IN THE SUPREME COURT OF FLORIDA

RICHARD KNIGHT,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC07841**
STATE OF FLORIDA,	)	**L.T. NO. 01-14055 CF 10A**
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

---

MELODEE A. SMITH
Florida Bar No. 33121
LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page(s)***

TABLE OF AUTHORITIES (CONT.)

Cases ***Page(s)***

SUMMARY OF ARGUMENT

I. The trial court abused its discretion in denying a mistrial based on witness Mullings' testimony that he knew Knight had a "violent background."

II. The trial court abused its discretion in refusing to grant a mistrial based on jurors' having been exposed to the fact that Knight had been wearing both handcuffs and leg shackles during the guilt phase of jury trial.

III. The trial court erred in ruling that no discovery violation occurred and in refusing to grant a mistrial when the State's DNA expert gave a new opinion, undisclosed prior to trial, that did not exclude Knight as a donor of key DNA evidence from which the expert's lab had earlier excluded Knight.

IV. The trial court erred in refusing to seat a new jury for the penalty phase based on witness Mullings' comment in the jury's presence during the guilt phase proceedings that Mullings knew Knight had a "violent background."

V. This Court should find section 921.141(5)(i), Florida Statutes violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Ring v. Arizona*.

VI. Mr. Knight's sentence of death would not be disproportionate had he received a fair trial.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON FAMILY WITNESS MULLINGS' COMMENT IN JURORS' PRESENCE THAT HE KNEW KNIGHT TO HAVE A "VIOLENT BACKGROUND"

The State's contention that the testimony of Hans Mullings, the victims' surviving husband and father, that Mullings knew his cousin, Richard Knight, had a "violent background," was somehow cured by an instruction simply ignores this prejudicial character testimony, *State's Answer Brief, pages 17-24*, lacks force.

Mr. Mullings told jurors: "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something *because I know Richard's violent background*." (V.25 T 2709) (emphasis added). Though Mr. Knight's objection to this testimony was sustained and the jury was told to disregard it, the defense noted "[t]here's no way they can disregard that" (V.25 T 2710), moving for a mistrial (V.26 T 2752-2781), which the trial court denied (V.26 T 2781).

The jury was thus exposed to testimony creating the unfairly prejudicial notion that Knight had a violent character, rendering his trial for these violent crimes unfair. Knight was entitled to a mistrial upon his timely motion, as the prejudice went to the heart of his defense: that he was not the killer. Mullings,

however, testified that Knight had a "violent background," suggesting Knight caused his mate's and daughter's deaths, and leaving in jurors' minds the notion that Knight was a violent person capable of committing these violent acts.

The trial court's instruction to simply disregard this testimony could not dispel jurors' reasonable belief that Knight was, for reasons known more clearly to Mr. Mullings, that, although this testimony had no direct relevance to Knight's guilt, there was something Mullings knew about Knight's "violent background" that made him immediately assume it was Knight who committed the offenses.

Mullings' "violent background" testimony, however inadvertently introduced by the State, was a skunk lobbed into the jury box that no amount of instruction could dispel. *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir.1962). It rendered the trial so fundamentally unfair that Mr. Knight--who has consistently maintained his innocence--should be afforded a new trial.

"A motion for mistrial should be granted when it is necessary to ensure that the defendant receives a fair trial." *Cornatezer v. State*, 736 So.2d 1217, 1218 (Fla. 5th DCA 1999). Improper admission of evidence of a defendant's prior criminal or violent history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction. *Cornatezer*, 736 So.2d at 1218. "When any

