] Hearing Improperly Forced Appellant to Proceed *Pro Se*.

Appellant was unhappy with his lawyers before even meeting them. His main objection was appointed counsel's waiver of his speedy trial rights before it was necessary, and before they had met or communicated with him. His complaints were loud, numerous, and vociferous. It was at that juncture that he requested to represent himself. An example of appellant's complaints occurred during the ***Faretta*** inquiry:

> THE COURT: Let me tell you some ways a lawyer can help you at trial.
>
> THE DEFENDANT: Go.

---

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

THE COURT: A lawyer has the experience and knowledge of the entire process. A lawyer will argue for your side during the whole trial and present the best legal argument for your defense.

THE DEFENDANT: Okay. Right there. A lawyer will argue for my side. My side. Mine. What I want is how I take that, okay? This -- it's, it's, it's about me. What we're standing here, this proceeding here is about me, it's not about them, and that's how I take that sentence there. It's not about them, it's about me, and we're not connecting like that.

THE COURT: Okay. But you understand that those are some of the things that a lawyer may do at trial?

THE DEFENDANT: Yes, I do, and I, I -- like, I understand that, but I want it also pointed out on the record that I understand that third or fourth sentence to mean -- interpret the way I just told you.

THE COURT: That they have to do whatever you tell them to do.

THE DEFENDANT: No, I didn't say that. My interest.

THE COURT: They're look- -- they're your lawyers. They look out for your interest. They look out -- that is their job.

THE DEFENDANT: My interest. Not theirs.

THE COURT: Right.

THE DEFENDANT: Mine.

(III 420-21)

In dealing with an obviously distraught defendant, the trial court committed reversible error by failing to adequately explore appellant's complaints about his court-appointed lawyers. ***Nelson v. State***, 274 So.2d 256 (Fla. 4th DCA 1973). In doing so, the trial court unconstitutionally deprived appellant of his Sixth Amendment right to counsel.

Nelson established the procedure a trial court must follow, consistent with an indigent's right to effective representation, when a defendant expresses a desire to discharge court-appointed counsel prior to trial because of alleged incompetency. Nelson said:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his court-appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required

to appoint a substitute.

Id. at 258-59; ***see also Hardwick v. State***, 521 So.2d 1071, 1074-75 (Fla.1988) (adopting procedure of ***Nelson***).

If the court finds that the defendant does not have a legitimate complaint, then the court is required to advise the defendant that if his request to discharge is granted, the court is not required to appoint substitute counsel and that the defendant would be exercising his right to represent himself. ***Trease v. State***, 768 So.2d 1050, 1053 (Fla.2000) (citing ***Hardwick***, 521 So.2d at 1074). If a defendant continues to desire to discharge counsel, the court must determine whether the defendant is knowingly and intelligently waiving the right to court-appointed counsel, as required by ***Faretta v. California***, 422 U.S. 806 (1975). The failure to conduct a proper ***Nelson*** hearing is reversible error. See ***Johnson v. State***, 629 So.2d 1050, 1051 (Fla. 2d DCA 1993).

"Requests for self-representation and claims of ineffective assistance of court-appointed counsel present a real quagmire to the trial judges, who must deal with them. Such difficulties are understandable, since the case law in these areas is voluminous, complex, and at times downright inconsistent." ***Angela D. McCravy, Self-Representation and Ineffective Assistance of Counsel: How Trial Judges Can Find Their Way Through the Convoluted Legacy of Faretta and Nelson***, 71 Fla. B.J. 44, 44 (Oct.1997). Appellant is sure that this Court, "recognize[s] the

burden placed on a trial court by ***Nelson*** and ***Faretta*** when confronted by a defendant, who is often obstreperous, claiming ineffective assistance of court-appointed counsel." ***Jones v. State***, 658 So.2d 122, 126 (Fla. 2d DCA 1995). These tedious and time-consuming requirements can test the frustration and patience of the most experienced trial judge, particularly when the issue "comes on the day of trial and a jury venire of inconvenienced citizens is impatiently waiting in the courthouse for the jury selection process to begin." ***Id***. While there are no "magic words" necessary to properly conduct a ***Nelson*** or ***Faretta*** inquiry, the burden is on the trial court to strictly adhere to the requirements mandated therein. That was not done here. Appellant's trial court never adequately addressed appellant's main complaint, that his court-appointed lawyers waived his speedy trial rights prematurely, unnecessarily, and without his knowledge or consent.

