

IN THE SUPREME COURT OF FLORIDA

ROBERT BAILEY,

Appellant,

v.

CASE NO. SCO7-748

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of 34 volumes. Volumes I through XXX have sequentially numbered pages. References to these volumes will use the prefix AR.@ Volumes I through XVIII contains the lower court clerk=s records including pleadings, orders and discovery materials. Volumes XIX and XX are transcripts of depositions. Volumes XXI through XXIII contains transcripts of motion hearings. Volumes XXIV through XXVII contain the transcripts of jury selection. Volume XXVIII is the transcript of the penalty phase. Volume XXIX is the transcript of the Spencer hearing. Volume XXX is the transcript of the sentencing. Volumes XXXI through XXXIV containing only the transcript of the guilt phase of the trial begins page numbering anew for those volumes of transcript only. References to these

volumes will use the prefix AT.@ Documentary and other exhibits are provided in the record with an index. A copy of the sentencing order is attached to this brief as an appendix.

STATEMENT OF THE CASE AND THE FACTS

Procedural Progress Of The Case

On April 15, 2005, a Bay County grand jury returned an indictment charging Robert J. Bailey with first degree murder and resisting an officer with violence for the shooting death of Kevin Scott Kight on March 27, 2005. (R1:58-59) Bailey pleaded not guilty. (R1:63) The State filed notice of intent to seek the death penalty on May 9, 2005. (R10: 1898) The Defense filed a motion to determine Bailey's competency and a motion to determine if he was mentally retarded. (R13:2536-2539) A hearing on those motions occurred on January 17, 2007. (R23:3699-3856) The court entered an order finding Bailey competent and not mentally retarded on January 23, 2007. (R16:3054-3059) A jury trial commenced on February 12, 2007. (R17:3315, 3330-3337, 3340-3346, 3350-3355, 3360-3388; R24-27:3858-4555; T31-34:1-483) On February 15, 2007, the jury returned a verdict finding Bailey guilty of both counts as charged. (R18:3388; T34:477-481) After a penalty phase, the jury recommended a death sentence with a vote of 11 to 1. (R18:3404; R28:4556-4762) Circuit Judge Michael Overstreet held a Spencer hearing on March 15, 2007, and adjudged Bailey guilty and imposed sentence on April 11, 2007. (R29:4764-4787; R18: 3500-3506; R30:4789-4819) The court found two aggravating circumstances: (1) Bailey had been convicted of a felony and was on parole at the time of the homicide and (2) the homicide was

committed to avoid a lawful arrest. Initially, the court rejected the statutory mental mitigating circumstances because Bailey's mental impairment were so substantial or extreme as to satisfy the requirements for finding these circumstances. As mitigating circumstances, the Court found: (1) Bailey was 22 years old at the time of the offense; (2) Bailey, although not mentally retarded, has a low I.Q. with testing scores between 64 and 77; (3) Bailey has a history of mental problems since childhood; (4) Bailey spent time in a juvenile facility where he improved on Ritalin, and in prison, Bailey was diagnosed with bipolar disorder, substance abuse and anti-personality disorder and treated with various medications; (5) Bailey was impaired due to drug and alcohol use at the time of the homicide; (6) Bailey is the product of a broken home, suffered lifelong substance abuse problems, and had little financial assistance or employment history; (7) Bailey was a poor student having been diagnosed with ADHD at age eleven; (8) at the time of his arrest, Bailey expressed concern for Officer Kight's well-being; (9) Bailey was respectful and cooperative during his court appearances. (R18:3481-3499) (App.)

Bailey filed his notice of appeal to this Court on April 13, 2007. (R18:3513)

Facts Presented At Trial

Officer Kevin Kight was a sergeant with the Panama City Beach police department on duty on March 27, 2005, Easter Sunday during Spring Break. (T31:36) Kight stopped a white Durango on Front Beach Road. (T31:82, 84) Officer Michael Rozier stopped to assist Kight as a back-up and walked up to the Durango with Kight. (T31:84) Kight was in the process of checking the driver's information and told Rozier he could leave to attend to another traffic stop. (T31:88-92) While at the other stop location, Rozier heard Kight on the radio seeking a check for driver's information, and since Rozier had a patrol car equipped with a computer, he performed a check for Kight. (T31:92-94) Rozier heard three rapid gunshots over the radio, and he immediately drove back to Kight's location. (T31:95-95) Noting that Kight was on the ground with two other officers attending to him, Rozier followed the vehicle tracks leaving the scene which lead down a side road leading to the beach. (T31:95-98) Rozier found a white Durango parked near a condo. (T31:95-100)

Officer Tonya Goodwin saw Kight at a traffic stop around 10:00 p.m. (T31:37-38) At that point, Kight was in his vehicle and another officer was parked behind him. (T31:39-40) Goodwin continued to her patrol area and later checked on another officer at another stop. (T31:41-42) She heard three loud, sharp noises over the radio she thought might be gunshots, and the she heard the dispatch with a location. (T31:42) As she

turned back to Kight's location with emergency lights and siren, a white vehicle passed at high speed. (T31:43) She found Kight on the ground and immediately began to render aid. (T31:43-44) Officers Buchanan and Taylor soon arrived and assisted until emergency medical personnel arrived. (T31:44, 48-51) Paramedics arrived and continued with CPR, but they never detected a pulse. (T32:122-124, 128-131) No signs of life were present and Kight was pronounced dead at the hospital. (T32:131-132)

On the following day, Dr. Charles Siebert performed an autopsy on Kight. (T34:386-405) Kight sustained two gunshot wounds to the upper chest just below the collar bone, and the wounds were about two inches apart. (T34:391-392, 404392) The bullets traveled through the weaker material of the upper left chest portion of the of the protective vest Kight wore. (T33:295-297; T34:392) A stippling pattern was found on the chin and upper neck consistent with the barrel of the gun being within 18 to 24 inches. (T34:393-394) The bullets traveled downward after entering the body meaning either that the shooter was in a much higher position or Kight was leaning forward. (T34:396-399) One bullet went through the middle part of the chest tearing the aorta and part of the heart. (T34:396) The bullet lodged in the vertebral column. (T34:397) A second bullet crossed the heart region striking the pulmonary artery, traveling through the liver and into a kidney. (T34:399-400)