curative instruction would be insufficient, the trial court should grant a mistrial." *Henderson v. State*, 789 So.2d 1016, 1018 (Fla. 2nd DCA 2000). See also *Brooks v. State*, 868 So.2d 643, 644 (Fla. 2d DCA 2004) (in prosecution for aggravated battery with a deadly weapon, wife's non-responsive answer to prosecutor's question implying defendant had been sent to prison for prior domestic violence was unfairly prejudicial as such evidence is "frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court"); *Cuthbertson v. State*, 623 So.2d 778 (Fla. 4th DCA 1993) (robbery defendant entitled to mistrial by State witness' testimony that witness knew defendant's girlfriend as she had aided "in the past when he's robbing," as the testimony referred to prior irrelevant criminal acts); *Donaldson v. State*, 369 So.2d 691 (Fla. 1979) (error to admit evidence that defendant had beaten his wife in the past as such evidence was offered to show guilt of assault by showing defendant's propensity to commit violent acts); *Thomas v. State*, 701 So.2d 891 (Fla. 1st DCA 1997) (in trial for attempted murder of a fellow inmate, evidence that defendant housed in cell for "more violent inmates" was inadmissible as "[t]his is precisely the type of character evidence that section 90.404(1) of the Florida Evidence Code is intended to prohibit.").

Mr. Mullings' gratuitous testimony on direct examination by the State that Mr. Knight had a "violent background" was improper and unfairly prejudicial, and could not have had anything other than a "devastating impact" upon the jury. *Harris v. State*, 427 So.2d 234, 235 (Fla. 3d DCA 1983).

When a jury is improperly informed of a defendant's prior criminal activity, a curative instruction has frequently been found to be insufficient to preserve a defendant's right to a fair trial. E.g., *Morton v. State*, 972 So.2d 1088 (Fla. 5th DCA 2008) (mistrial should have been granted in drug prosecution when confidential informant testified "a lot of folks" knew the defendant was a drug dealer, despite trial court's instruction for jury to disregard testimony); *Brooks v. State*, 868 So.2d 643 (Fla. 2d DCA 2004) (mistrial should have been granted after witness improperly commented that defendant had been "sent back to prison," despite trial court's instruction for jury to disregard testimony); *Henderson v. State*, 789 So.2d 1016 (Fla. 2d DCA 2000) (mistrial should have been granted after witness improperly commented that it appeared that defendant had committed prior robberies, as any curative instruction would have been insufficient); *Cornatezer v. State*, 736 So.2d 1217 (Fla. 5th DCA 1999) (mistrial should have been granted

after witness improperly commented that defendant was convicted felon, despite trial court's instruction for jury to disregard testimony).

The State's notion this testimony as to Mr. Knight's "violent background" was "isolated" and "not mentioned for the rest of the trial" is belied by the State's central theory of Knight's guilt, also expressed in the State's closing argument in urging jurors to convict because Knight "came back and confronted [Ms. Stephens] and he got angrier in the confrontation. And that's when he went out to the butcher block and got a knife and returned and began the attacks that ended the lives of Odessa Stephens and the four year old Hanessia Mullins." (V.34 T 3567).

Mr. Mullings' trial testimony that as he arrived at the scene he immediately assumed that Mr. Knight had engaged in acts of violence since he knew Mr. Knight to have a "violent background" colored every piece of evidence adduced at Mr. Knight's trial, rendering the trial unfair and Mr. Knight's convictions therefore unjust. This Court should reverse and remand Mr. Knight's Judgments and Sentences of Death, ordering a new trial without the introduction of this unfairly prejudicial "violent background" testimony.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON JURORS' HAVING BEEN EXPOSED TO THE FACT THAT KNIGHT HAD BEEN WEARING BOTH HANDCUFFS AND LEG SHACKLES DURING THE GUILT PHASE OF JURY TRIAL

During the guilt phase of jury trial, Knight moved to disqualify the jury panel and moved for a mistrial based on the jury's exposure to Knight's being handcuffed and shackled (V.44 T 300). Following an evidentiary hearing (V.44 T 213-300), Knight's motion for mistrial was denied (V.44 T 311).

A criminal defendant cannot be compelled to stand trial in prison garb because it could impair the defendant's presumption of innocence, which is a basic component of the fundamental constitutional right to a fair trial. See *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Torres-Arboledo v. State*, 524 So.2d 403 (Fla.1988). Placing the defendant in restraints such as shackles or handcuffs can also affect the defendant's presumption of innocence, but under proper circumstances this risk may be outweighed by the trial court's obligation to maintain safety and security in the courtroom. See *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Diaz v. State*, 513 So.2d 1045 (Fla.1987). See also *Cramer v. State*, 843 So.2d 372, 373 (Fla. 2nd DCA 2003)

(defense counsel's failure to object to defendant's trial wearing shackles and jumpsuit may constitute ineffective assistance of counsel).

Knight asserts he was unfairly prejudiced by this spectacle because, though there was no evidence that he posed a particular security or safety threat in the jail or courtroom, when the jury saw him in shackles, they were led to believe that the trial court possessed some evidence of Knight's future dangerousness and uncontrollable behavior, implying death would be the only appropriate penalty.

The United States Supreme Court's opinion in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," *Id.* at 633, 125 S.Ct. 2007, applies with added force in the present case, particularly in light of the fact that the visible shackling at bar occurred during the *guilt* phase of jury trial, necessarily also spilling over also into the penalty phase of jury trial, requiring reversal of Knight's ill-obtained Judgments of Conviction and Sentences of Death.

III.

THE TRIAL COURT ERRED IN RULING THAT NO DISCOVERY VIOLATION OCCURRED AND IN REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S DNA EXPERT GAVE A NEW OPINION UNDISCLOSED PRIOR TO TRIAL THAT DID NOT EXCLUDE KNIGHT AS A DONOR OF KEY DNA EVIDENCE FROM WHICH THE EXPERT'S LAB EARLIER EXCLUDED KNIGHT

The State's contention that "the court found there not to be a discovery violation at all and, therefore, it could not prejudice the defense," *Answer Brief, page 33,* is belied by record facts and this Court's procedural prejudice standard.

First, the record shows a discovery violation. When the State questioned DNA expert McElfresh about his comparisons of foreign DNA in a mixture found in two samples from the crime scene (blue jean shorts and boxers) with standards taken from a minor, Victoria Martino, the latter of which standards had not previously been sent to McElfresh's lab, the defense objected, asserting a discovery violation and moving for mistrial, which the trial court initially denied without holding a *Richardson* hearing (V.31 T 3342; 3347-3355). Dr. McElfresh then testified, based on his new and previously undisclosed comparisons of the foreign DNA in the mixture with standards from Ms. Martino the State had only recently supplied him with, that Knight could not be excluded from the samples

(V.31 T 3355-3369; 3375). Asked on cross whether his lab had ever analyzed Ms. Martino's DNA, Dr. McElfresh replied that it had not (V.31 T 3372). Asked when he was first given Ms. Martino's DNA standards, he replied: "Approximately two weeks ago" (V.31 T 3372).[1] Mr. McElfresh agreed on cross that his lab had previously excluded Knight from the samples (V.31 T 3382). Knight renewed his motion for mistrial (V.32 T 3441-3445), which the trial court denied in an ambiguous ruling (V.32 T 3459-3460) ("We're sort of having a *Richardson* hearing backwards here. Based on everything that I know, I don't believe there's a discovery violation. . . . Okay. I don't believe the violation was inadvertent.").

Thus, the State: (1) gave the defense what appeared to be a complete DNA comparison prior to trial; and (2) then ordered that further DNA comparisons be done without notice to the defense. Based on the discovery the State *had* produced, Knight relied on a defense of excluded DNA from these items. At trial, however, the State introduced new DNA comparisons, ambushing that defense.