Adherence to ***Nelson*** (and ***Faretta*** when appropriate), is mandatory. This Court must reverse appellant's convictions and remand for a new trial. The trial court failed to conduct an appropriate ***Nelson*** inquiry. As a result, appellant was forced to represent himself in contravention of his Sixth Amendment right to counsel.

POINT III

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE EIGHTH AMENDMENT AS WELL AS THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY IMPOSING TWO DEATH SENTENCES FOR TWO DISTINCT CAPITAL MURDERS WITHOUT AN INDIVIDUALIZED FINDING OF FACT FOR EACH SEPARATE MURDER.

The trial court rendered one written order containing the findings of fact in support of both death sentences. (I 183-196) Although the trial court discussed the individual facts relating to each of the two murders, the trial court did so in one seamless order. Appellant contends that this lack of individualized sentencing in a death penalty context violates the Eighth Amendment to the United States Constitution and Article I, Sections 9, 17 and 22, Constitution of the State of Florida.

In ***Bottosom v. Moore***, 833 So.2d 693, 706-7(Fla. 2002), Chief Justice Anstead wrote in his concurrence (in result only):

> The Ring decision essentially holds that the Sixth Amendment right to trial by jury mandates that a jury make the findings of fact necessary to impose the death sentence, and conversely, the Sixth Amendment precludes the imposition of the death sentence when the responsibility for such factfinding is done by a judge, as it is in Florida.
> Regardless of the jury's collective or individual advisory

> recommendation, Florida's death sentencing statute states that it is the trial court that "shall enter a sentence of life imprisonment or death." § 921.141(3), Fla. Stat. (2001). Further, and critical to the resolution of the Ring issue, our statute provides, "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the [aggravating and mitigating] circumstances ... and upon the records of the trial and the sentencing proceedings." Id. (emphasis supplied). Even in cases where the jury has given an advisory recommendation of death, "[i]f the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment." Id.

A trial court's written findings of fact regarding the aggravating and mitigating factors are critical to Florida's death-sentencing scheme. ***See, e.g., Cave v. State,*** 445 So.2d 341 (Fla 1984)[remanded to trial court to supplement the record with specific findings]; ***Van Royal v. State***, 497 So.2d 625, 628(Fla. 1986)[death sentence vacated; remanded for imposition to a life sentence]; ***Christopher v. State***, 583 So.2d 642, 646 (Fla. 1991)[trial court's failure to provide timely written findings compels remand for imposition of a life sentence]; ***See also Grossman v. State***, 525 So.2d 823 (Fla. 1988)[directing that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence.].

In Florida, the jury makes no findings of fact. ***See State v. Steele***, 921 So.2d

538(Fla. 2005). Instead, the jury provides only an advisory recommendation by a simple majority that need not be unanimous. As Chief Justice Anstead wrote in ***Bottoson v. Moore,*** 833 So.2d at 707-8:

> That Florida's sentencing scheme relies exclusively upon the findings of fact made by the trial judge is perhaps best evidenced by the hundreds of opinions this Court has rendered interpreting Florida's current death penalty scheme since the death penalty was reenacted into Florida law a quarter century ago. In those opinions this Court has consistently reviewed and relied on the factual findings of judges, rather than juries, to determine whether the death penalty was properly imposed. See, e.g., Morton v. State, 789 So.2d 324, 333 (Fla.2001) ("The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies.").