Kight would have lost consciousness in less than one minute. (T34:402-403) During the autopsy, two bullets were collected. (T33:305-306, 317) Siebert stated that had the gunshots traveled straight from the entrance point near the clavicle the wounds would not have been fatal. (T34:404-405) Siebert concluded the gunshot wounds caused Kight's death and the manner of death was homicide. (T34:403)

A Panama City Beach resident, Hillary Chaffer, tuned onto Front Beach Road from a shopping center. (T31:54-56) She and her sister noticed that the police had stopped a vehicle. (T31:56) The traffic was heavy and stop and go. (T31:58) As Chaffer drove her truck to a position parallel to the stopped vehicle, a White Dodge Durango, she observed that the Durango's engine was still running and the police officer was back at his vehicle for information. (T31:56-60) The man driving the Durango looked pale, almost gray, and he started to sweat and looked scared. (T31:57) Chaffer said he appeared like he was about to throw up. (T31:65) He looked in his rearview mirror and started to drive away while the officer was not looking. (T31:58-61) The officer looked up, and the driver put on his brakes. (T31:58-61) As the officer again approached the Durango, he had his right hand on his gun and reached back with his left to get his handcuffs. (T31:58, 62) Chaffer then faced forward to drive, but heard two gunshots. (T31:58-61) She

looked back in time to see and hear a third gunshot, and she saw the driver of the Durango with a gun in his hand. (T31:58-62) These three shots were fast, one right after the other. (T31:66) The driver speed away on the grass beside the road, turned through a parking lot and down a side road. (T31:62) Chaffer knew that the side road was a dead end at the beach. (T31:63) She made a U-turn to get back to the fallen officer. (T31:63) Chaffer identified Robert Bailey as the driver of the Durango. (T31:64)

Jarrold Schalk was a high school student spending a spring break weekend at Panama City Beach with a friend's family on March 27, 2005. (T31:66-67) His friend, Stacy Harrison, was driving the family minivan on Front Beach Road and Schalk was in the front passenger seat. (T31:67-68) The traffic was slow and they drove by a white Dodge Durango an officer had stopped. (T31:69) At the closest point, the minivan passed within five feet of the Durango. (T31:70) Schalk identified Robert Bailey as the person he saw in the driver's seat of the Durango. (T31:70) The officer approached the Durango with his handcuffs in his hand. (T31:71) As the minivan was about parallel to the Durango, Schalk noted the driver of the Durango appeared upset, he reached across, pointed a gun, and fired. (T31:71) Schalk could see the flash from the barrel of the gun. (T31:71) He ducked down, and then heard two more shots and breaking glass.

(T31:71) The shots were fast, one after the other. (T31:78, 80-81) The breaking glass was from a bullet hitting the van striking the glass behind the front seats. (T31:71, 75) Schalk told Stacy to drive, and she drove off. (T31:71) Schalk looked in the rearview mirror and saw the officer down. (T31:71) They turned around and went back to the location where they spoke to other officers who had already arrived. (T31:71-72)

At the scene, officers later collected some items of evidence: two fired cartridge casings and a set of handcuffs from the ground; Kight's protective vest; and from Kight's citation holder, a citation for driving with revoked license and an identification card for Robert Bailey. (T31:45, 47, 52; T33:242-243; T34:363-364) From the minivan, a bullet was recovered from door. (T33:247-252, 316) A search of the white Durango revealed cell phone, a vehicle rental contract, a fitness club card with Bailey's name on it, and a fired cartridge casing. (T33:303-305)

Corey Lawson was a college student on break riding in pick-up truck with friends driving along Front Beach Road around 10:30 p.m. on March 27, 2005. (T32:132-134) As the truck was stopped in heavy traffic, a man ran up to the road from the beach and jumped in the bed of the truck where Lawson and one of his friends were riding. (T32:135-136) The man appeared Ashaky@, nervous, and afraid. (T32:136-137, 154) He covered himself with

a towel which was in the truck. (T32:157-158) Lawson asked the man what he wanted and he said he had just **A**pped a cop. (T32:136) At first, Lawson did not know if the man was serious, but the man then leaned back and showed a gun he had hidden in his pants. (T32:136-137) He said he had to get off the road and out of the area, and he did not care where. (T32:136-138) Lawson concluded they had better do as the man asked or he might shoot someone. (T32:138-139) The man called someone on his cell phone and discussed a pick-up point. (T32:139) He began giving directions which Lawson the relayed to the driver of the truck. (T32:138-139) They eventually dropped the man off at a liquor store called Sweet Dreams. (T32:139) The man was in the truck with Lawson for forty minutes to an hour. (T32:145) During that time, the man said he was wanted and if he was caught, he would go to jail for life. (T32:142) The officer was trying to arrest him, and he shot him. (T32:142) Additionally, the man said he had a lot of money and he had rented a SUV for \$1000. (T32:144-145) As he left the truck, the man put \$100 in Lawson's hand. (T32:144) Lawson and his friends found a police officer and reported the events including a description of the man. (T32:140-141, 145-148) The man had also said his name was **A**Saint. (T32:148) Lawson later identified Robert Bailey as the man. (T32:148)

Police officers arrested Robert Bailey on the morning of March 28, 2005, at the Sugar Sands Motel. (T33:255-260, 290-291)

Bailey was behind a building. (T33:258, 290-291) Investigator Jim Jenkins saw Bailey either trying to pull something from his pants or shove something into his pants. (T33:258) Jenkins apprehended Bailey at gunpoint. (T33:258-260)