The prosecutor's conduct in providing Knight's defense counsel with DNA expert opinion discovery without any indication or hint that it was not complete, leaving the defense with the false impression that the DNA obtained from the blue

[1] It was the Assistant State Attorney himself who conceived of and procured this new expert opinion testimony without disclosure to the defense (V.32 T 3445).

jean shorts and boxers found at the crime scene would exclude Mr. Knight, only to spring forth at trial with an opposite expert opinion after ordering additional analysis, undisclosed to Knight's counsel, was a discovery violation that unfairly prejudiced the defense. Though the trial court properly held "I don't believe the violation was inadvertent" (V.32 T 3459-3460), the trial court erred in finding no discovery violation, erred in finding the violation was not substantial, erred in finding the violation did not prejudice the defense's preparation for trial, and erred in failing to grant a mistrial after its unheralded introduction into evidence.

The State's closing argument, moreover, repeatedly reminded jurors of, and actually quoted from, McElfresh's new and damaging trial testimony, undisclosed pre-trial, that "the probability of excluding somebody in that mixture, if they were going to be excluded in the Caucasian population, was 99.998 percent, 99.999 percent in the African-American population, and the same in the Hispanic population" (V.34 T 3546-3549, 3564, 3570-3571).

Second, the State's suggestion that the defense suffered no procedural prejudice is contradicted by this Court's prevailing procedural prejudice standard.

The inquiry in a *Richardson* hearing is "whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial

preparation or strategy.'" *Scipio v. State*, 928 So. 2d 1138, 1150 (Fla. 2006) (quoting *State v. Schopp*, 653 So.2d 1016, 1020 (Fla. 1995)). An analysis of procedural prejudice "considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation." *Id.* at 1149. It is immaterial whether the discovery violation would have made a difference to the fact finder in arriving at the verdict. *Id.* at 1150.

A discovery violation is harmless only if the appellate court can determine, beyond a reasonable doubt, that the defense was not procedurally prejudiced. *Id.* Because it is the State's burden to show that the error was harmless, the State must show in the record that the defendant was not prejudiced by the discovery violation. *Schopp*, 653 So.2d at 1020.

At bar, the State has not met its burden of showing that this discovery violation was harmless. The State's failure to disclose Dr. McElfresh's new expert opinion testimony materially hindered the defense's trial preparation. Mr. Knight's trial strategy with regard to Dr. McElfresh's trial testimony would have been materially different had he known of this new testimony, which was contrary to the testimony previously supplied to the defense.

Rather than moving for a mistrial, Mr. Knight's counsel stated he would have had a defense expert rebut that testimony. (V.32 T 3444). Whereas Knight's counsel might have enlisted an expert regardless of the discovery violation, he would not have been able to prepare that expert for trial without knowledge that Dr. McElfresh would use DNA data previously not supplied to McElfresh's lab, rather than the data disclosed to the defense as having been supplied to McElfresh's lab, for DNA analysis. *See Scipio*, 928 So.2d at 1145 (noting a party can hardly prepare for an expert opinion that it does not know about).

Deposing Dr. McElfresh, either pre-trial or after this undisclosed testimony came to light, as the trial court suggested (V.32 T 3458), would not have been adequate to resolve the discovery violation. Mr. Knight still would have been without an expert witness to rebut McElfresh's testimony as it was procured, without disclosure to the defense, during jury selection. This was particularly harmful because the primary theory of Knight's defense was misidentification and the defense was not privy to this expert opinion until the cat was out of the bag.

The opinion in *Casica v. State*, 24 So.3d 1236 (Fla. 4th DCA 2009), issued after Knight's Initial Brief, is instructive. In *Casica*, DNA analyst Whitten examined three samples from a defendant's boxer shorts, each containing DNA of

at least two individuals. She could not exclude the victim or defendant. The odds of randomly selecting an unrelated individual who could be included as a contributor to the mixtures were 1 in 110, 1 in 490, and 1 in 1,200. State DNA expert Tracey testified he tested the same samples, but used a different method, opining it was 250,000 or 260,000 times more likely DNA on the boxers came from the defendant and victim than from the defendant and an unknown person. He used the FBI database to reach his conclusion. Casica objected and moved for mistrial, asserting a discovery violation as the State failed to disclose this opinion prior to trial. A *Richardson* hearing ensued, at which Tracey testified he originally analyzed the data using the NIST database, but that the prosecutor later asked him to recalculate using the FBI database. Tracey related his new calculation to the prosecutor, who did not provide the new calculation to the defense. Defense counsel stated his strategy was to move to strike Tracey's testimony as he thought the analysis using the NIST database was inadmissible. He made no opening statement in part so he could challenge Tracey's NIST testimony, leaving only Whitten's DNA calculations, which were more favorable to the defense than Tracey's FBI calculation. The trial court found the violation was not willful, offering to adjourn so the defense could depose Tracey. Defense counsel rejected

this offer, as deposing Tracey would be futile because he would need to hire an expert to effectively challenge the new testimony. He had not hired an expert as he thought the court would strike Tracey's NIST testimony. The trial court denied a mistrial and Casica appealed, asserting he was procedurally prejudiced by the discovery violation. The Fourth District reversed, holding the State's failure to disclose the new calculation materially hindered the defendant's trial preparation as his strategy with regard to Tracey would have been materially different had he known of the new calculation and he would have enlisted an expert to rebut it.

In *Casica*, as here, the discovery violation hinged not on the DNA evidence made available to the defense, but the undisclosed expert opinion testimony based on that evidence, procedurally prejudicing the defense trial preparation. Moreover, the fact that Ms. Martino's DNA standard, originally not provided to McElfresh's lab, was later provided to and considered by McElfresh at the State's behest, without disclosure to the defense, barred any effective challenge to the undisclosed testimony. At bar, as in *Casica,* this case should be remanded for a new trial.

IV.

THE TRIAL COURT ERRED IN REFUSING TO SEAT A NEW JURY PANEL FOR PURPOSES OF THE PENALTY PHASE OF TRIAL BASED ON FAMILY WITNESS MULLINGS' COMMENT IN THE JURY'S PRESENCE DURING THE GUILT PHASE PROCEEDINGS THAT MULLINGS KNEW KNIGHT HAD A "VIOLENT BACKGROUND"

The State casts this point as a renewal of Knight's guilt phase motion for mistrial, *Answer Brief, page 41*, and asks this Court to apply a standard of review that should not apply to the trial court's ruling on the defense motion to disqualify the penalty phase jury panel based on its exposure to guilt phase testimony that Knight had a "violent background" (V.48 T 495-506). The cases the State cites as "similar" to the case at bar all dealt with denials of defense motions for mistrial, *Answer Brief, page 43*; not a motion to disqualify a penalty phase panel.

The abuse of discretion standard applicable to motions for mistrial should not be applied to a ruling on a motion to disqualify a guilt phase jury from the penalty phase as the justification for an abuse of discretion standard is inapplicable.

The justification for an appellate court's application of an abuse of discretion standard to trial courts' rulings on motions for mistrial was explained by this Court in *Strawn v. State ex rel. Anderberg*, 332 So.2d 601 (Fla. 1976):

> In the conducting of a complicated criminal trial, [the trial court] finds it necessary to rule many times and, like the referee in an athletic contest, *must rule quickly*. Generally speaking, he has neither the time, convenient library, nor a staff to research each legal and evidentiary question with which he is confronted *in a fast moving trial*. It is, therefore, necessary that he be given broad discretion in disposing of such matters.

Strawn v. State ex rel. Anderberg, 332 So.2d at 603 (emphasis added).

Where a trial proceeding has not yet begun, is not yet moving, and the trial court need not rule quickly, that justification loses force. A motion to disqualify a guilt phase jury panel from the penalty phase trial for fear of not being able to receive a fair trial is more akin to a pre-trial motion to disqualify a trial judge for fear of not being able to receive a fair trial. The standard of review of a trial judge's determination on a motion to disqualify is de novo, *Chamberlain v. State*, 881 So.2d 1087, 1097 (Fla. 2004), which is the standard that should apply at bar.

When the guilt phase verdicts were returned, and well before the penalty phase trial, Knight's counsel moved the trial court for an order disqualifying the seated jury and requiring the seating of a new jury for the penalty phase trial based on the victims' family witness Hans Mullings' comment during the guilt phase that Mullings knew Knight to have a "violent background" (V.48 T 495-506). The objectionable comment, uttered by the victims' father and husband respectively on

direct, was made as follows: “I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something *because I know Richard's violent background*.” (V.25 T 2709) (emphasis added). The trial court denied the defense motion to seat a new jury panel for the penalty phase trial, stating: “There was no indications to the violent nature of the testimony” (V.48 T 506).

Knight reasonably feared he would not receive a fair penalty phase trial as this “violent background” testimony would reasonably taint jurors in the penalty phase with a preconceived notion that Knight had a *longstanding* violent character, compromising jurors’ impartiality and rendering the penalty phase trial unfair.

While Florida law seems devoid of any published opinion dealing with the denial of a new penalty phase jury based on a guilt phase witness’ testimony that the defendant has a “violent background,” reason dictates such bad character evidence, injected into jurors’ minds before the penalty phase trial has even begun, would color the character evidence only properly presented in the penalty phase.

The State’s suggestion that the trial court’s instruction *during the guilt phase* to ignore the “criminal background” testimony cured any prejudice from this testimony arising *during the penalty phase, Answer Brief, page 43,* lacks merit. The jury was not reinstructed in the penalty phase proceeding that it could not

consider the guilt phase "criminal background" testimony. The jury *was* instructed before the penalty phase trial: "Your advisory sentence should be based on the evidence you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in those proceedings." (V.55 T 1146).

As this Court explained the differences between guilt phase harmfulness and penalty phase harmfulness in *Castro v. State*, 547 So.2d 111 (Fla. 1989):

> We are not persuaded, however, that McKnight's testimony about his experience with Castro was equally harmless as to the death sentence. Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a *Williams* rule error is presumed to infect the entire proceeding with unfair prejudice.

Castro v. State, 547 So.2d at 115.

The State's contention that Knight placed his character at issue during the penalty phase, opening the door to such testimony, *Answer Brief, page 44*, places the cart before the horse. The jury heard violent character testimony before the defense could elect whether to open the door, forcing its hand in the penalty phase.

This case should therefore be reversed and remanded for a new penalty phase trial before a jury untainted by such "violent background" testimony.

V.

FLORIDA'S DEATH SENTENCING STATUTE BOTH VIOLATES THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IGNORES THE UNITED STATES SUPREME COURT'S OPINION IN *RING V. ARIZONA*

Knight stands by the argument and citations of authority contained in the Initial Brief. This Court should find section 921.141(5)(i), Florida Statutes violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), vacating Knight's death sentences and remanding for imposition of life imprisonment without possibility of parole.

VI.

PROPORTIONALITY REVIEW [RESTATED]

The State's Answer Brief added this point, proportionality, to the points raised in Mr. Knight's Initial Brief, and this Court has a duty to review it. *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003). Mr. Knight does not argue, however, that, were he accorded a fair trial, the death penalty would be disproportionate to other cases upheld by this Court. The problem here, however,

is Mr. Knight's deprivation of a fair trial, as set forth with more particularity in Points I, II, III, IV and V of the Initial Brief on Appeal and this Reply Brief, *supra*.

CONCLUSION

For the foregoing reasons and for the reasons more fully set forth in Appellant's Initial Brief, this Court should reverse and remand this case for a new trial, penalty phase proceeding, and/or resentencing hearing.

Respectfully submitted,

MELODEE A. SMITH
Florida Bar No. 33121
LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Assistant State Attorney Tony Loe, 201 S.E. 6th Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Lisa-Marie Krause Lerner, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and (3) Mr. Richard Knight, #L36345, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by U.S. Mail, this 21st day of July, 2010.

CERTIFICATE OF FONT AND TYPE SIZE

This brief is word-processed utilizing 14-point Times New Roman type.

_____

MELODEE A. SMITH
Florida Bar No. 33121
LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

Attorney for Appellant