The trial court's action can be analogized to a jury returning one recommendation for two separate first-degree murders. As this Court pointed out in ***Pangburn v. State, 661 So.2d 1182 (Fla. 1995),*** Section 921.141, Florida Statutes clearly provides that a jury is to render an advisory sentence as it pertains to a single murder. When juries are asked to provide recommendations in penalty phase proceedings involving multiple counts of first-degree murder, those juries frequently render different recommendations for different counts. ***See LeCroy v. State***, 533 So.2d 750 (Fla. 1988) (two murders: one recommendation of death, one recommendation of life); ***Craig v. State***, 510 So.2d 857 (Fla. 1987), (same). The

Pangburn court pointed out that aggravating and mitigating circumstances that apply to one count may not apply to another. In ***Pangburn***, this Court found, as a matter of first impression, that, under Florida's scheme for imposing a sentence of death, a separate jury recommendation must be rendered for each count of first-degree murder being considered. "To hold otherwise would undermine our sentencing procedure in capital cases by allowing arbitrary and irrational results." ***Pangburn v. State***, 661 So.2d at 1188.

More recently, this Court reiterated the ***Pangburn*** holding in ***Snelgrove v. State***, 921 So.2d 560, 571(Fla. 2005):

> The potential for unreliability in the imposition of the death penalty is too great to subject general jury recommendations of death to harmless-error analysis. This is true for several reasons. First, as we explained in Pangburn, aggravating and mitigating circumstances that apply to one count may not apply to another, leading jurors on occasion to recommend death for one murder and life for another. See id. Second, in Florida, the judge and jury are considered cosentencers, see Kormondy v. State, 845 So.2d 41, 54 (Fla.2003), and a recommendation of life must be accorded great weight by the sentencing judge. See Tedder v. State, 322 So.2d 908, 910 (Fla.1975). Third, general sentences that do not distinguish between individual counts are prohibited in Florida. See Dorfman v. State, 351 So.2d 954, 957 (Fla.1977). General sentences create uncertainty because it cannot be determined that the same sentence would have been imposed if one of the crimes had not been committed. Therefore, if one conviction that is part of a general sentence is reversed, the entire sentence must be

> vacated. See id. This is a particularly trenchant concern in capital cases, in which a new penalty phase can be expensive and time-consuming. With an individual recommendation on each count, one death sentence may be affirmed even if another is reversed. See, e.g., Buckner v. State, 714 So.2d 384, 386 (Fla.1998) (affirming death sentence on one count and reversing death sentence on second count). Lastly, juries sometimes recommend the death penalty for multiple murders by a different vote on each count. The vote breakdown can be a useful consideration in determining whether error during the penalty phase is harmful and therefore reversible. See Mahn v. State, 714 So.2d 391, 398 (Fla.1998) (noting that death recommendation was by eight-to-four vote in holding error in finding cold, calculated, and premeditated aggravator was not harmless); Preston v. State, 564 So.2d 120, 123 (Fla.1990) (observing that jury recommended death by one-vote margin in reversing death sentence after prior conviction relied upon for aggravating factor was vacated). With no count-by-count vote breakdown, this aspect of our analysis is impossible.
>
> Because the potential for unreliability is so great in general recommendations for the imposition of the death penalty, we hold that a Pangburn violation is not subject to a harmless-error test. Rather, such an error requires per se reversal.

Appellant submits that the trial court's actions in considering the appropriate sentence for both first-degree murders in one sentencing order violates the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution. The United States Supreme Court has repeatedly held that a

capital sentence is cruel and unusual under the Eight Amendment if it is imposed without an individualized determination that that punishment is "appropriate"- whether or not the sentence is "grossly disproportionate. ***See Woodson v. North Carolina***, 428 US 280(1976); ***Lockett v. Ohio***, 438 US 586(1978); ***Eddings v. Oklahoma***, 455 US 104 (1982); and ***Hitchcock v. Dugger***, 481 US 393 (1987). The "individualized capital sentencing doctrine" has no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties. ***See Harmelin v. Michigan***, 501 US 957(1991)