Other officers assisted in the arrest and search of Bailey. (T33: 260, 290-291) A firearm was recovered from Bailey's waistband and cartridges were in his pocket along with a wallet, a cell phone and keys. (T33:262-263, 292, 297-300) One key was to a Dodge Durango rental vehicle and a second key was for a motel room. (T33:298) Bailey asked Investigator Jenkins, more than once, about the condition of the officer. (T33:288)

Two of Bailey's friends were found in a room at the Sugar Sands Motel **B** D=Tori Crawford and John Braz. (T32:206) Crawford testified for the State at trial. (T32:159) He stated that the three of them drove from Wisconsin to Florida to spend a few days at Spring Break. (T32:161-163) Crawford was friends with Braz and had recently met Bailey through his friendship with Braz. (T32:161) Braz used the nickname **ALT@** and Bailey was use the nickname **ASaint.@** (T32:160-161) Braz and Bailey picked up Crawford in Chicago where he was visiting a friend, and the three of them drove to Florida in a white Durango Bailey was driving. (T32: 161-163) Crawford said the Durango was a rental

Bailey's grandfather rented for him. (T32:164) They left Chicago around 8:00 or 9:00 p.m. on Saturday, March 26, 2005, and drove through the night to Pensacola. (T32:164-169) The trip lasted about 12 hours, and the three of them drank some beer and smoked marijuana during the drive. (T32:164-169) Braz and Bailey switched off the driving task throughout the trip, although Bailey drove most of the time. (T32:168) In Pensacola, they ate at the Crab Shack around 1:30 p.m. (T32:170) Due to the hurricane damage in the area, they drove to Panama City Beach. (T32:169, 172) They found a room at the Sugar Sands Motel about 4:30 p.m. (T32:172-173) After check-in, the three, and two others they met at the motel, went to the Sweet Dreams bar. (T32:175-178) Bailey drove them in the Durango. (T32:178) Since Crawford was only 20, he was not immediately able to go inside. (T32:179) After about an hour, Bailey wanted to leave, and he and Crawford left the bar in the Durango. (T32:180-182) Crawford described Bailey as not sober but also not drunk. (T32:182)

As Bailey and Crawford drove down the road in heavy, slow traffic, they stopped to talk to some girls who were beside the road. (T32:183) While talking, Bailey did not realize the traffic had proceeded and he was blocking traffic behind him. (T32:184-186) An officer stopped them. (T32:186) Bailey seemed nervous and scared. (T32:186) Crawford said the officer would

probably just check his driver's license and maybe give him a ticket. (T32:186-187) The officer approached and Bailey handed him a license. (T32:187) When the officer left, Bailey then explained to Crawford that he did not have a license and he was wanted for a parole violation. (T32:187-189) Bailey thought he would be arrested. (T32:188-189) Crawford continued to calm Bailey saying he might just get a ticket. (T32:190) He was shaking to the point he could not dial his cell phone and asked Crawford to call his girlfriend for him. (T32:221) Crawford heard Bailey tell his girlfriend that he had been pulled over and he thought the cop was going to arrest him. (T32: 192) He said if he tried to arrest him, he was going to Apop this cop@ and he wanted his girlfriend to come to Panama City to pick him up. (T32:193) Crawford was not sure if Bailey was serious, but he noted that Bailey's face was red, he had tears in his eyes, he was shaking and seemed serious. (T32:192, 221) Crawford also knew Bailey had been drinking and had not slept. (T32:222) Bailey pulled a gun from under the seat and placed it under his right leg. (T32:193) Crawford again tried to calm Bailey down. (T32:193) Bailey said he was not going back to prison. (T32:194) Crawford was afraid and thought he had the choice to stay in the vehicle or to get out. (T32: 194) He looked in the rearview mirror and saw the officer was in his car looking down at something. (T32:194) Crawford opened the door, left the

vehicle and mingled in with a crowd of people along the roadway. (T32:194-195) Crawford walked and caught a ride back to the Sweet Dreams bar. (T32:195-200, 224) He heard sirens and a person with whom he caught a ride told him a police officer had been shot. (T32:199) When he walked into the bar, Crawford saw Bailey and Braz there in an argument. (T32:200)

The argument continued as the three went back to the motel room. (T32:200- 201) Bailey told Braz that he thought he shot the officer two or three times. (T32:201) He said, "I didn't mean to do it." (T32:225) Bailey called his girlfriend on his cell phone. (T32:201) Crawford tried, without success, to call his father in Atlanta who used to be a police officer to get a ride. (T32:202) Braz and Bailey continued to argue and said they needed to get rid of the guns. Both Bailey and Braz had firearms. (T32:203) Braz threw his gun off the balcony into some water. (T32:204) Bailey emptied a box of bullets and placed them in his pocket. (T32:204) Bailey decided to leave. (T32:205)

Braz and Crawford stayed and waited for the police, since they had done nothing wrong. (T32:205-206) The police arrived and placed Braz and Crawford in custody. (T32:206-208) Crawford gave a statement to the police. (T32:208-209)

Randy Squire worked as an investigator for the Corrections Corporation of America which operated the jail where Bailey was incarcerated pending trial. (T34:406-407) He was a former

police officer. (T34:406) Bailey was housed in a one person cell, and Squire had the responsibility of monitoring Bailey's mail and telephone calls. (T34:407-408) He read at least 100 of Bailey's letters and became familiar with his handwriting. (T34:409) Over defense objections, Squire identified the handwriting on a document from Bailey's cell and the Court admitted the document in evidence. (T34:409-410) The document was a poem about being stopped by a police officer and running away. (T34:410-411) Squires testified that Bailey wrote a lot of poems while in the jail. (T34:412)

Joseph Hall, an FDLE firearms expert, compared the examined the firearm taken from Bailey and compared it to the fired cartridge casings and bullets recovered during the investigation. (T33:307-317) The firearm was a functioning Taurus 9mm semi-automatic pistol. (T33:292, 2967-300, 310-314) Hall concluded that the two fired cartridge casings found at the scene and the one found in the Durango were fired from the Taurus firearm. (T33:314-316) Additionally, Hall also found that the two bullet projectiles recovered at autopsy were fired from the Taurus firearm. (T33:317-318) The bullet projectile from inside the door of the minivan was too damaged for comparison. (T33:316-317) Penalty Phase

The State presented only one witness to testify to aggravating factors. (R28:4567-4572) Carl Safford, a probation

and parole agent, from Wisconsin who had supervised Bailey on parole upon a felony conviction testified. (R28:4567-4570) Bailey began supervision on October 20, 2004, after a felony conviction. (R28:4569-4570) His supervision was due to terminate on July 17, 2009. (R28:4572) Safford last saw Bailey on March 9, 2005, and obtained a warrant for his arrest on the same day. (R28:4571-4572) Bailey was under supervision at the time of the homicide. (R28:4567-4572)

The Defense presented one witness to testify in mitigation, Dr. Larry Kubiak, a psychologist. (R28:4573-4656) Dr. Kubiak had previously testified in the hearing to determine Bailey's competency and mental retardation. (R23:3702-3780) He performed a psychological evaluation of Bailey on October 28, 2005. (R28:4574) This process included a review of prior evaluations and historical information. (R28:4574-4576) (Defense Exhibits 1 through 5) (R28:4577, 4580, 4581, 4585, 4587) Additionally, Kubiak conducted over four hours of testing and observations. (R28:4575)

Kubiak reviewed various records from Wisconsin. Records from the Department of Health and Human Services Behavioral Health Division of Milwaukee County provided records from 1993 and 1994 concerning Robert Bailey. (R28:4577-4580) (Defense Exhibit 1) Bailey was about twelve years old and was referred

due to disruptive school behaviors. (R28:4578-4579) The diagnosis at that time was attention deficit hyperactivity disorder. (R28:4578-4579) In 1997, Bailey was placed in a treatment facility called Lad Lake designed to assist youth having problems with delinquent behavior. (R28:4581)(Defense Exhibit 3) He was discharged in 1998. (R28:4582) While in the facility, Bailey was placed on Ritalin. (R28:4582) After taking the medication, Bailey's behavior improved and assisted him in controlling his impulsiveness. (R28:4583) Kubiak explained Ritalin's use in treating attention deficit hyperactive disorder. (R28:4583-4584) Kubiak also reviewed records from Wisconsin Department of Corrections. (R28:4584-4585) (Defense Exhibit 4) Bailey received psychiatric treatment while incarcerated. (R28:4585-4586) His diagnosis of attention deficit hyperactivity disorder was noted, and he was considered for the

possibility of bipolar disorder but the diagnosis was not completed. (R28:4586) These records contained psychiatric reports dated 2002 through 2004, and continuous evaluations through his incarceration. (R28:4586) Kubiak also reviewed school records. (R28:4586-4587) (Defense Exhibit 5) These covered the dates back to 1999 and 2000. (R28:4587) The records contained academic skills assessments showing Bailey attained his GED managing an overall score of 236 with 230 as the minimum passing score. (R28:4588)

Dr. Jill Rowan performed the Wechsler Adult Intelligence test on Bailey on July 8, 2005. (R28:4580)(Defense Exhibit 2) Kubiak related the results of Rowan's testing. (R28:4580) Bailey had verbal score of 71, a performance score of 64 and a full scale score of 65. (R28:4580-4581)(Defense Exhibit 2) These scores placed Bailey in the mildly retarded range. (R28:4581)

Kubiak performed a number of tests in his evaluation of Bailey including neuropsychological testing to determine brain function. (R28:4588-4591) (Defense Exhibit 6) Bailey had difficulty performing many of these tests generally scoring in the bottom two percent. (R28:4591-4599) These scores were consistent with someone with an IQ of less than 70. (R28:4592) Kubiak also administered tests to detect malingering and he

found nothing to indicate Bailey was intentionally trying to perform poorly. (R28:4575-4576, 4588, 4590, 4599, 4607) This lead Kubiak to conclude that Bailey suffered from significant neurological deficits. (R28:4599) The deficits impaired Bailey's cognitive processing ability, decision-making, memory and impulse control. (R28:4594-4596, 4608-4617) Kubiak found the scores indicative of significant brain damage. (R28:4596, 4614-4617) The scores were similar to those found in people with mild Alzheimer's disease. (R28:4596, 4608-4612) Kubiak found some severe brain damage which had accumulated over time. (R28:4616) This was consistent with Bailey's history which included some problems at birth, drinking gasoline at age two, falling from a two-story building resulting in head trauma, using alcohol and drugs at a young age, and falling out of window at age sixteen while drunk and not receiving medical attention. (R28:4617)

Other testing Kubiak performed evaluated various mental health problems. (R28:4600) Bailey had elevated scores in a number of areas. (R28:4600) After using a correction factor for over or under reporting built into the test, Kubiak found several scores remained clinically elevated showing Bailey suffered from psychiatric problems. (R28:4601) Specifically, Kubiak found significant evidence of Post-Traumatic Stress

Disorder, alcohol and drug abuse, depression and some evidence of bipolar disorder. (R28:4601, 4612) There were also other personality disorders which lead Bailey to misperceive situations, make poor judgments, and have impaired ability to make connections between actions and consequences. (R28:4605) Bailey lacks adequate coping skills leading to inconsistency and unpredictability in his actions. (R28:4605-4606)

In conclusion, Kubiak's diagnosis of Bailey include several conditions. (R28:4618) First, he found Bailey suffered from significant brain damage. (R28:4618) Second, testing and history supported Post-Traumatic Stress Disorder. (R28:4618) Third, testing and history showed alcohol and drug abuse. (R28:4618) Fourth, Kubiak concluded Bailey had a paranoid delusional personality disorder which would lead to mistrust of authority figures. (R28:4619) Fifth, Bailey suffered from depression and possibly bipolar disorder. (R28:4618, 4610) Sixth, Bailey has borderline personality disorder with schizotypal features. (R28:4620)

Regarding the statutory mental mitigating circumstances, Kubiak concluded they both applied. (R28:4622) Bailey suffered an extreme mental or emotional disturbance at the time of the crime because his brain damage and psychiatric problems would have impacted his decision-making. (R28:4622) Bailey also

suffered a substantially impaired ability to appreciate the criminality of his actions and to conform his conduct at the time of the offense. (R28:4622)

In rebuttal, the State presented four witnesses, three of whom had also previously testified in the competency and mental retardation hearing. (R23:3781-3845) Nancy Huttelmaier had been a teacher in an Alternative Youth Program in Wisconsin where Bailey completed his high school equivalency diploma. (R28:4657-4678) Dr. Greg Prichard and Dr. Harry McClaren, both psychologists, testified for the State. (R28:4679-4700; 4702-4713) Finally, Randy Squires testified about an telephone conversation between Bailey and John Braz intercepted and monitored at the jail. (R28:4713-4733)

Nancy Huttelmaier was a teacher at the Franklin Alternative Youth Program at the Milwaukee County House of Corrections. (R28:4657) The program is designed for incarcerated juveniles under 18, special education students to age 22, and regular students to age 20. (R28:4658) Students would be tested for an assessment of basic educational needs and a program would be designed for them. (R28:4658) Robert Bailey entered the program on September 13, 1999. (R28:4659) He entered the program with a 12.9 reading level and a 7.1 math level. (R28:4660) During his participation in the program, Bailey was able to pass the GED

test with an overall score of 236 with a minimum passing score of 230. (R28:4663-4665) Since he was under the age of 18 and one half years, he also had to pass testing in civics and health, a Wisconsin state requirement. (R28:4665-4666) He passed those area as well. (R28:4665-4666) Huttelmaier reviewed Bailey's earlier school records and noted the when he attended class he made B's and C's, and when he did not attend regularly, he made D's or U's. (R28:4670) She concluded that he required, close supervision and motivational incentives to perform, and she observed nothing to make her think Bailey was retarded. (R28:4673,4676) Huttelmaier said Bailey seemed to try his very best while in the program, and he was able to pass the GED test by six points. (R28:4678)

Dr. Greg Prichard evaluated Bailey on January 8, 2007. (R28:4682) He reviewed records from Wisconsin Department of Corrections, some information about psychiatric treatment, information about the offense and the transcript of a telephone conversation Bailey had while in jail. (R28:4682-4683) Prichard administered an intelligence test and conducted a two and one-half hour interview. (R28:4684) Bailey had an full scale score on the IQ test of 75. (R28:4683) Prichard is not a neuropsychologist and does not administer the type of tests Dr. Kubiak performs. (R28:4696) Prichard thought the Bailey might

not have performed optimally on the IQ test, but he still tested as not mentally retarded. (R28:4683) Given Bailey's completion of the GED program, Prichard thought Bailey functioned close to average intelligence. (R28:4683-4682) The telephone conversation Bailey had with his friend John Braz in which he stated he was going to try to appear crazy or retarded was a factor in Prichard's assessment. (R28:4690-4691) Prichard's diagnosed Bailey with polysubstance dependence based on his history of drug abuse and with anti-social personality disorder. (R28:4684-4685) Regarding the statutory mental mitigating circumstances, Prichard's opinion was that neither applied. (R28:4692-4693)

Dr. Harry McClaren evaluated Bailey after meeting with him on four occasions **B** - December 22, 2005, January 6, 2006, and December 28 and 29, 2006. (R28:4703) McClaren administered the Weschsler Adult Intelligence Test on the first meeting and on the December 2006, meeting, he administered the Minnesota Multiphasic Personality Inventory. (R28:4703) McClaren also reviewed investigative reports, reports of other experts, and medical records from Florida and Wisconsin. (R28:4704) He concluded that Bailey had an IQ of at least 75. (R28:4710) Based on records, McClaren noted that he could not rule out bipolar disorder due to family history and Bailey's current

diagnosis of major depression. (R28:4711) McClaren acknowledged Bailey's history of attention deficit disorder which would indicate some brain dysfunction. (R28:4712) Unlike Kubiak, McClaren does not perform neuropsychological testing for brain function and other conditions. (R28:4708-4709) McClaren diagnosed polysubstance dependence due to alcohol and drug use and two personality disorders. (R28:4712) He found Bailey suffered from borderline personality traits leading to chronic anger, mood instability and unstable relationships. (R28:4712) Additionally, Bailey suffers from anti-social disorder which leads to conflicts with authority, inability to learn from experience and impulsive behaviors. (R28:4712) Regarding the statutory mental mitigating circumstances, McClaren was of the opinion that neither applied in this case. (R28:4705)

Randy Squires, an investigator with Corrections Corporation of America, testified about the recording of telephone calls at the jail. (R28:4713-4714) On December 16, 2005, a telephone call between Robert Bailey and John Braz was recorded. (R28:4714) The State played a recording of the call for the jury. (R28:4721) Included in the conversation was discussion about pending cases. (R28:4721-4732) At one point, Bailey said, "They are saying I'm mildly retarded and that I might be crazy." (R28:4727) He also said another psychiatrist was coming to see

him and that he might start sending letters to Braz that might sound weird. (R28:4727) Bailey also said his lawyer told him he could not be tried if they found him mildly retarded or crazy. (T28:4731) He told Braz that he was trying to make sure that happens and the if Braz needed to do something he should start talking to the walls. (R28:4732)

Spencer Hearing

At the Spencer hearing, the State presented four victim impact witnesses. (R29:4768-4786) Officer Kight's wife, mother, father and aunt testified. (R29:4768-4786) The State also introduced their prepared statements as Exhibits 1-4. (R29:4769, 4774-4775, 4776, 4777)

SUMMARY OF THE ARGUMENT

1. A review of this case shows that the death sentence is not proportionate and must be reversed. Proportionality review requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Such a review shows that Bailey's death sentence is disproportionate and must be reversed.

2. This Court has consistently condemned improper prosecutorial comments and arguments which tend to inject fear, emotion and improper considerations into the jury's decision-making. Such arguments undermine the fairness of the jury's decision and violate due process. When such arguments impact the validity of the verdict itself, the error is fundamental and a reversal is required even though such arguments were not the subject of an objection in the trial court. The prosecutor's comments and arguments in this case constitute fundamental error and violate due process. Bailey asks this Court to reverse his case for a new trial.

3. Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Bailey 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, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002).

Bailey now asks this Court to reconsider its position in Bottoson and King.

ARGUMENT

ISSUE I

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. *See, e.g., Offord v. State*, 959 So.2d 187 (Fla. 2007); *Urbin v. State*, 714 So.2d 411, 417 (Fla. 1998); *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996); *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. *Ibid.* However, proportionality review is not a counting process **B-** the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. *Ibid.* A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I Secs. 9, 17, Fla. Const.

Robert Bailey's case is not one of the most aggravated and least mitigated of homicide cases. In fear of being arrested on a warrant for violation of parole, Bailey panicked and made an impulsive decision to shoot the police officer. D-Tori Crawford described Bailey's fear and panic at the time. He noted that Bailey had not slept and had been drinking. Bailey seemed

nervous and scared that he would be arrested. He was shaking to the point he could not dial his cell phone and asked Crawford to call his girlfriend for him. Bailey's face was red, he had tears in his eyes, he was shaking and seemed serious. Crawford tried to calm Bailey down without success. Other witnesses also saw Bailey's distraught condition. Hillary Chaffer who happened to be driving by the scene described Bailey as pale, almost gray, sweating and looked scared. He appeared like he was about to throw up. Jarrod Shalk, a passenger in the minivan which was located at the scene at the time described Bailey as upset. Later, Corey Lawson, who encountered Bailey in the pick up truck when Bailey secured a ride described Bailey as Ashaky, nervous, and afraid. In a panicked and distraught state, Bailey shot the officer in an impulsive, spur-of-the-moment act.

The evidence of this being a premeditated killing was weak. Bailey's statements that he was going to Apop the cop does not necessarily mean a statement of an intent to kill. An statement of intent to shoot is not necessarily an intent to kill. Bailey asked Investigator Jenkins about the condition of the officer, suggesting Bailey did not know the officer died. Although three shots were fired and two hit the officer, the gunshots were in what might normally have been a nonfatal location. The medical examiner testified that the wounds would

not have been fatal if the bullets= trajectory had been straight through rather than at a downward angle.

Bailey=s impulsive actions and poor decision-making were consistent with the mitigation and mental conditions he suffers. Bailey was diagnosed with brain damage, although there was some dispute as to the severity and whether he qualified for statutory mitigators. The trial court specifically found: (1) Bailey has a low I.Q. with testing scores between 64 and 77; (2) Bailey has history of mental problems since childhood; (3) Bailey was a poor student having been diagnosed with ADHD at age eleven; (4) Bailey spent time in a juvenile facility where he improved on Ritalin; (5) Bailey was diagnosed with bipolar disorder, substance abuse and anti-personality disorder and treated with various medications while in prison (6) Bailey was impaired due to drug and alcohol use at the time of the homicide; (7) Bailey is the product of a broken home, suffered lifelong substance abuse problems, and had little financial assistance or employment history.

Comparable Cases

In Hardy v. State, 716 So.2d 761 (Fla. 1998), this Court reversed a death sentence imposed for killing a police officer who had stopped Hardy and his three companions while investigating a robbery. Through the testimony of one of the young men, Ricky Rodriguez, the State established that the four

of them were walking through a parking lot after the car they were driving broke down. Sergeant Hunt stopped them and began to pat them down. As Hunt patted down Rodriguez, Hardy shot Sergeant Hunt twice in the head with a stolen .38 caliber pistol Hardy had concealed on his person. The young men fled, but Hardy returned to take the officer's 9 mm pistol which he later used to shoot himself in the head. To establish motive for shooting the officer, the State introduced evidence that Hardy and others had been involved in two earlier shooting incidents.

In one incident, Hardy and others, while driving a stolen car, fired shots at one person. In a second incident, another person was shot three times in the back. The victim of the second shooting identified Hardy as the driver of the stolen car and the person who first threatened to shoot him. Also, less than two months before the homicide, Hardy had said, "If it ever came down to me and a cop, it was the cop." 716 So.2d at 765.

After a period of rehabilitation, the court found Hardy competent to stand trial. During the competency hearing, two psychologists testified about intelligence testing. One found Hardy's full-scale IQ was 81 with a verbal IQ of 74 and a performance IQ of 96. A second found Hardy's functioning borderline with a full-scale IQ of 77, a verbal IQ of 72 and a performance IQ of 89. 716 So.2d at 763. In mitigation, the trial court found Hardy's age of 18 at the time of the crime as

the only statutory mitigating circumstance. Nonstatutory mitigation included brain damage from the self-inflicted gunshot wound, Hardy's attempt to punish himself with the suicide attempt, impoverished and emotionally abusive childhood, the availability of a life sentence without parole and Hardy's compliant behavior while incarcerated. 716 So.2d at 762-763. The trial court found two aggravating circumstances: the homicide was cold, calculated and premeditated and the victim was a police officer engaged in the performance of his duties. This Court reversed the cold calculated and premeditated aggravating circumstance noting that the crime was likely because Hardy panicked and made a spur-of-the-moment decision when he realized the officer was about to find him in possession of a concealed, stolen firearm. 716 So.2d at 766. One of Hardy's companions described Hardy at this time as "paranoid" and "flinching." 716 So.2d at 766. This Court held Hardy's death sentence disproportionate.

This case is comparable to Hardy, and Bailey's death sentence should be reversed. The circumstances of the shootings in both cases are similar. In both, a young man, in fear of imminent arrest, panicked and made an impulsive decision to shoot a police officer. Hardy was eighteen at the time of his crime and Bailey was twenty-two. Aggravating factors in Bailey's case, if anything, are less than the aggravation present

in Hardy. Bailey was on parole when he shot the officer, and his fear of arrest was a parole violation warrant. Hardy shot the officer while in possession of a stolen pistol and with knowledge that he had been involved in two earlier shooting incidents where another person had been shot. Hardy, 716 So.2d at 762, 764-765. Bailey shot the officer as he approached the car to make the arrest. Bailey fired three quick shots from the car window. Two shots struck the officer in the shoulder area through a weaker portion of the officer's protective vest. The medical examiner stated that if the wounds had been straight through, the wounds would not have been life-threatening. The angle of the officer leaning forward allowed the bullets to travel into the chest cavity causing the fatal wounds. Hardy, however, caught the officer while he was distracted frisking another person and shot him twice in the head at close range. Hardy also took the officer's weapon before fleeing. 716 So.2d at 762.

A comparison of the mitigation also demonstrates that the cases are comparable. Hardy, after suffering the self-inflicted head wound, had two full-scale IQ test scores of 77 and 81. Hardy, 716 So.2d 761. Most of Hardy's mental impairments were attributed to the brain damage he suffered from the head wound occurring after the homicide. 716 So.2d 762-763. Bailey had three IQ tests with scores ranging between 64 and 75. Bailey's

mental impairments were attributable to factors preceding the homicide and reflective of his mental state at the time of the shooting of the officer. Bailey also had a history of other mental and emotional conditions since childhood.

In another comparable case, Brown v. State, 526 So.2d 903 (Fla. 1988), this Court also reversed the death sentence. The facts of the offense were summarized in the opinion as follows:

The facts of the murder were recounted at trial by nineteen-year-old Edward Cotton, the co-defendant. In the early evening hours of April 4, 1985, Cotton and eighteen-year-old Brown donned stocking masks and held up a convenience store. The robbery was interrupted by a customer who fled under fire. After driving away from the scene of the robbery, Cotton and Brown were intercepted by Officer Bevis of the Jackson County Sheriff's office. The officer directed Cotton to exit the car and produce his driver's license. During this process Bevis looked inside the car and saw a stocking mask, a credit card belonging to the store clerk who had just been robbed, and a gun. Bevis ordered appellant out of the car at gunpoint and told him he would blow his head off if he ran. Bevis then directed both men to place their hands on the patrol car while he radioed for assistance. At this point, appellant suggested to Cotton that they jump Bevis, but Cotton refused. As Bevis tried to handcuff Cotton, appellant jumped Bevis and the two men struggled in the road. Cotton testified that he tried to break up the struggle but gave up and moved to the middle of the road. Cotton then heard a shot, heard Bevis say "Please don't shoot," and heard two more shots. Cotton and appellant then fled in their automobile. Another police car soon gave chase, forcing Cotton and Brown to abandon their vehicle and run into the woods. After a few moments, Cotton returned to the road and surrendered. Appellant was captured the following morning.

Brown, 526 So.2d at 904-905.

In aggravation, the trial court found four circumstances: (1) Brown had a previous conviction for a violent felony; (2) the murder occurred during a robbery; (3) the murder was committed to avoid arrest and hinder law enforcement; and (4) the murder was especially heinous atrocious or cruel. 526 So.2d at 905. This Court reversed the finding of the heinous atrocious or cruel circumstance because the two fatal shots to the head quickly followed the first shot to the arm. 526 So.2d at 907. In mitigation, this Court noted Brown's age of 18, disadvantaged childhood, abusive parents, lack of education, and IQ scores of 70 to 75, a level just above mild retardation. 526 So.2d at 908. This Court concluded the jury's life recommendation was appropriate and reversed the death sentence the trial court imposed.

This case is comparable to Brown and a reversal of Bailey's death sentence is required. Both cases involve young men who panicked upon fear of being arrested. Bailey fired three, quick shots at the officer from the vehicle window. Brown, however, shot the officer first in the arm, and he then approached the officer and shot him twice in the head at close range while the officer begged Brown not to shoot. Bailey's aggravating circumstances were his status of being on parole and killing to avoid arrest. Brown's aggravating circumstances were more

extensive: (1) a previous conviction for a violent felony; (2) killing during the commission of a robbery; and (3) killing to avoid arrest. In mitigation, Brown had an IQ score of 70 to 75, a disadvantaged childhood and a history of being emotionally handicapped during his childhood. Bailey had IQ scores between 64 and 75. Bailey had a history of other mental and emotional conditions since childhood. Brown was eighteen at the time of his crime and Bailey was twenty-two.

Conclusion

Bailey's death sentence is disproportionate. He asks this Court to reverse his death sentence and to remand his case for a life sentence.

ISSUE II

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN PERMITTING THE PROSECUTOR TO MAKE INFLAMTORY REMARKS WHICH PREJUDICED THE GUILT AND PENALTY PHASES OF THE TRIAL.

This Court has consistently condemned improper prosecutorial comments and arguments which tend to inject fear, emotion and improper considerations into the jury's decision-making. See, e.g., Brooks v. State, 762 So.2d 879 (Fla. 2000); Urbin v. State, 714 So.2d 411 (Fla. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996); Garron v. State, 528 So.2d 353 (Fla. 1988); Bertolotti v. State, 476 So.2d 130 (Fla. 1985). Such arguments undermine the fairness of the jury's decision and violate due process. *Ibid.* When such arguments impact the validity of the verdict itself, the error is fundamental and a reversal is required even though such arguments were not the subject of an objection in the trial court. See, Urbin, 714 So.2d at 418 f.n.

8. The prosecutor's comments and arguments in this case violated due process, and Bailey asks this Court to reverse his case for a new trial. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

The prosecutor improperly positioned himself as a member of the jurors' community and that he represented the community's best interest. He then demonized Robert Bailey and equated Bailey's coming into the community as evil entering the community. The Athe defendant as evil in the community@ theme continued in the

guilt and penalty phases of the trial. Finally, the prosecutor improperly told the jury to place themselves in the victim's position when facing the defendant at the time of the shooting.

In jury selection, the prosecutor introduced himself as follows:

Good morning, I'm Steve Meadows, I'm the State Attorney for the 14th Circuit and I'm here representing the community.®

(R24:3909)(emphasis added) In opening statement, the prosecutor began his theme:

May it please the court Easter Sunday, March 27th, 2005 began like many, many other Easters throughout this country over the years. *But in our community on that day an ill wind began to blow, a strong wind, a wind that the people who were there will remember for the rest of their lives. It was brutal and it was continuingY*

* * * *

What happens over the next nine to ten minutes changed that community, changed this community and brings us to why we are here today.

The preceding day, Saturday, March 26th, this defendant whose nickname is ASaint® --- kind of like calling me ATiny®Y

(T31:18-20) (emphasis added)

Later, at the start of his closing argument, the prosecutor continued:

Easter Sunday, March 27th, 2005. *I told you that a cold and brutal wind had enveloped our community. It is*

chilling to this day because of who we sit in the courtroom with. This man brings all of us here today.

This man puts you, by his choices, in the chairs to render a tough, tough decision. Not one that is tough because of the facts but one that is tough because of the gravity of why we are here^Y.

(T34:427-428)(emphasis added) After lauding the good citizenship of witnesses who tried to render aid, the prosecutor implied a comparison of their actions to Bailey's which the prosecutor described as evil:

Choices. Time. Character. Those are the things I want to talk to you about in my closing argument. Hillary Chaffer, Jordan Schalk, they made tough decisions that night too. After seeing fire come from the barrel, glass shattering, officers falling. What did Hillary Chaffer do? Did she embrace her responsibility of being a good citizen? That young lady did. She turned around and she came right back there trying to render aid. Jarrod Schalk, the same thing. A bullet has just gone through the glass. He's seen the fire. *He saw the face, a face he described as mean, angry. I submit evil.*

Ladies and gentlemen, by the facts and the evidence that have been presented to you over the last two days you too have seen the face of the defendant.

(T34:431-432)(emphasis added) The prosecutor ended his closing argument placing the jurors in the position of the victim looking at the defendant's eyes at the time of he shooting:

I ask that as you to sit down in the jury room to deliberate you do two things before you reach time to take a vote. I want you all just to put your finger 18 to 24 inches away from each other's face and see how close you are when your eyes are meeting, as his met those eyes on an Easter night in our community and in 18 to 24 inches away firing once, twice, and three times.

(T34:442) (emphasis added)

In the penalty phase argument, the prosecutor continued his characterization of Bailey as evil, and in fact, he told the jury that Bailey was **un**worthy of the mitigation that has been presented.@ (R28:4747)

You know, I told you the Defense is allowed to bring in anything they believe to relevant, any aspect of the Defendant's character, record, or background. *I said, let's get to the heart of the matter. Now, let's get to the heart, the figurative heart of this Defendant.*

(R28:4739) The prosecutor ended his penalty phase closing as follows:

Ladies and gentlemen, the heart of the matter is that this is a cold, brutal, savage murder committed with aggravation that I have explained. The heart of this Defendant is one that is unworthy of the mitigation that has been presented. It has not been reasonably established. I ask that you render a verdict of justice, a verdict which rights the scales, a verdict where the sword goes unscabbard.

(R28:4747)(emphasis added)

The prosecutor's arguments were improper for a number of reasons. First, the arguments demonized Bailey as **evil**@ invading the jurors' community and labeled him as an **outsider**.@ See, Brooks v. State, 762 So.2d 879 (Fla. 2000)(prosecutor characterized the defendant as having a **true** deep-seated violent character@ and as being **vicious**, brutal and violent to the

core@); King v. State, 623 So.2d 486 (Fla. 1993)(prosecutor implied to the jury it would be cooperating with evil if a life sentence recommended); Rhodes v. State, 547 So.2d 1201 (Fla. 1989)(called defendant a vampire). Second, the prosecutor improperly appealed to jurors' fears and their responsibility to the community including telling the jurors that the prosecutor represented them as members of the community -- implying that his position was in the jurors' best interest since they were all members of the same community. This Court has consistently condemned, as emotional appeals to fear, arguments suggesting the jury needs to base its decision on what would help the community and to send a message to the community. See, e.g., Campbell v. State, 679 So.2d 720, 724-725 (Fla. 1996); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Third, the prosecutor used a Golden Rule argument when suggesting the jurors envision looking into Bailey eyes from 18 to 24 inches as the victim did while being shot. Compounded by the prosecutor's theme that the defendant was Evil, the argument suggested that the victim would have been looking into the eyes of evil. Golden Rule arguments are never proper. See, e.g., Garron v. State, 528 So.2d 353, 358-359 (Fla. 1988); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Finally, the prosecutor told the jury to disregard the mitigation presented because the defendant's character was unworthy of the mitigation offered. This argument

was also tied to the prosecutor's theme that the defendant had an evil character. This misled the jury on its role in considering mitigation. See, Brooks v. State, 762 So.2d 879, 902 (Fla. 2000); Urbin v. State, 714 So.2d 411, 420-421 (Fla. 1998).

These arguments prejudiced the guilt and penalty phases of the trial. Bailey asks the Court to reverse his case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously denied motions to dismiss the death penalty in this case because Florida's death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). (R14:2630-2662, 2695-2696, 2776-2777; R22:3678-3679, 3692) Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are codecision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstance in the indictment.

Bailey 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, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Additionally, Bailey 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). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Bailey asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes

unconstitutional. Bailey's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

For the reasons presented in this Initial Brief, Robert J. Bailey asks this Court to reverse his judgments and sentences for a new trial on the basis of Issue II. On the grounds presented in Issue I and III, Bailey asks that his death sentence be reversed for imposition of a sentence of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Stephen R. White, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050 and to appellant, Robert Bailey, #128135, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this _____ day of February, 2008.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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