Although the murders happened in close temporal proximity, there were clear differences in each. For example, appellant submits that the murder of Randy Peacock was much more premeditated than the murder of Johnston. Appellant attacked Johnston first, as soon as he had the hatchet in his hands. Appellant attacked Johnston, while Johnston was facing him. Appellant then walked several yards from the shed to the house where he attacked an unsuspecting Peacock from behind. After bludgeoning Peacock, appellant returned to the shed to check on Johnston who may have needed "finishing off." He then returned to the kitchen where Peacock had staggered to his feet. At that point, appellant sought an additional weapon, specifically a knife, which he then used to stab Peacock repeatedly. He finished the job with an upward, twisting thrust of the blade into

Peacock's abdomen trying to hit a major organ. All the while, appellant remained behind Peacock.

The recitation in the previous paragraph by undersigned counsel is certainly "above his pay grade." However, the trial court had a duty to individually assess each aggravating factor, especially the "heightened premeditation" circumstance, as it applied to each individual murder. By doing so in one, seamless finding of fact, the trial court abandoned its duty to individually weigh the evidence and act as a co-sentencer with the jury. The fact that each of the jury's recommendations was by an identical ten-to-two vote is of no import. This is especially true where the jury was almost completely unaware of the voluminous mitigating evidence found by the trial court.

POINT IV

THE DEATH SENTENCES ARE DISPROPORTIONATE DUE TO THE PECULIAR AND UNIQUE POSTURE OF THIS CASE.

The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. ***See Urbin v. State***, 714 So.2d 411 (Fla.1998); ***State v. Dixon,*** 283 So.2d 1 (Fla.1973). This Court's proportionality review rests upon recognition that death is a uniquely irrevocable penalty, requiring uniformity in its imposition. ***See Urbin***, 714 So.2d at 416-17; ***Sinclair v. State***, 657 So.2d 1138, 1142 (Fla.1995). Thus, this Court must undertake a qualitative review of 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. ***See Tillman v. State***, 591 So.2d 167 (Fla. 1991).

The trial court considered four aggravating factors. Two of these, financial gain and felony murder, merged into one aggravating factor, since the felony was robbery. The trial court correctly found that appellant had prior violent felony convictions. The heightened premeditation aggravator was the third aggravating factor found in support of both death sentences. (I 185-90)

In considering the applicable mitigating circumstances, the trial court candidly wrote:

> The Defendant presented no evidence at trial to suggest the presence of any statutory mitigating circumstance. However, during the separate sentencing hearing, the Defendant argued he was high on cocaine at the time he committed the offense. This Court has reviewed each statutory mitigating circumstance and finds that although no evidence was introduced during trial to support the existence of a statutory mitigating circumstance, the Defendant's argument at the Spencer hearing, that he was high on cocaine at the time the murders were committed, coupled with the bank records introduced by the Defendant during the penalty phase of the trial, is sufficient to entitle the Defendant to consideration by the Court of the following statutory mitigating circumstance:...

(I 190) The court then analyzed the sole statutory mitigating circumstance under consideration; that appellant was under the influence of extreme or emotional disturbance based on his use of cocaine and resulting addiction. (I 190-91) The trial court wrote:

> The fact that a Defendant was intoxicated or under the influence of narcotics can support establishment of this factor. See, Hollsworth v. State, 522 So.2d 348 (Fla. 1988). The Defendant called no witnesses during the guilt and penalty phases of his trial and chose not to take the stand in his own defense. During the penalty phase, he admitted a number of bank records into evidence. The bank records show that between July 3, 2006 and October 2, 2006, the Defendant was withdrawing large amounts of money. Without more, this evidence is insufficient to establish this mitigating circumstance. However, during the separate sentencing hearing, which was held on October 12, 2007, the Defendant argued to the Court that he was high on cocaine at the time the

> murders were committed. He also indicated that when he was arrested in Citrus County on the day after the homicides, he had just placed an eight-ball of cocaine in his mouth. Although Detective Burres testified that the Defendant told him he committed the offense due to his addiction, no additional evidence was presented during the course of the trial to corroborate the Defendant's argument that he was intoxicated at the time of the offense or that he was in possession of an eight-ball at the time of his arrest.
>
> The fact that the Defendant may wish to have this mitigating circumstance considered based on his statement to the court that he was intoxicated at the time he committed the murders, does not overcome the other evidence in the case that establishes in overwhelming fashion that the Defendant was in complete control of his faculties when these heinous crimes were committed.
>
> After carefully considering all the evidence in this case, as well as the Defendant's arguments regarding intoxication, the Court is not reasonably convinced that this mitigating circumstance was established by the evidence. Therefore, the Court finds this mitigating circumstance does not apply and gives it no weight.

(I 190-91) The trial court did find several nonstatutory mitigating circumstances applicable to the appellant:

> (1) Appellant suffers from cocaine addiction [little weight];
>
> (2) Appellant suffered abuse as a child [little weight];
> (3) Appellant displayed good behavior during the course of all court proceedings [some weight];
>
> (4) Appellant expressed remorse [some weight];

> (5) Appellant cooperated with police and was instrumental during his own conviction [some weight];
>
> (6) Appellant was gainfully employed and earned substantial income at the time of the crimes [very little weight];
>
> (7) Appellant is currently serving a sentence of life in prison and will never be paroled [little weight].

(I 191-94)

In finding the above mitigating circumstances, the trial court pointed out that appellant offered no testimony or witnesses during the penalty phase. Appellant did introduce bank records at his penalty phase. At the ***Spencer*** hearing, appellant presented additional argument about his drug addiction and read a prepared statement. (I 191) Although appellant did not ask the trial court to consider any specific nonstatutory mitigating factor, the trial court recognized its duty to consider all mitigating evidence found anywhere in the record regardless of whether it is advanced by the appellant. (I 191) Additionally, the trial court pointed out the state's concession that a number of mitigating circumstances did exist. (I 191-92)

Appellant points out that the jury was not aware of most of the valid mitigating evidence, much of it conceded by the state, found applicable by the trial court. In spite of that fact, at least of two jurors recommended life imprisonment

without parole over a death sentence in each of the two counts. One wonders what result might have been had with competent lawyering, proper mitigation investigation and presentation, and thoughtful dissection of the evidence in aggravation. Although appellant committed two senseless, brutal murders, his crimes are not the most aggravated and least mitigated in the universe of all first-degree murders. His crimes were the result of a severe drug addiction of which the jury heard little. Two of the three aggravating factors found and weighed by the trial court are present in most first-degree murders. The mitigation found by the trial court was quite substantial, even though appellant's *pro se* presentation of mitigating evidence was quite anemic. A proper weighing of the mitigation against the aggravation should result in two life sentences without possibility of parole.

POINT V

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.[6]

Appellant represented himself throughout the proceedings below. Elsewhere in this brief, appellant asserts that this was error. ***See Point II.*** Since appellant was *pro se*, he filed no pretrial motions challenging the constitutionality of Florida's death sentencing scheme. As such, appellant is convinced that the state will contend that this issue is not preserved and is procedurally barred. Appellant begs to differ. This Court has repeatedly rejected this type of challenge, especially in cases such as this, where appellant was convicted of an additional count of first-degree murder. However, appellant submits that Florida's death sentencing scheme is inherently flawed and that any challenges appellant might have made below would have been soundly rejected. The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** was the responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional

questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

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

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined

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[6] ***Ring v. Arizona***, 436 US 584(2002).

that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances. Additionally, this particular case is somewhat unique due to the fact that the jury was unaware of most of the mitigating evidence that was subsequently considered and found by the trial court. In that respect, the nonunanimous recommendations were an astounding feat under the circumstances of appellant's *pro se* representation.

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

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to reverse and remand for a new trial as to Points I and II. As for Points III, IV and V, this Court should vacate appellant's death sentences and remand for the imposition of two life sentences without possibility of parole.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Norman McKenzie, #648711, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 3rd day of September, 2008.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER