IN THE SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS,

Petitioner,

v.

HARRY SINGLETARY, Secretary, Department of Corrections, State of Florida,

Respondent.

CASE NO. 81330

PETITION FOR WRIT OF HABEAS CORPUS

STEVEN H. MALONE
Florida Bar No. 305545
Office of the Public Defender
Fifteenth Judicial Circuit
421 Third Street, 6th Floor
West Palm Beach, FL 33401
(407) 355-7608

GWENDOLYN SPIVEY
Florida Bar No. 295450
Post Office Box 14494
Tallahassee, FL 32317
(904) 668-3593

ATTORNEYS FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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PETITION FOR WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

TERRY MELVIN SIMS petitions this Court for a writ of habeas corpus, seeking relief from the affirmance of his conviction of first-degree murder and sentence of death. He will be referred to herein as Mr. Sims or Petitioner. The Respondent will be referred to as the State.

In this brief, the symbol "R" denotes references to the record of the direct appeal, while "RP" denotes references to the record of post-conviction proceedings.

While Steven Malone remains counsel of record for Mr. Sims for all other purposes, his representation herein does not extend to the issues of ineffective assistance of appellate counsel, as a conflict of interest exists due to Mr. Malone's former association with appellate counsel, Craig Barnard, now deceased.

STATEMENT OF JURISDICTION AND VENUE

Article V, Sections 3(b)(7), (9) of the Florida Constitution confer on this Court the power to issue the writ of habeas corpus. This petition is properly lodged with this Court since the petition presents claims directed at this Court's prior decision affirming Mr. Sims' conviction and death sentence and involves claims of ineffective assistance of counsel before this Court. Kinsey v. State, 19 So. 2d 706 (Fla. 1944); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984).

Further, this Court has never hesitated in exercising its inherent jurisdiction whenever claims are presented which undermine confidence in the fundamental fairness of capital proceedings. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1986); Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); State v. Green, 446 So. 2d 218 (Fla. 1985); In re Agan, 466 So. 2d 217 (Fla. 1985).

PROCEDURAL HISTORY

On April 12, 1978, the grand jury for the Eighteenth Judicial Circuit indicted Mr. Sims for crimes which occurred on December 29, 1977. Count I alleged Mr. Sims killed George Pfeil by premeditated design or in the course of robbing Robert Duncan; Count II is an identical charge, except it alleges the murder occurred during a robbery of William Guggenheim. Count III charged Mr. Sims with robbing Guggenheim, and Counts IV and V with robbing Duncan. R 843-44. Pretrial motions were heard on December 11, 1978, and denied by written order one week later. R 952-54. Motions to suppress identification were heard and denied in January, 1979. R 958-60, 968-71.

Trial began January 30, 1979. The court granted a judgment of acquittal on Count V, but the jury convicted Mr. Sims as charged on Counts I-IV. The jury recommended death on February 8, which sentence was imposed on July 24, 1979. R 1089-93, 1218.

In April, 1981, on his direct appeal, Mr. Sims filed in this Court a Motion to Remand for Clarification of the Record, and the motion was granted by this Court on May 14, 1981. A hearing was held in the trial court in June, 1981, and it was determined that no court reporter was present at the pretrial motion hearings or at the jury charge conference.

On April 28, 1981, this Court issued a special order requiring Mr. Sims' Initial Brief to be served on or before July 1, 1981. In Re: Directive to the Public Defender for the

Fifteenth Judicial Circuit of Florida, Case No. 60,515. While the case was still on remand to the trial court, Mr. Sims' appellate counsel filed a motion requesting that he be allowed to file his initial brief in this Court while the cause was on remand, without prejudice to file a supplemental brief once clarification of the record had been completed. That motion was granted on June 22, 1981.

Mr. Sims' Initial Brief was then filed in this Court on June 29, 1981. Subsequently, oral argument was held January 6, 1982, without objection by appellate counsel. See letter of December 29, 1981, informing the Court that counsel was prepared to argue the cause as scheduled.

After the trial court entered its order on clarification on March 2, 1982, appellate counsel then filed in this Court, on or about April 23, 1982, a Motion to Relinquish Jurisdiction for the purpose of reconstructing the non-available record, pursuant to Florida Rule of Appellate Procedure 9.200(b)(3). After response by the State, Mr. Sims' Motion for Reconstruction of the Record was not referred to the full Court but was denied by the single acting chief justice, on May 25, 1982, without stated reason.

This Court then affirmed Mr. Sims' conviction and sentence. Sims v. State, 444 So. 2d 922 (Fla.), cert. denied, 467 U.S. 1246 (1984)(hereafter Sims I).

Mr. Sims filed a motion in the circuit court for relief under Rule 3.850, Florida Rules of Criminal Procedure, on July 24, 1986. RP 401-24. In March, 1986, Mr. Sims filed a

Petition for Writ of Habeas Corpus with this Court, Case No. 68,422; on September 2, 1986, this Court ordered the petition dismissed pursuant to a notice of voluntary dismissal filed by Mr. Sims. Sims v. Wainwright, 494 So. 2d 1153 (Fla. 1986).

On October 19, 1987, Mr. Sims filed an Application for Relief Pursuant to Hitchcock v. Dugger in this Court, Case No. 71,313. On July 12, 1989, this Court ordered that claim transferred to the Circuit Court. RP 539. Mr. Sims filed a Supplement and Amendment to Motion to Vacate on September 21, 1989. RP 727-30. A consolidated Amended and Supplemented Motion to Vacate Judgments and Sentence was filed on March 23, 1990, pursuant to court order. RP 741-832. Following the filing of the State's Response on May 29, 1990, hearing was held thereon on May 29 and June 1, 1990. The parties submitted legal memoranda, RP 938-1047, and the trial court denied all relief on February 18, 1991. RP 1071-90.

Appeal was timely taken on March 15, 1991. RP 1094-99. This Court subsequently affirmed the trial court's denial of Mr. Sims' motion for post-conviction relief. Sims v. State, 602 So. 2d 1253 (Fla. 1992), cert. denied, ___ U.S. ___, Docket No. 92-6602 (January 11, 1993)(hereafter Sims II).

STATEMENT OF THE CASE

This case arises from the murder of George Pfeil, an off-duty security guard, during the robbery of a drugstore in Longwood, Florida, on December 29, 1977. There has never been any dispute that the robbery involved Curtis Baldree, Eugene Robinson[1], B. B. Halsell, and a fourth person. While Mr. Baldree and the fourth man entered the drugstore, Robinson and Halsell stayed outside in a stolen car. As the prosecutor said at the outset of his jury argument, the only question was the identity of the fourth man. R 697. Baldree, Halsell, and Robinson were members of the so-called "Dixie Mafia," as was Terry Wayne Gayle.[2] The State's theory at trial was that Terry Sims was the fourth robber who fired the fatal shot; Mr. Sims' theory was that Terry Wayne Gayle was the fourth person.

In affirming the conviction and sentence on direct appeal, this Court summarized the trial testimony as follows:

> Terry Melvin Sims was convicted for the first-degree murder and robbery of George Pfeil, an off-duty deputy sheriff who entered a pharmacy while it was being robbed by Sims and three other men. Two of these other participants, Curtis Baldree and B.B. Halsell, were the state's chief witnesses. They testified that Sims and Baldree armed themselves with pistols and entered the pharmacy, while Halsell and the fourth

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[1]In the State's view, Mr. Robinson was "the mastermind of this whole thing." R 735. At the post-conviction hearing, the prosecutor testified that the State's theory was that Mr. Robinson "engineered" the robbery. R 261. Presently an inmate in a federal prison, he has never been prosecuted for his role in the instant offense.

[2]His name sometimes appears in the record as "Gale" and "Gail."

> participant, Gene Robinson, waited in a car a short distance away. Baldree said that he went to the back of the store to rob the pharmacist while Sims stayed at the front of the store watching the door. Sims ordered the customers and employees to the back of the store and into the bathroom. When Pfeil came into the store he and Sims exchanged gunfire. Pfeil was shot twice and Sims was wounded in the hip. Sims and Baldree escaped the scene and later joined their accomplices. The four men then departed the area.
>
> This account of the robbery and the shooting was confirmed by pharmacist Robert Duncan, Duncan's wife and daughter both of whom worked at the store, and two customers who identified appellant. One of the customers, William Guggenheim, testified that he tried to leave the store when he saw a man pointing a gun at the pharmacist. He was stopped by Sims who took his wallet. Guggenheim said he then saw Sims shoot a man who was entering through the front door.
>
> The main theory of the defense was mistaken identity. The defense attempted to discredit Baldree and Halsell on the basis of their bad character, drug addiction, criminal records, and the plea agreements between them and the state. The defense attacked the identification testimony of one of the customers as the product of a suggestive photographic line-up and questioned the testimony of Guggenheim on the basis of his earlier failure to choose appellant from a photographic line-up. The defense then presented evidence of appellant's resemblance to another individual said to be a frequent criminal associate of Baldree and Halsell.

Sims I, at 923-24.

At trial, the pharmacist identified Mr. Baldree as one of the robbers. R 363-64. His wife, Caroline, testified that Mr. Sims resembled one of the robbers. R 392. His daughter, Colleen, did not originally identify Mr. Sims as one of the robbers when shown a photographic lineup, R 411-14, but she later

identified him after seeing his picture in the newspaper. R 414, 419. One customer, William Guggenheim, originally did not identify Mr. Sims when shown his photograph; in fact, he identified another person as the robber. R 1186, 496. At trial, however, he did identify Mr. Sims. R 495-500, 487. Another customer, Sue Kovec, identified Mr. Sims as being in the front of the store during the robbery. R 503-506.

The evidence showed that Mr. Baldree, who held his gun to the pharmacist's face with cocked trigger during the robbery, R 435, had spent 24 years in state and federal prisons for such crimes as armed robbery, sale of narcotics, attempted murder, and escape. R 426-27. He was on drugs the day of the offense. R 451-52, 459. In exchange for his testimony, he was allowed to plead guilty to two misdemeanors, R 445, and admitted that "he would do just about anything to keep that deal." R 659. Mr. Halsell, who was on morphine the day of the crime, had committed several robberies and more than 100 burglaries. R 300, 323. He also said he would do "whatever was necessary" for his plea bargain sentence of 15 years probation conditioned on time served in the county jail. R 659.

The defense presented testimony as follows: Robert Little testified that Mr. Halsell had a reputation as a drug addict and liar and that Mr. Halsell and Mr. Baldree had falsely accused him of a crime in the past. R 355-35. Carole Wetherby, a pharmacy employee, disputed Mr. Guggenheim's account of where he was at the time of the shooting. R 537-41.

Eugene Robinson's former wife, Beverly Ann, testified that Mr. Baldree hallucinated constantly. R 457. His reputation was that he was dangerous and treacherous. R 550. She further testified that Mr. Halsell and Mr. Baldree worked together as a team and that they would commit robberies and burglaries with Mr. Gale. R 548-49. They would rob drugstores and then bring the drugs directly to Ms. Robinson for sale. R 556. She further testified as to Mr. Gale's physical characteristics, relating that he and Mr. Sims resembled each other so much that they were given the nicknames Little T (Mr. Sims) and Big T (Mr. Gale). R 549-50. She never saw Mr. Sims with Baldree and Halsell. R 550. (She knew Mr. Sims because they were from the same town. R 548.)

Joyce Gray, Mr. Baldree's common-law wife, gave similar testimony about his character. She also testified that, at some time, Mr. Baldree told her that there was a man in the spare bedroom who had been injured in a fall from a roof, or "something like that." R 577. He told her not to go into the room. R 578.

Mr. Halsell's former girlfriend, Gail Millikin, testified that Mr. Baldree would hallucinate when on drugs. R 586-87. Mr. Baldree had in the past falsely accused her of robbery. R 87-88. She testified that Mr. Baldree and Mr. Halsell knew Mr. Gale, and she described his physical characteristics. R 589-90.

Bonnie McCumbers, Mr. Sims' girlfriend, testified that Mr. Sims stayed home with her every night between Christmas and New Year and showed no signs of a gunshot wound. R 599-98. June Hart testified that she visited McCumbers and Sims on January 3,

1978, and saw him several times during the following weeks, but that he showed no signs of limping or pain. R 612-13. Her husband, Robert, gave similar testimony. R 622-23.

In rebuttal, the State called William Dunbar, a surgeon and convicted felon. On January 3, 1978[3], Eugene Robinson brought a man looking like Mr. Sims[4] to his office for treatment of a wound to his left hip. R 668-70. The man was in excruciating pain; the injury looked like a tear or cut, and a bone was chipped. Id. Because of his conviction and resulting incarceration, Dr. Dunbar had lost any records of this event. R 673.

Also in rebuttal, the State called John Schumacher, a Jacksonville police officer, who testified that Ms. McCumbers had previously stated that, at some time in the past, Mr. Sims had received a puncture wound when he fell off a ladder and landed on a piece of wood "or something to that effect." R 681-82. He also testified that Mr. Gayle "is heavier set than Mr. Sims. He has a considerable bit less hair.[5] He's not as thin in the face.[6] He's a little stockier in the shoulders. He doesn't appear as frail as Mr. Sims does. He's more solid built."

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[3]He remembered the date because it was the beginning of his federal trial for dispensing illegal prescriptions and violation of a trust. R 666, 668.

[4]Referring to Mr. Sims, he testified: "That looks like the man. I have only seen him one time, but that looks like him." R 670.

[5]Ms. Kovec had testified to being struck by the gunman's lack of hair and receding hairline. R 508.

[6]A police officer who caught a glimpse of the gunman testified that he did not have a thin head. R 526.

R 683. Mr. Sims and Mr. Gayle are the same height, R 685, and their hair is the same color. R 686. Officer Schumacher did not see Mr. Gayle between the fall of 1977 and early 1978 and did not know his weight at that time. R 685-86.

The only sentencing evidence the State presented the jury was proof that Mr. Sims was convicted of assault with intent to commit robbery in 1971. The defense presented evidence from four witnesses concerning Mr. Sims' character, non-violence and assistance to others: Sharon Mathis testified that Mr. Sims had taken care of her and her children when she was seriously ill with a tumor. R 796. Ms. Mathis' mother testified that he was very kind, never irrational or violent, and read the Bible often. R 803. Ms. Mathis' 15-year-old daughter testified that he took on a father role, was very kind, provided for their family, and counselled her about her problems. R 806-807. John Marshall, who had shared a cell with Mr. Sims, testified regarding Mr. Sims' extensive and successful efforts at counselling a young boy away from a life of crime and toward returning to his family. R 790-91.

The jury rendered a verdict calling for a sentence of death.[7] The presentence investigation report showed that: Mr. Sims was the product of an unstable home, and his family moved many times. His mother was married three times, with the last marriage being very damaging to the family and very disturbing to Terry Sims. The insecurity in the family caused Terry and his

[7]The jury's vote was not recorded.

brother to leave home, and many of Terry's early problems were attributed to this instability. R 1108-1109.

In sentencing Mr. Sims to death, the trial court found seven aggravating circumstances and no statutory mitigating circumstances. On appeal, this Court summarized these findings:

> As aggravating circumstances, the trial judge found that appellant had previously been convicted of a felony involving the use or threat of violence, citing a previous conviction for assault with intent to rob and a previous conviction for robbery, section 921.141(5)(b), Florida Statutes (1977); that appellant created a great risk of death to many persons, section 921.141(5)(c); that the capital felony was committed in the course of or in the attempt to commit or in flight after committing a robbery, section 921.141(5)(d); that the murder of the uniformed deputy sheriff was committed for the purpose of avoiding arrest, section 921.141(5)(e); that the murder was motivated by pecuniary gain, section 921.141(5)(f); that the murder was committed to disrupt or hinder the enforcement of the law, section 921.141(5)(g); and that the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). Finding no statutory mitigating circumstances, the trial judge found that the aggravating circumstances outweighed any mitigating considerations.

Sims I, at 925. While affirming the death sentence, this Court struck three of the aggravating circumstances (pecuniary gain; hindering law enforcement; heinousness) and affirmed three (felony murder, commission of prior violent felony, and avoiding arrest). The Court made no further mention of the fourth (great risk to many). It affirmed the conviction and sentence because it was of the opinion that the trial court had found no mitigating circumstances:

> Since there were no mitigating circumstances, the two instances of improper double consideration of or giving separate effect to similar statutory aggravating circumstances may be regarded as harmless error. We will simply consolidate the separate statutory factors so as to accord them their proper weight. The double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances. Hargrave v. State, 366 So. 2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). Similarly, the erroneous finding that the murder was heinous, atrocious, or cruel may be considered harmless error. Armstrong v. State, 399 So.2d 953 (Fla. 1981).
>
> Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes. Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

Sims I, at 926. Neither the trial court nor this Court considered Mr. Sims' nonstatutory mitigating evidence.

GROUNDS FOR HABEAS CORPUS RELIEF

I. MR. SIMS WAS DENIED THE "RIGHT TO COMPLETE REVIEW" IN VIOLATION OF THE MANDATORY RULE, STATE STATUTE, AND THE STATE AND FEDERAL CONSTITUTIONS.

In the present case, the trial court did not provide a court reporter to report the hearing on the pretrial motions or the jury charge conferences. Thus, no transcript of those proceedings was included in the initial record on appeal. Accordingly, counsel for Mr. Sims properly moved this Court to reconstruct the record of those proceedings. Inexplicably, however, that motion was denied, as a result of which Mr. Sims' direct appeal was decided without a complete record.

Although one can only speculate why the motion for reconstruction of the record was denied, it was clearly not the decision of the full Court. (See handwritten notation on original Motion and Court's internal operating procedures on 5-25-82.) Even more clearly, it violated Mr. Sims' right to a complete record and complete review of his trial court proceedings.

The trial court in this case was required to provide a court reporter at all trial proceedings:

> All criminal . . . proceedings, and any other judicial proceedings required by law or court rule to be reported at public expense, shall be reported.

Fla. R. Jud. Admin. 2.070(a)(emphasis added). This rule was effective on July 1, 1978. In Re Florida Rules of Judicial Administration, 360 So. 2d 1076 (Fla. 1978). The rule is

mandatory that "all criminal proceedings" be reported and "contemplate[s] that the entire record of the proceedings will be available for transcription to an appellant who desires to appeal a conviction . . . ." In The Interest of J.E. v. State, 404 So. 2d 845, 846 (Fla. 5th DCA 1981).

Similarly, Florida Rule of Appellate Procedure 9.200(f)(2) gives a clear mandate:

> If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given.

(Emphasis added.) See also, Philip J. Padovano, The Appellate Process §§ 9.8-9.9 (1988). Finally, Section 921.141(4), Florida Statutes, provides:

> REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(Emphasis added.) See Craig v. State, 510 So. 2d 857 (Fla. 1987).

It is well settled that an appellant has a right to a complete record on appeal. Hamilton v. State, 573 So. 2d 109 (Fla. 4th DCA 1991); Loucks v. State, 471 So. 2d 131, 132 (Fla. 4th DCA 1985); Lipman v. State, 428 So. 2d 733, 737 (Fla. 1st DCA

1983). This is especially true in a capital case, which involves a broader scope of appellate review and involves a unique need for reliability under the Eighth Amendment to the United States Constitution and under Article I, Section 17 of the Florida Constitution. Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); § 921.141, Fla. Stat. (1979); Fla. R. App. P. 9.140(f). If it is impossible to obtain a complete record for appellate review, reversal is required. Felton v. State, 534 So. 2d 911 (Fla. 3d DCA 1988); Yancey v. State, 267 So. 2d 836 (Fla. 4th DCA 1972). Without a complete record, a defendant does not receive due process of law and the effective assistance of counsel pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

In Delap, a decision which was rendered five years before the denial of a complete record herein, this Court wasted little time in concluding that a new trial was necessary where it had been determined that reconstruction of the missing portions of the record was impossible. Id. at 463. Here, on the other hand, this Court refused even to order an attempt to reconstruct the missing portions of the record.

In Smith v. State, 407 So. 2d 894 (Fla. 1982), this Court was faced with a situation where defense counsel's closing argument had not been reported. Although this Court ruled against Smith's claim because defense counsel had instructed the court reporter not to report his closing argument, id. at 898-

99[8], this Court noted that "had appellant been denied the opportunity of a complete review through no fault of his own, there would be precedent for vacating the trial court's decision." Id. at 898, citing Delap, 350 So. 2d 462. Thus, this Court recognized that, absent a waiver, there is a "right to a complete review." Delap, 350 So. 2d at 463 n.1.

The present case involves no such waiver.[9] Compare Haist v. Scary, 366 So. 2d 402 (Fla. 1978)(parties affirmatively waived presence of court reporter). Thus, the trial court erred in failing to ensure that all proceedings were reported, and that error was solidified by this Court's erroneous refusal in 1982 to allow Mr. Sims his absolute right to a complete record. A similar situation evolved in Hamilton, 573 So. 2d 109, where the testimony of one witness was missing from the record. On the basis of the State's opposition that there was no valid issue on appeal to be obtained from a reconstructed record, the circuit court, sitting in its appellate capacity, dismissed the appeal as frivolous. Reversing, the Fourth District Court of Appeal wrote:

> Once a criminal defendant has chosen to exercise his right to appeal, he is entitled to a full transcript of the trial record. Lipman v. State, 428 So.2d 733, 737 (Fla. 1st DCA 1983). Florida Rule of Appellate Procedure 9.200(f) makes provision for supplementation of an incomplete record, and

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[8]Petitioner asserts that a reconstructed record would have documented trial counsel's request for a court reporter.

[9]Issue VIII, infra, raises the alternative argument that, if appellate counsel is to be faulted for the Court's failure to provide a complete record, that failure was certainly ineffective assistance of counsel.

> states that no proceeding shall be determined because of the incompleteness of the record until there has been an opportunity to supplement the record. These principles of law do not bear directly on the instant issue, but furnish a sympathetic backdrop for it.
>
> It has been said that an appellate court's judicially neutral review of the record is no substitute for the careful, partisan scrutiny of a zealous advocate; that it is appellate counsel's unique role to discover and highlight possible error and present it both orally and in writing to the appellate court. Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985). The appellate court needs the assistance of informed counsel quite as much as the defendant does. Aranda v. State, 205 So.2d 667, 670 (Fla. 4th DCA 1968). Further support for this thesis is found in the fact that even when appellate defense counsel can find no viable issues on appeal, he is not permitted to withdraw until he has discussed in a brief to the appellate court any arguable issues on appeal that he has been able to find. See Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Id. at 110-11. The Hamilton court analogized denial of an appeal to deprivation of the right to appellate counsel:

> Ruling the appeal frivolous before the issues on appeal have been identified is analogous to the circuit court's depriving petitioner of the assistance of appellate counsel, quite as fully as if the court had appointed incompetent appellate counsel although indigence of the criminal appellant required it. The effect of premature dismissal of petitioner's appeal was to deprive him of his constitutional due process right to appellate review of his criminal conviction. See Bannerman v. Wainwright, 283 So.2d 124, 125 (Fla. 1st DCA 1973); Simmons v. State, 200 So.2d 619 (Fla. 1st DCA 1967). Except by certiorari, petitioner has no remedy available to overcome this departure from an essential principle of law, which if uncorrected amounts to a miscarriage of

> justice. See Combs v. State, 436 So.2d 93, 96 (Fla. 1983).

Id. at 111.

The same result obtained here. When it was clarified that portions of the trial court record were unreported, Petitioner moved to remand for reconstruction of the record. Just as in Hamilton, the State's Response objected to the reconstruction on the basis that no possible meritorious appellate issue could be established. Contrary to the clear requirements of law, this Court denied the request for reconstruction. In so doing, the Court denied Mr. Sims' right to an appeal, to an effective appellate advocate, and to due process of law.

The "right to complete review" is especially critical in a capital case with the unique need for reliability demanded where death is punishment, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and with the need for full appellate review to guide and channel capital sentencing discretion. See, e.g., Proffitt v. Florida, 428 U.S. 242, 251, 253, 258 (1976); Parker v. Dugger, 111 S. Ct. 731, 112 L.Ed.2d 812, 826 (1991) (emphasizing the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."). The denial of full review accordingly violates Article I, Sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution.

While a showing of prejudice is unnecessary where there is a violation of a mandatory rule, see Tascano v. State, 393 So. 2d

540 (Fla. 1981), and where the right of complete review has been abrogated, Delap, 350 So. 2d at 462, several of the proceedings during the unavailable hearings demonstrate the need for such a mandatory rule. For example, the motion for a hearing regarding prosecution-proneness of death-qualified jurors was an issue on direct appeal in this cause, but without a record of the hearing on the motion, Mr. Sims was unable to demonstrate the proffered expert witnesses. As another example, Mr. Sims moved for production of grand jury testimony, which is allowed under certain circumstances, e.g., State v. Gillespie, 227 So. 2d 550, 559 (Fla. 2d DCA 1969), and is a right that can be particularly important in a case such as the present one where the alleged co-perpetrators received a deal in return for their testimony. Yet Mr. Sims was precluded from raising that question on direct appeal because of the lack of a transcript of the hearing. The same situation obtained regarding the remainder of the pretrial motions. See Issue VIII, infra.

As to the jury charge conferences, there is no way, without a record, to determine requested charges or objections to charges. As to one charge in particular -- the trial court's instruction on consideration of mitigating circumstances -- that issue was lost to Petitioner because the transcript is unavailable, since it does not appear as a matter of record. In fact, all that appears of record is an objection to the instruction on "aggravating circumstances," R 830, and that reference was erroneous. With a record, Mr. Sims would be able

to demonstrate that the objection actually was to the instruction on mitigating circumstances as not complying with Lockett v. Ohio, 438 U.S. 586 (1978). However, Mr. Sims could not raise the question in his appeal because of the unavailable transcript. Another aspect of the penalty charge conference that is important, but missing, is the decision by the trial judge to instruct only upon certain of the aggravating circumstances. The reasoning of the judge, as well as that of the prosecutor, would be critical in the evaluation of the sufficiency of the evidence to support a death sentence -- especially in this case where the trial judge in imposing death relied upon an aggravating factor upon which he had not instructed the jury. An additional omission from the direct appeal attributable to the lack of a record is the absence of any challenge to the jury instruction on the aggravating circumstance that the murder was heinous, atrocious or cruel; this alleged error is included in the motion for new trial, but again there was no transcript on which to base an appellate argument. See also Issue VIII, infra.

Accordingly, Mr. Sims has been denied the right to a complete review. While reconstruction would have been feasible in 1982, the delay occasioned by this Court's denial of reconstruction now renders a new trial essential. Thus, the mandatory rules of this Court, as well as the state and federal constitutional right to due process and prohibition of cruel and unusual punishment -- especially as applied to a capital case

where a life is at stake -- require that Mr. Sims be granted a new trial.

II. THE JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, DEPRIVING MR. SIMS OF AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Mr. Sims' sentence resulted from a combination of errors in instructing Mr. Sims' jury concerning the proper Eighth Amendment weighing of aggravating and mitigating circumstances.[10] That there was fundamental constitutional error in the instructions to the jury is a matter which is no longer open to debate. Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). These errors were compounded by the sentencing court's weighing of invalid factors and by this Court's failure to provide meaningful review to the flawed sentencing proceedings on direct appeal.

There can be no serious dispute over the fact that Espinosa has overruled this Court's prior decisions. The rationale which this Court previously applied to the evaluation of jury instructional error at the penalty phase of a capital trial, the very rationale in effect at the time of the direct appeal in Mr. Sims' case, was found constitutionally lacking in Espinosa.[11]

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[10]This Court has already held that the jury instructions violated Hitchcock v. Dugger, 481 U.S. 383 (1987), although it found the error harmless. Sims II, at 1257. Petitioner shows herein that there was error in the instructions on both sides of the aggravation/mitigation balance, and that those errors were not harmless, requiring that a new sentencing be conducted.

[11]Espinosa overruled precedent finding the "heinous, atrocious, or cruel" instruction constitutionally appropriate. Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976)(finding that, although the trial judge erred in his finding of "heinous, atrocious, or cruel," there was no error in instructing the jury on this

Espinosa makes it manifest that the Eighth Amendment error which infected the sentencing proceedings in Mr. Sims' case "invalidates" the death sentence. Stringer v. Black, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992)(holding, consistent with Espinosa, that the vagueness of the "heinous, atrocious, or cruel" instruction invalidates the death sentence). This Court's direct appeal ruling is contrary to the teachings of Espinosa, while Espinosa demonstrates that relief is now appropriate.

Mr. Sims addresses these errors herein. Mr. Sims begins his discussion with an independent analysis of each of the invalid and unconstitutionally vague aggravating circumstances presented to the sentencing jury. Mr. Sims will then establish that this Eighth Amendment error is not harmless beyond a reasonable doubt and that a resentencing before a new jury is mandated.

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aggravator because, "Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more is required."); and Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989)(ruling that the standards of Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988), are inapplicable to Florida's instruction on "heinous, atrocious, or cruel"). Likewise, Espinosa overruled precedent rejecting challenges to the vagueness of the "heinous, atrocious, or cruel" instruction. Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)(finding challenge to the jury instruction on the aggravator meritless because "Maynard v. Cartwright . . . did not make Florida's penalty instructions on . . . heinous, atrocious, or cruel unconstitutionally vague."); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor."). Finally, Espinosa overruled precedent evaluating the effect of error on the "heinous, atrocious, cruel" aggravator solely on the basis of the judge's findings. Cooper; Smalley; Robinson v. State, 574 So. 2d 108, 112-3 and n.6 (Fla. 1991).

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO THE SENTENCERS.

No fewer than three invalid aggravating circumstances were presented to and presumably weighed by Mr. Sims' jury. We know that the "especially heinous, atrocious or cruel" aggravating factor and the "pecuniary gain" aggravating factors were invalid because they were struck by this Court on direct appeal. Sims I, at 925. Moreover, the "great risk of death to many" aggravating factor, which this Court failed to discuss but apparently struck on direct appeal,[12] is both unconstitutionally vague and factually inapplicable to the instant case, rendering that aggravator invalid as well. Applying a constitutionally invalid rule of automatic affirmance[13] where the trial court found no mitigating factors, and examining only the trial court's weighing process, this Court affirmed Mr. Sims' death sentence. Id. at 926.

Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating and mitigating circumstances but must extend to the jury's weighing process also:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the

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[12]In listing the valid aggravating factors, the court omitted the "great risk" aggravating factor, indicating that it had been struck. Sims I, at 926.

[13]See Clemons v. Mississippi, 494 U.S. 738 (1990); Stringer v. Black, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992).

> jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 120 L.Ed.2d at 859 (emphasis added).

1. "Heinous, atrocious, or cruel" aggravating circumstance.

Espinosa specifically held that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor, see, e.g., Florida Standard Jury Instructions (Criminal) (1981), violate the Eighth Amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the Eighth Amendment if the description of the

circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 120 L.Ed.2d at 858. The Court further noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

After concluding that, in every sense meaningful to the Eighth Amendment, the Florida jury is a capital sentencer, the Supreme Court had no difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the Eighth Amendment. The error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though the trial court did not improperly weigh the "especially heinous" aggravator:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S 367, 376-77 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 120 L.Ed.2d at 859 (emphasis added).

Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the defects identified by the Supreme Court in Godfrey v. Georgia, 446 U.S. 420 (1980), Maynard v. Cartwright, 486 U.S. 356 (1988), or Shell v. Mississippi, 111 S. Ct. 313, 112 L.Ed.2d 1 (1990), the verdict is infected with Eighth Amendment error. In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

The trial court instructed the jury as follows concerning the "heinous, atrocious, or cruel" aggravating factor:

> Six, that the crime for which the defendant is to be sentenced was especially henious [sic] and atrocious or cruel. Henious [sic] means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others. Pitiless.

R 825-26. Plainly, this instruction suffers from the same defects identified by the Court in Shell, where the court held a virtually identical instruction to be unconstitutionally vague. Shell, 112 L.Ed.2d at 4 (Marshall, J., concurring). As Justice Marshall explained:

> The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail [to provide guidance to the sentencer]; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of

> ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, [486 U.S. 356,] 363 [(1988)] (quoting Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (plurality opinion) (emphasis added).

Id. at 5. Because a "person of ordinary sensibility" could fairly characterize this case, like "almost every murder," as "extremely wicked," or "shockingly evil," "we must presume that the jury" weighed this invalid aggravating circumstance. Espinosa, 120 L.Ed.2d at 859. This presumption is only strengthened by the fact that the trial court, trained in the law and aware, unlike the jury, of this Court's interpretations of the aggravating factor, himself found and weighed it. R 1091. Unlike Espinosa, in which the trial court and this Court agreed that the heinous, atrocious or cruel aggravating factor did apply, the unconstitutionally vague instruction in this case ensured that Mr. Sims' jury erroneously weighed this aggravating factor -- a factor which as a matter of law does not apply.

With no meaningful guidance from the trial court, Mr. Sims' jury was told by the State that the "heinous, atrocious, or cruel" aggravating circumstance applied to this case and justified a death sentence:

> Last criteria is the particular act is particularly henious, atrocious, and cruel. There's two ways you can measure that. You recall the coroner, Dr. Urrgang, testified that either the wound that impacted into the cranial area or the one that hit the thoracic area would have caused death. That this one would have been relatively instantaneous and this one probably within two minutes, a sucking chest wound. There he is drowning in his blood.

> But there's another side to it. And that's the side that you saw when Mr. Duncan and Miss Kovec were up there.
>
> How many nightmares are these people going to have? They are going to have to bear that the rest of their lives. The children that were in that store, running around, trying to get in a bathroom and hide, cowering. People who didn't belong there. Who came in with guns. Shoved them in their faces and asked for their drugs and their money.
>
> Then when a police officer came on the scene, and attempted to retreat, this man pursued him and shot him, not once but twice.
>
> Yes, initially he may have thought that this man was a bus driver or someone else in uniform. But how about the point in time when George Arthur Pfeil is backing up and pulling out his service revolver? What is the mental impression that a normal person gets at that point in time? And what did Guggenheim say? He was out, going toward the front of that door. The aggressor.

R 815-16.

The effect of the State's argument on Mr. Sims' jury is unquestionable. That is, there is no question that, given the vague jury instructions, the jury could reasonably have believed that it was permissible for them to consider legally irrelevant factors such as the effect of the incident on bystanders, or that Mr. Sims was the "aggressor," in determining whether to weigh the "especially heinous" aggravating factor.

Moreover, it is clearly documented that the jury was, in fact, confused about the proper application of the aggravating factors, for they sent the Court a request for a "printed copy" of the "criteria for aggravating and mitigating circumstances." R 832-33; 1039. However, the only response from the Court

(indeed, the only response possible given the lack of definition of these terms), was to read to the jury the same vague instruction they were provided in the first instance. R 833-34.

A vague and invalid aggravating circumstance was presented to, argued to, and weighed by the jury. Because the weighing process was "infected with a vague factor," Mr. Sims' death sentence "must be invalidated." Stringer v. Black, 112 S. Ct. at 1139.

2. "Pecuniary gain" and "hinder law enforcement" aggravating circumstances.

The trial court instructed the jury to weigh three of the following aggravating circumstances and itself found and weighed all four: that the murder was committed during a robbery; that the murder was committed for pecuniary gain; that the murder was committed to avoid arrest; and that the murder was committed to hinder law enforcement.[14] R 825-26; 1091. On direct appeal, this Court held that it was error for the trial court to "double" the aggravating circumstance of committed during a robbery with that of committed for pecuniary gain, and also that it was error for the trial court to "double" the avoid arrest and hinder law enforcement aggravators. Sims I, at 925.[15]

The error, however, also affected the jury's weighing process. As with the "especially heinous, atrocious or cruel"

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[14]The Court did not instruct the jury on the "hinder law enforcement" aggravating factor. R 825.

[15]This Court failed to conduct a constitutionally adequate review of the trial court's weighing of the invalid aggravating circumstances. See Issue III, infra.

aggravating circumstance, "we must presume that the jury" weighed the "invalid aggravating circumstance," Espinosa, 120 L.Ed.2d at 859, that was struck by this Court on direct appeal. There was no way for the jury to know that it should not give separate and substantial weight to the "committed during a robbery" and "pecuniary gain" aggravating circumstances, and "we must presume" that it did so. Id.

3. "Great risk of death to many" aggravating circumstance.

In the absence of any limiting construction, the "great risk of death to many" aggravating circumstance is inherently vague. The language of the circumstance, standing alone, gives no guidance as to how great the risk of death must be or how many people must be at great risk. Nor does it provide any guidance as to whether or not the great risk of death to many must occur in close relation to the capital homicide. Recognizing that the aggravating circumstance alone does not provide significant guidance to sentencers, the Florida Supreme Court has established limiting constructions.

The leading case with respect to the aggravator is Kampff v. State, 371 So. 2d 1007 (1979), where the Court provided the following definitions:

> "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of persons would not establish this aggravating circumstance.

Id. at 1009-10. See also Williams v. State, 574 So. 2d 136, 138 (1991)(aggravating factor only present where proof beyond reasonable doubt that "the actions of the defendant created an immediate and present risk of death to many persons."). In addition, the Court has limited the aggravating factor by holding that three persons, in addition to the homicide victim, are not enough to constitute "many" persons, Bello v. State, 547 So. 2d 914 (Fla. 1989); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Johnson v. State, 393 So. 2d 1069 (Fla. 1981), and that only conduct immediately surrounding the capital felony may be considered in support of the aggravating circumstance. Delap v. State, 440 So. 2d 1242 (Fla. 1983); Mines v. State, 390 So. 2d 332 (Fla. 1980); Elledge v. State, 346 So. 2d 998, 1004 (Fla. 1977).

Even with such limiting constructions, the aggravating circumstance is inherently subjective and can easily be misapplied. This fact is illustrated by the large number of cases in which the Florida Supreme Court has struck findings of the aggravating factor by trial courts knowledgeable in the law and aware of the limiting constructions. See, e.g., Jackson v. State, 599 So. 2d 103 (Fla. 1992); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Bello v. State, 547 So. 2d 914 (Fla. 1989); Lucas v. State, 490 So. 2d 943 (Fla. 1986); Mills v. State, 476 So. 2d 172 (Fla. 1985); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Delap v. State, 440 So. 2d

1242 (Fla. 1983); Mason v. State, 438 So. 2d 374 (Fla. 1983); Bolender v. State, 422 So. 2d 833 (Fla. 1982); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Francois v. State, 407 So. 2d 885 (Fla. 1982); White v. State, 403 So. 2d 331 (Fla. 1981); Jacobs v. State, 396 So. 2d 713 (Fla. 1981); Mines v. State, 390 So. 2d 332 (Fla. 1980); Brown v. State, 381 So. 2d 690 (Fla. 1980); Lewis v. State, 377 So. 2d 640 (Fla. 1980).[16] It is almost inevitable that a jury, given no limiting construction and set free to decide for itself whether the defendant "created a great risk of death to many persons," will find the aggravating circumstance in virtually any case in which it was possible that any person other than the victim could have been harmed, thus finding the factor based on facts that this Court has held cannot be used to support it.

In the instant case, it is highly likely that the jury considered facts that are not within the narrowing construction, since the prosecutor argued that the aggravating circumstance applied, based on such facts, and the trial court found the aggravating circumstance based on such facts. At penalty phase, the prosecutor argued that the aggravating factor was supported by the mere presence of other people in the vicinity at the time

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[16]The inherent difficulty of applying the factor is also illustrated by the fact that there are at least two cases in which the Florida Supreme Court has affirmed the aggravating factor in an initial appeal but then struck the factor on a subsequent appeal. Compare King v. State, 514 So. 2d 354 (Fla. 1987), with King v. State, 390 So. 2d 315 (Fla. 1980); compare Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986), with Lucas v. State, 376 So. 2d 1149, 1153 (Fla. 1979). See also Scull v. State, 533 So. 2d 1137, 1141 (Fla. 1988).

that the capital felony took place. R 814. There was no evidence, however, that any violence was directed at most of these people, and their mere presence therefore does not support the aggravating factor. Bolender v. State, 422 So. 2d 833, 838 (Fla. 1982).

The State's argument was that any crime involving the use of guns in a public place per se creates a great risk of death to many persons. That argument was clearly inconsistent with Kampff[17], but there was no way for the jury to know that.

The probability that the jury failed to apply any limiting principle is raised to a near certainty by the fact that even the trial court failed to apply any of the Florida Supreme Court's limitations on the aggravating factor. The trial court's findings with respect to this aggravating factor are as follows:

> Sims by the use of a firearm by his directions to the people in the pharmacy, by committing a separate robbery while this main one was in progress, and by his actions of engaging in a gunfight with a Seminole County Deputy Sheriff, created a great risk of death to many persons.

R 1091.

These trial court findings are nothing but an exercise in rampant speculation that various persons who were in the vicinity could possibly have been at risk of harm from a stray bullet or

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[17]See, e.g., Williams v. State, 574 So. 2d 136 (Fla. 1991)(no great risk of death to many where guard shot in bank); Hallman v. State, 560 So. 2d 223 (Fla. 1990)(no great risk of death to many where 10 people in area of shoot-out outside bank); Jacobs v. State, 396 So. 2d 713 (Fla. 1981)(no great risk of death to many at shooting in rest stop).

something of the kind. Similarly, the State urged the jury to engage in exactly the same kind of rampant speculation. Yet that is precisely the type of speculation prohibited by Kampff. A "person may not be condemned for what might have occurred." White v. State, 403 So. 2d 331, 337 (Fla. 1981). The aggravating factor "must be based on a high probability, not a mere possibility or speculation." Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987), citing Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Francois v. State, 407 So. 2d 885 (Fla. 1981). Encouraging a jury to engage in such speculation with respect to an aggravating factor invalidates the factor, and hence the death sentence. Espinosa; Stringer v. Black, 112 S. Ct. 1130 (1992).

B. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer. In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating

> factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. at 1139.

Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137. The "weighing process" when Mr. Sims' case was heard by the jury was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

This Court has not conducted any review of the effect of the error in the instructions to Mr. Sims' jury on the "heinous, atrocious, or cruel," "pecuniary gain," or "great risk of death to many" aggravating factors. On direct appeal, this Court never acknowledged that there was any error in the jury instructions[18],

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[18]Of course, these issues could have been addressed more fully given reconstruction of a complete record. See Issues I, supra, and VII, infra.

and instead simply reviewed the trial court's "findings" as to these aggravating factors, with the exception of the "great risk of death to many" aggravating factor, which it did not even address. Sims I, at 925.

In no way could this Court's review of the trial court's findings on direct appeal be carried over to the error in instructing the jury, because the harmless error analysis with respect to jury instructions at capital sentencing is entirely different. This principle is well recognized in the context of Hitchcock jury instruction error. As this Court explained, "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event," Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), for jury harmless error review is quite different from the review involved when a trial judge's sentencing findings are at issue.

This is why the United States Supreme Court has held that harmless error analysis of juror capital sentencing error is especially "difficult," given the discretion afforded the sentencers. Satterwhite v. Texas, 486 U.S. 249, 258 (1988); Stringer, 112 S. Ct. at 1130. This is why the Eleventh Circuit Court of Appeals has held that reviewing courts should avoid "speculat[ing] as to the effect" of constitutional error in capital sentencing involving a jury, Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991), and why Chief Judge Tjoflat has stated, "[s]ince the [Florida Supreme] court could not determine with certainty what the jury's recommendation . . . would have

been [absent the constitutional error]," Booker, 922 F.2d at 646 (Tjoflat, C.J., concurring)(emphasis added), the affirmance of a death sentence on the basis of a harmless error finding must be deemed "arbitrary." Id. at 645.

This is why this Court has noted that where, as here, mitigation is present, it would be "speculative" to find jury sentencing error harmless. Hall, 541 So. 2d at 1128; see also Preston v. State, 564 So. 2d 120, 123 (Fla. 1990)(juror sentencing error not harmless because "[t]here was mitigating evidence introduced, even though no statutory mitigating circumstances were found [by the trial judge]."). Indeed, only very recently this Court stated, with respect to an unconstitutional instruction on a single invalid aggravating factor: "We cannot tell what part the instruction played in the jury's consideration of its recommended sentence." Hitchcock v. State, Case No. 72,200 (Fla. Jan. 28, 1993). For that reason, this Court remanded the case for a new penalty phase proceeding. Id.

And this is also why the Mississippi Supreme Court has never held, after the United States Supreme Court found the Mississippi "heinous, atrocious, or cruel" instruction unconstitutionally vague, Clemons; Shell, that the errors involved in a jury's consideration of that aggravator could be deemed harmless. Jones v. State, 602 So. 2d 1170 (Miss. 1992); Shell v. State, 595 So. 2d 1323 (Miss. 1992); Clemons v. State, 593 So. 2d 1004 (Miss. 1992); see also Johnson v. State, 547 So. 2d 59 (Miss. 1989).

Because errors such as those involved in Mr. Sims' case firmly press the thumb on "death's side of the scale," Stringer, 112 S. Ct. at 1137, such errors can rarely be properly found harmless beyond a reasonable doubt.

In this case, these errors cannot be found harmless beyond a reasonable doubt in this case absent the type of "speculation" which the Eighth Amendment forbids. Id. The Supreme Court, after all, has explained that a "vague" aggravator such as the one employed here "invalidates" the death sentence. Id.

Under Sochor and Stringer, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor v. Florida, 114 S. Ct. 2114, 119 L.Ed.2d 326, 341-42 (1992). This Court, of course, has recognized and adopted the Chapman standard. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). What Sochor does, however, is tell this Court that its application of the Chapman standard to Eighth Amendment error does not comport with constitutional requirements. When discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, 111 S. Ct. 1884 (1991). In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. 111 S. Ct. at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption,'" 111 S. Ct. at 1890, and then "held

'beyond a reasonable doubt . . . the jury would have found it unnecessary to rely on either erroneous mandatory presumption.'" Id. at 1891. The United States Supreme Court found the lower court's analysis constitutionally inadequate because the lower court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman formulated." Id. at 1894. In Yates, the Supreme Court explained that the "Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 111 S. Ct. at 1892, quoting Chapman, 386 U.S. at 24. The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." 111 S. Ct. at 1893. In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt' in that 'it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." Sochor, 119 L.Ed.2d at 342. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of Eighth Amendment error.

Mr. Sims' jury voted for death as the result of an unconstitutionally skewed weighing process, skewed as to three aggravators. Under the Chapman harmless error test, this Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. Nor could this Court "find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893. It would be speculation for this Court to find beyond a reasonable doubt that any one of these errors was unimportant to the jurors voting for death[19], let alone the cumulative effect of all three errors. In light of the entire record, it would be impossible for this Court to find "beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained," Chapman, 386 U.S. at 24, or that the errors were "unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893. Espinosa dictates that we presume the jury applied the invalid aggravating circumstances. Espinosa, 120 L.Ed.2d at 859.

With respect to the aggravating circumstances struck by this Court on direct appeal, this Court's review failed to comply with Espinosa in that it completely disregarded the jury's role in capital sentencing proceedings. Sims I, at 926. Under Espinosa, this Court must presume that the jury did rely on the invalid

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[19]Because there was no record of the jury vote, it is possible that a single additional vote for life would have resulted in a life recommendation.

aggravating factors, and when that presumption is made, this Court cannot say that the error "did not contribute to the verdict [of death] obtained." Chapman, 386 U.S. at 24. This Court cannot assume that the sentence would be death if the thumb of an invalid aggravating circumstance -- not to mention three other fingers -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24.

C. THIS CLAIM CHALLENGES FUNDAMENTAL ERROR COMMITTED BY THIS COURT AS PART OF ITS APPELLATE REVIEW.

Prior to Espinosa, the Florida Supreme Court repeatedly refused to acknowledge that, under Tedder v. State, 322 So. 2d 908 (Fla. 1975), and its progeny, the Florida penalty phase jury, for all intents and purposes, is the capital sentencer. The Court consistently rejected that argument, apparently on the basis of its belief that the Florida penalty phase jury is not a sentencer for Eighth Amendment purposes. See, e.g., Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989). See also Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990)(holding that Maynard v. Cartwright, 486 U.S. 356 (1988), does not affect Florida's death sentencing procedures.).

The United States Supreme Court has now decisively rejected that position and held that the Florida penalty phase jury is "the sentencer." In Espinosa v. Florida, 112 S. Ct. 2926, 120

L.Ed.2d 854 (1992), after discussing the State's argument based on Smalley, the court replied as follows:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, or death. Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> . . .
>
> [I]f a weighing State decides to place capital-sentencing authority in two actors [i.e., the sentencing jury and judge] rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

Id. at 859 (citations omitted).

A host of consequences follow from the conclusion that the jury is "the sentencer." For example, presentation of an "invalid aggravating factor" to the sentencing jury in a "weighing" state like Florida requires "invalidation of the death sentence," which may only be affirmed by a reviewing court after determining "what the sentencer [i.e., the jury] would have done absent the factor." Stringer, 112 S. Ct. at 1137. Furthermore, when a jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 111 L.Ed.2d 511, 528 (1990). Espinosa holds that the safeguards required to insure that capital sentencers' decisions are reliable -- and that the

sentencer's discretion is suitably guided, channeled and limited -- apply with full force to the Florida capital sentencing jury.

Espinosa overturns this Court's longstanding rejection to challenges of unconstitutionally vague jury instructions concerning aggravating circumstances and requires this Court to reassess its direct appeal denial of this claim on the merits. Espinosa is a change of law as defined by this Court in Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).

The issue regarding the jury instruction on the "especially heinous" aggravating factor was preserved by objection at trial. Although there is no record of the penalty phase charge conference, see Issue I, supra, Mr. Sims asserted in his motion for new trial that the trial court "instructed said jury regarding the heinous nature of said offense over Defendant's objection." R 1045. Thus, it must be presumed that the objection was properly preserved.

Mr. Sims contends that all these errors were adequately raised on direct appeal. To the extent, however, that this Court finds any waiver on direct appeal, it was ineffective for appellate counsel to fail to raise any aspect of this claim. At the time that the direct appeal briefs were filed, Godfrey v. Georgia, 446 U.S. 420 (1980), had already been decided. In Stringer, the Supreme Court held that Maynard v. Cartwright, 486 U.S. 356 (1988), and therefore presumably Espinosa v. Florida, 120 L.Ed.2d 854 (1992), was "controlled by Godfrey," 112 S. Ct. at 1136, i.e., that those later rulings were "dictated" by the

precedent of Godfrey. 112 S. Ct. at 1135-36. That being the case, competent appellate counsel would raise a Godfrey issue, and any failure by appellate counsel to raise the issue was ineffective.

III. THIS COURT APPLIED A RULE OF AUTOMATIC AFFIRMANCE OF THE DEATH PENALTY ON DIRECT APPEAL, DEPRIVING MR. SIMS OF HIS RIGHT TO MEANINGFUL APPELLATE REVIEW OF HIS DEATH SENTENCE, AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.

After striking three aggravating factors on direct appeal -- "especially heinous, atrocious or cruel," "pecuniary gain," and "hinder law enforcement" (and without expressly reviewing the trial court's erroneous application of the "great risk of death to many" aggravator") -- this Court held as follows:

> Despite these errors, therefore, we find that death is still the appropriate penalty. It was properly determined that the capital felony was committed in the course of a robbery, that it was committed for the purpose of avoiding arrest, and that appellant had previously been convicted of life-threatening crimes.[20] Where there are some aggravating and no mitigating circumstances, death is presumed to be the appropriate punishment. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Therefore, despite the judge's erroneous consideration of some of the aggravating circumstances, there remain several other aggravating circumstances properly found which support the sentence of death.

Sims I, at 926 (emphasis supplied).

The Court explicitly stated that it applied a mandatory presumption that a death sentence be affirmed, despite the striking of numerous aggravating circumstances, if any other aggravating and no mitigating circumstances existed. Such a rule is forbidden by the Eighth Amendment in capital cases. Sochor v.

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[20]By failing to mention the "great risk of death to many" aggravating factor in this list, the Court would appear to have struck it sub silentio.

Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992); Stringer v. Black, 112 S. Ct. 1130, 117 L.Ed.2d 367 (1992); Parker v. Dugger, 111 S. Ct. 731 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990). Moreover, the rule was inapplicable here, for there were mitigating circumstances in the record, and this Court's failure to consider those circumstances deprived Mr. Sims of meaningful appellate review. Parker, 111 S. Ct. 731.

It is now clear beyond any question that the Eighth Amendment forbids this Court from applying a rule that would automatically affirm a death sentence, despite the fact that one or more aggravating factors relied on by the sentencer are stricken on appeal, based on the fact that one or more valid aggravating factors remain. Yet that is precisely what this Court did in its review of Mr. Sims' death sentence.

In Clemons v. Mississippi, 494 U.S. 738 (1990), the Court considered whether the Mississippi Supreme Court had conducted either a proper harmless error review or appellate reweighing of the death sentence. It noted that some of the Mississippi Supreme Court's language could "be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance." Id. at 751. The Supreme Court then held that such a rule is unconstitutional:

> An automatic rule of affirmance would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of mitigating factors and aggravating circumstances.

Id. at 752. The Supreme Court has subsequently indicated that this rule is fully applicable to Florida, stating that "Florida, of course, is subject to the rule forbidding automatic affirmance by the state appellate court if an invalid aggravating factor is relied upon." Stringer v. Black, 112 S. Ct. at 1138. Finally, in Sochor, 119 L.Ed.2d at 341-42, the Supreme Court removed any conceivable doubt by reversing and remanding a Florida death sentence because this Court had performed inadequate harmless error review on direct appeal.

This Court's mandatory presumption that death is the proper punishment when any valid aggravators remain is virtually indistinguishable from the language found by the Supreme Court in Clemons to constitute an impermissible rule of automatic affirmance.[21] Nor is there any other indication in this Court's opinion that it made the constitutionally required determination that the errors were "harmless beyond a reasonable doubt" in that they "did not contribute to the [sentence] obtained." Chapman v. California, 386 U.S. 18, 24 (1967); see Sochor, 119 L.Ed.2d at 341. While this Court earlier referred to the concept of "harmless error," it was not to make a harmless error determination but simply to assert that the types of error involved could be considered harmless. Sims I, at 926. Nor do

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[21]In Clemons, the Mississippi Supreme Court held that, "when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." Clemons v. State, 535 So. 2d 1354, 1362 (Miss. 1988), quoted in Clemons v. Mississippi, 494 U.S. at 751.

the Court's citations to Hargrave v. State, 366 So. 2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979), and Armstrong v. State, 399 So. 2d 953 (Fla. 1981), suggest that the Court conducted a proper harmless error analysis.

Neither Armstrong nor Hargrave involved a determination that error was harmless beyond a reasonable doubt; rather, both cases, like Sims, were based on a rule of automatic affirmance.

> The jury recommended death. The trial judge erroneously considered certain circumstances as aggravating. The error did not impair the process of weighing the aggravating against the mitigating circumstances because there were no mitigating circumstances to weigh. The killings took place in the course of a robbery. Death is the appropriate punishment. The sentences of death are affirmed.

Armstrong, at 963. Thus, Armstrong presents the sort of rule of automatic affirmance condemned in Clemons v. Mississippi, 494 U.S. 738 (1990), and Sochor. Further, Armstrong relies on the jury's penalty verdict without analyzing the effect of the improper circumstances in producing that verdict.[22] Espinosa.

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[22]Thus the analysis in Clark v. State, 443 So.2d 973, 977 (Fla. 1983):

> The trial judge, following the standard criminal instructions, refused to instruct the jury that the aggravating circumstances of killing during the commission of a robbery and for pecuniary gain must be treated as a single factor. Clark argues that the relative closeness of the jury's vote on its recommended sentence -- eight to four in favor of death -- suggests that the improper consideration of these two circumstances as separate factors may have been decisive in its arriving at a recommendation of death. Such an argument is sheer conjecture. Moreover, the sentencing order clearly shows that the trial court, upon whom the sentencing responsibility actually rests, did not improperly count these factors twice.

Hargrave states:

> We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1976), condemns the doubling up of the aggravating circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

366 So. 2d at 5. Similar citations in Sochor did nothing to cure the inadequacy of this Court's review. Sochor, 119 L.Ed.2d at 341.

Moreover, this Court's review on direct appeal was inadequate for another and equally significant reason. Specifically, the trial court found no statutory mitigating circumstances. R 1093. It made no findings concerning the mitigating evidence actually presented by Mr. Sims, all of which was nonstatutory.[23] On direct appeal, this Court treated the case as one in which there were "no mitigating circumstances." Sims I, at 926. In reality, however, as this Court recently acknowledged, there were nonstatutory mitigating circumstances: "We agree that there was other nonstatutory mitigating evidence

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[23]This Court recently acknowledged as much, noting that the "trial court's written order obviously could have been clearer." Sims II, at 1257.

that should have been weighed . . . ." Sims II, at 1257. Thus, on direct appeal, this Court failed to review the actual record of Mr. Sims' case; instead, it reviewed a record which in its view contained "no mitigating circumstances."

In this regard, Mr. Sims' case is virtually identical to Parker v. Dugger, 111 S. Ct. 731, 112 L.Ed.2d 812 (1991). In Parker, this Court apparently conducted a harmless error analysis. However, from a review of the record, the Supreme Court determined that the trial court must have found nonstatutory mitigating circumstances but that this Court reviewed the case under the misapprehension that no such circumstances were present. In these circumstances, the Supreme Court held, "there is a sense in which the court did not review Parker's sentence at all." Id. at 826. As the Supreme Court explained:

> It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record. "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime."

Id. at 826, quoting Zant v. Stephens, 462 U.S. 862, 879 (1983).

Just as this Court's failure to review Parker's "actual record" deprived Parker of meaningful appellate review, so its treatment of Mr. Sims' case as one in which there were "no mitigating circumstances" deprived him of meaningful appellate review. Furthermore, had this Court granted Mr. Sims the meaningful appellate review to which he was entitled, it could

not have applied its rule of automatic affirmance. As the Supreme Court pointed out in Parker:

> The Florida Supreme Court's practice in such cases -- where the court strikes one or more aggravating circumstances relied on by the trial judge and mitigating circumstances are present -- is to remand for a new sentencing hearing.

Parker, 112 L.Ed.2d at 825, citing Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Moody v. State, 418 So. 2d 989, 995 (Fla. 1982). Thus, had this Court conducted the meaningful appellate review to which Mr. Sims was entitled, he would have received a remand for a new sentencing hearing.

IV. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY REPEATEDLY CHASTISING DEFENSE COUNSEL IN THE JURY'S PRESENCE.

On a number of occasions during Mr. Sims' trial, the trial court rushed, chastised and admonished Mr. Sims' attorneys in the jury's presence. The Court's disparaging, at times even caustic, remarks to defense counsel began during voir dire, R 44, were repeated during opening statement, R 240-42, and continued throughout the trial. During the defense cross-examination of three witnesses, the Court hastened counsel to "move on" and otherwise corrected counsel no less than 24 times, even refusing to allow counsel to approach the bench. R 291, 333, 340, 352, 353, 354, 356, 357, 380, 390, 398, 456, 458, 460, 461, 462, 463, 468, 470. The Court peaked when it summarily excused a witness midway through cross-examination, on the basis the cross was repetitive, rejecting the defense objection. R 468-70. In response to defense cross of a detective, the court spontaneously interjected "Oh, come on." R 685.

The damning effect of these actions on the jury cannot be doubted. Even if the court's rulings were correct, there is no excuse for so chastising and demeaning defense counsel -- and thereby a capital defendant -- before the jury.

The importance of judicial impartiality, particularly in a capital case, was emphasized in Quercia v. United States, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L.Ed.2d 1321 (1933):

> The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is

> received with deference, and may prove controlling."

See Hubbard v. State, 37 Fla. 156, 20 So. 235 (1896). The accused in a criminal case has the right to a fair trial, an essential element of which is an impartial judge, if not in actuality then at least in appearance. Here, "the cloak of impartiality which the judge should wear [was] destroyed." Baker v. United States, 357 F.2d 11, 14 (5th Cir. 1966). In Hamilton v. State, 109 So. 2d 422, 424-425 (Fla. 3d DCA 1959), the court wrote:

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. [Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.]

In Hamilton, the trial judge had asked the decedent's wife, in the presence of the jury, "Do you still live where you lived at the time your husband was murdered?" Id. at 423. Although the judge's comment was unintentional, the first-degree murder conviction was reversed on the basis of plain error. See also Kellum v. State, 104 So. 2d 99, 104 (Fla. 3d DCA 1958).

Judicial comments to a defendant in front of the jury, standing alone, can be grounds for reversal:

> It matters not, however, what the circumstances may be, or what the trial judge's opinion is as to the defendant's demeanor on the witness stand, or as to defendant's

> guilt, he should be careful that he say or do nothing in the presence of the jury which would indicate what his opinion may be.

Seward v. State, 59 So. 2d 529, 532 (Fla. 1952)(reversing conviction for assault with intent to commit murder because of judicial comments to defendant). See also Raulerson v. State, 102 So. 2d 281, 286 (Fla. 1958)(reversing death sentence). Thus, it is a well-settled rule in Florida that:

> [G]reat care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

State v. Ah Tong, 7 Nev. 148; 1 Thomp. Trials, Section 219, and citations, quoted with approval in Lester v. State, 37 Fla. 382, 20 So. 232, 234 (1886); accord Roberts v. State, 94 Fla. 149, 113 So. 726 (1927); Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Parise v. State, 320 So. 2d 444 (Fla. 3d DCA 1975); Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987).

This was not new behavior to Mr. Sims' trial judge. A similar action by the same judge was reversed in Green v. State, 575 So. 2d 796 (Fla. 4th DCA 1991), where the trial court had summarily excused two potential jurors without allowing the defense an opportunity to inquire. Likewise, the judge here, after repeatedly rushing counsel to "move on," culminated his impatience by summarily dismissing a key State witness before cross-examination could be concluded.

Such ongoing behavior not only deprived Mr. Sims of his constitutional right of cross-examination (as addressed on the direct appeal) but also deprived him of his constitutional right to an impartial judge and a fair trial in violation of Article I, Sections 9 and 16 of the Florida Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.

V. MR. SIMS WAS DENIED THE RIGHT TO BE PRESENT AT HIS TRIAL CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9, 16, 17, 21, 22 AND 23 OF THE FLORIDA CONSTITUTION.

The incomplete record before this Court did not reflect the absence of Mr. Sims from the charge conferences. On remand for clarification, the trial judge certified this fact in his order of February 15, 1982, filed with this Court. Judge Waddell specifically determined that "the defendant was not present at [the charge conference], nor was a court reporter present, in that no testimony was being taken." However, the briefs had already been filed, and this issue had not been included.

The right to be present at trial is fundamental, and its denial has been held to be per se reversible error. Ivory v. State, 351 So. 2d 26 (Fla. 1977). The jury charge conference is plainly a critical stage of trial at which the defendant must be present. Turner v. State, 530 So. 2d 45 (Fla. 1987).

There is no allegation of waiver here, nor can there be; the trial court proceeded without a court reporter, thinking a record of the proceedings was unnecessary where there would be no testimony. See Order of February 15, 1982. Mr. Sims did not waive his presence, so reversal on direct appeal would have been required. Francis v. State, 413 So. 2d 1175 (Fla. 1982). In any event, the defendant's presence in a capital case is not waivable. Diaz v. United States, 223 U.S. 442, 455 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

Mr. Sims never had the chance to hear or even read about what his lawyers and the judge discussed at these unrecorded charge conferences. It was his life and liberty on the line, but he was excluded from these off-the-record meetings between the lawyers and judge. Mr. Sims was denied the right to be present at all critical stages of his trial, and that fundamental error should be remedied now.

VI. THIS COURT SHOULD REVISIT THE CONSTITUTIONAL PROPRIETY OF MR. SIMS' CONVICTION AND SENTENCE BECAUSE THE FAILURE TO REQUIRE A SPECIAL VERDICT VIOLATED HIS RIGHT TO A UNANIMOUS JURY VERDICT AS GUARANTEED BY ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Sims was charged by Indictment with two counts of first-degree murder; each count charged both felony-murder and/or premeditated murder, R 843, and both crimes were pursued by the State. The jury was given the standard jury instruction defining first-degree murder, with the instruction specifically referencing felony-murder and premeditated murder. R 748.

Thus, the instruction revolved around two counts of first-degree murder which could be proven in one or both of two ways, and the jury was instructed only that any verdict it reached must be unanimous. R 764-65. After several hours of deliberations and three questions, the jury returned verdicts of guilty as charged on both murder counts. R 773-74.

Nowhere was the jury told that it must be unanimous as to either the charge of felony-murder or premeditated murder. Rather, it was instructed only that it must return a unanimous verdict as to each count generally charging first-degree murder. As a result, it is certainly conceivable that the jury returned a verdict of guilt because certain members believed that the State had established felony-murder while the balance believed that premeditated murder had been proven. The result was that Mr. Sims was denied his right to a unanimous jury verdict on any

theory. In fact, it is conceivable that the jury may have returned a verdict of guilt without even being convinced that either State theory had been established beyond a reasonable doubt. Rather, given the jury instruction, it might have returned its verdict because there was some evidence of felony-murder and some evidence of premeditated murder. Such a result cannot be squared with the heightened degree of reliability mandated in a capital prosecution.

At sentencing, the judge found as an aggravating circumstance that the murder was committed during the course of a felony, a finding that would be prohibited by principles of double jeopardy and collateral estoppel had the jury rejected the evidence as to the felony-murder theory as insufficient.

Here, it is not only possible but highly likely that the jurors did not unanimously agree on either felony-murder or premeditated murder; and in fact they may not have even agreed that the evidence as to either theory was established beyond a reasonable doubt. As such, Mr. Sims was severely prejudiced by the comingling of offenses.

The obvious and simple answer to the problem presented at Mr. Sims' trial was to require special verdicts in capital prosecutions when both premeditated and felony-murder theories are argued. This Court has implicitly suggested this procedure, see In the Matter of the Use By the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So. 2d 594 at 597-98 (Fla. 1981), but apparently no further action was taken.

However, a special verdict form has been employed by trial judges. This Court has recently reviewed two cases where special verdict forms were employed, LeCroy v. State, 533 So. 2d 50 (Fla. 1988), where a Palm Beach County jury found one murder premeditated and a second not, and Lamb v. State, 532 So. 2d 1051 (Fla. 1988), where a jury specifically found a murder to be both premeditated and felony-murder. Further, it is clear that this Court would have liked special verdicts to be available in other caes. See, e.g., Spivey v. State, 529 So. 2d 1088, 1094 (Fla. 1988), where this Court was required to analyze the jury's general verdict. See also Haliburton v. State, 561 So. 2d 248 (Fla. 1989), where Justice Barkett wrote:

> I concede that this Court has previously held that a special verdict delineating whether a first-degree murder conviction is based on felony murder or premeditated murder is not required. However, I believe it would be a much better practice. Moreover, I cannot see any logical reason not to require one. Surely a trial judge would benefit from such a verdict when considering the jury's recommendation and deciding whether to impose the death penalty. Likewise, death penalty review would be easier and more complete with the information contained in such a special verdict. I would require such a special verdict in all future cases.

Id. at 252 (Barkett, J., concurring specially).

Special verdicts are commonplace in civil cases. Even though there is no rule of procedure which requires them, this Court has encouraged them in two-issue cases, saying:

> We believe that the "two issue" rule represents the better view. At first thought, it may seem that injustice might result in some cases from adoption of this

> rule. It should be remembered, however, that the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case. See Harper v. Henry, supra. Then, there will be no question with respect to the jury's conclusion as to each. If the trial court fails to submit such verdicts to the jury, counsel may raise an appropriate objection.

Colonial Stores, Inc. v. Scarbrough, 355 So. 2d 1181, 1186 (Fla. 1978). Special verdict forms have been held mandatory in comparative negligence cases. Lawrence v. Florida East Coast R.R. Co., 346 So. 2d 1012, 1017 (Fla. 1977).

Federal courts have consistently held that the jury must reach unanimity on the facts at issue in order to convict a defendant, see United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).[24] Relying on the Supreme Court opinion in In Re Winship, 397 U.S. 358 (1970), the Gipson court reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457, quoting In Re Winship, 397 U.S. at 364. The court went on to say that "[r]equiring the vote of twelve jurors to convict a defendant does little to ensure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d at 458.

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[24]See also, Case Comment, Right To Jury Unanimity On Material Fact Issue: United States v. Gipson, 91 Harv. L. Rev. 499 (1977).

Other courts, both federal and state, have found the reasoning in Gipson persuasive. See, e.g., United States v. Beros, 833 F.2d 455 (3rd Cir. 1987)("persuaded by the analysis and rationale" of Gipson, the court held that "[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury." (emphasis added)); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986)(general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State v. Boots, 308 Or. 371, 780 P.2d 725 (1989)(citing Gipson for authority in reversing defendant's capital murder conviction); Probst v. State, 547 A.2d 114 (Del. 1988)(holding "[t]he sixth amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's specific illegal action," citing Beros, 833 F.2d 455); State v. Flynn, 14 Conn. App. 10, 539 A.2d 1005, cert. denied, 109 S. Ct. 226 (1988)(Connecticut has adopted "holding and rationale" of Gipson); State v. Johnson, 46 Ohio St. 3d 96, 545 N.E.2d 636 (1989), cert. denied, 110 S. Ct. 1504 (1990)(quoting Gipson approvingly); and People v. Olsson, 56 Mich. App. 500, 224 N.W.2d 691 (1974)(defendant could not be convicted of first-degree murder when alternative theories of premeditated murder and felony murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory).

In Sheppard v. Rees, 909 F.2d 1234, 1237-38 (9th Cir. 1990), the Ninth Circuit reversed a first-degree murder conviction, stating:

> Where two theories of culpability are submitted to the jury, one correct and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict. See Mills v. United States, 164 U.S. 644, 646 (1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

Requiring juror unanimity on a single theory of first-degree murder is necessary to effectuate the reasonable doubt standard enunciated by the Supreme Court in In Re Winship, 397 U.S. 358, and is essential to meeting the constitutional requirements of heightened reliability in a capital case. It begs the question to say that premeditated and felony murder are merely different methods of performing the same act, as there are significant differences between an intentional murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without juror agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated. Further, it is conceivable that each member of the jury may not have been convinced beyond a reasonable doubt of either State theory but rather may have returned a verdict of guilt because of some evidence of guilt as to each theory.

It is true that, in noncapital cases, the Supreme Court has held that, although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal

trials. Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972). In reaching this conclusion, the court specifically pointed out that, in both Louisiana and Oregon, a defendant in a capital case would be entitled to a unanimous verdict. Johnson, 406 U.S. at 357 n.1; Apodaca, 406 U.S. at 406 n.1.

The Supreme Court has never held that a less-than-unanimous verdict is constitutional in a capital case. Rather, it has held that capital cases require a heightened degree of reliability in the verdict. See, e.g., Beck v. Alabama, 447 U.S. 625, 638 (1980). Jury unanimity is essential to the heightened degree of reliability required in capital cases.

Moreover, unlike the state law on which the Supreme Court based its decisions in Johnson and Apodaca, Florida law requires a unanimous jury verdict in all criminal cases. Florida Rule of Criminal Procedure 3.440 (1988). Because Florida has chosen to make jury unanimity a right under state law, it must administer that right consistent with due process of law. Evitts v. Lucey, 469 U.S. 387 (1985)(when a state provides a right, it must administer that right in accord with due process). Florida has failed to do so here. By authorizing a less-than-unanimous jury verdict in a first-degree murder case charging alternatively premeditated murder and felony murder, Florida provides less protection for the potential capital defendant than is afforded a defendant charged with the far less serious crime of negligent homicide.

The United States Supreme Court recently addressed this precise issue, concluding by a bare plurality that the United States Constitution is not violated by the lack of a special verdict as to guilt. Schad v. Arizona, 115 L.Ed.2d 555 (1991). However, the court emphasized in closing that it was not rejecting the desirability of "jury instructions requiring increased verdict specificity." Id. at 574. Further, the Court did not address the issue of special verdicts as to penalty.

This Court should hold the absence of a special verdict as to both guilt and penalty violative of the Florida Constitution. Compare People v. Young, 814 P.2d 834 (Colo. 1991).

VI. THE REQUIREMENT THAT MR. SIMS PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT VIOLATED HIS RIGHT TO A RELIABLE AND NONARBITRARY SENTENCING DETERMINATION AS GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Any capital sentencing scheme must insure that the decision to impose a death sentence is reliable and nonarbitrary. Furman v. Georgia, 408 U.S. 238 (1972). See also Beck v. Alabama, 447 U.S. 625 (1980); Mills v. Maryland, 486 U.S. 367 (1988). Given the qualitative difference between death and all other criminal sanctions, as well as the heightened degree of reliability required before any death sentence constitutionally can be imposed, both the Florida and United States Constitutions mandate that application of any capital sentencing scheme leave no doubt that the decision to impose death is a factually correct one.

The Florida capital sentencing scheme, to the extent it requires the accused to prove that life is the appropriate penalty, runs afoul of these fundamental constitutional precepts. Put another way, the sentencer in a Florida capital case is told that death is the appropriate punishment even if she finds that the mitigating and aggravating circumstances are equally compelling. This is what the sentencing jury was told in Mr. Sims' case. R 828. Such an approach simply cannot be squared with the requirements of the Florida and United States Constitutions given the significance of a death sentence and the concomitant requirement that the community have the utmost confidence in the accuracy and reliability of any death sentence.

See Proffitt v. Florida, 428 U.S. 242, 260 (1976)(White, J., concurring).

This is perhaps the most obvious explanation for the U. S. Supreme Court's recent statement in Parker v. Dugger, 498 U.S. ___, 112 L.Ed.2d 812 at 824, 111 S. Ct. 731 (1991), defining or construing the burden under the Florida capital sentencing scheme as requiring that the State establish that the aggravating circumstances outweigh the mitigating circumstances if death is to be the appropriate punishment. The Parker Court twice cited Section 921.141(3), Florida Statutes, for the assertion that death is appropriately imposed only when the aggravating circumstances outweigh the mitigating circumstances, even though that language is the reverse of the burden set out in the statute.

Unlike Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990), or Boyde v. California, 110 S. Ct. 1190 (1990), Mr. Sims is not alleging that the sentencing scheme in his case precluded an individualized sentencing determination.[25] Rather, he alleges

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[25]In Blystone, the sentencer was required to impose a death sentence if the aggravating circumstances outweighed the mitigating circumstances or if there are aggravating circumstances but no mitigating circumstances. Blystone, 110 U.S. at 1078, 1081 (1990). The Supreme Court concluded that such a statutory scheme did not preclude the constitutionality mandated individualized sentencing determination required by Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny, because there was no limitation on the sentencer's ability to consider any relevant evidence in mitigation. Similarly, in Boyde, the sentencing scheme provided that death was appropriate if the aggravating circumstances outweighed the mitigating circumstances. Boyde, 110 S. Ct. 1190, 1192 (1990). As in Blystone, the U. S. Supreme Court concluded, absent some showing that the sentencer was precluded from considering relevant evidence in mitigation, that sentencing scheme satisfied the

that, by placing the burden of proof on him to show that the mitigating circumstances outweighed the aggravating circumstances if life was to be the appropriate penalty, see Parker, he has been denied a reliable, nonarbitrary sentencing determination. It would seem self-evident that, if due process requires proof by the State beyond a reasonable doubt before a defendant can be sentenced for petit theft, placing the burden on Mr. Sims to show that death is not the proper sanction is constitutionally improper. By definition, such a claim was not at issue in Blystone or Boyde, given that the burden on the State in each case was to establish that the aggravating circumstances outweighed the mitigating circumstances.

Mr. Sims' claim is much like the claim found meritorious in McKoy v. North Carolina, 110 S. Ct. 1227 (1990). In particular, Justice Kennedy, finding the jury instruction at issue constitutionally insufficient, did so not because the instruction improperly precluded consideration of relevant evidence in mitigation, but rather because it could give rise to an unreliable and arbitrary sentencing determination. Id. at 1229, 1240 (Kennedy, J., concurring).

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constitutionally mandated individualized sentencing requirement.

Even if Blystone or Boyde are of some relevance to this claim, they are not controlling regarding the constraints imposed on Florida's capital sentencing scheme by Article I, Sections 9 and 17 of the Florida Constitution. See People v. Young, 814 P.2d 834 (Colo. 1991), finding an analogous provision of the Colorado capital sentencing scheme to be violative of that state's constitutional due process clause.

Even if the Court finds that the Florida capital sentencing scheme is not violative of the U. S. Constitution, it is violative of Article I, Sections 9 and 17 of the Florida Constitution. In construing the federal constitution, federalism concerns often result in a limited reading of the Fourteenth Amendment Due Process Clause by the U. S. Supreme Court, but no similar constraints are present when construing Article I, Sections 9 and 17 of the Florida Constitution. In fact, given the absence of any conformity amendment, as is the case with the search and seizure provision of the Florida Constitution, see Article I, Section 12, Florida Constitution, it should be presumed that the breadth of Article I, Sections 9 and 17, is not inextricably limited by the breadth of the Fourteenth Amendment. Even assuming, then, some relevance of the five-to-four decisions in Blystone and Boyde to this question, both should be rejected as inconsistent with Article I, Sections 9 and 17 of the Florida Constitution.

McKoy represents a change in the law sufficient to invoke Witt v. State, 387 So. 2d 922 (Fla. 1980). Alternatively, if it was cognizable on direct appeal, appellate counsel was clearly ineffective for the failure to raise this error. See Issue VIII, infra.

The State cannot prove beyond a reasonable doubt that this error did not contribute to the sentence. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); see Way v. State, 568 So. 2d 1263 (Fla.

1990). Given this error, Mr. Sims is entitled to a new sentencing hearing.

VIII. MR. SIMS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

A habeas corpus petition is the appropriate vehicle for raising claims of ineffective assistance of appellate counsel in a capital case. Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986). In order to prevail, Mr. Sims must identify a specific act or omission by appellate counsel which constituted a serious and substantial deficiency and which prejudiced Mr. Sims by undermining the essential fairness and reliability of the appeal. Id. at 940. In this case, appellate counsel's performance was deficient in a number of respects, and that deficiency undermines confidence in the outcome of Mr. Sims' appeal, thus depriving Mr. Sims of his constitutional right to the effective assistance of appellate counsel under Article I, Sections 9 and 17 of the Florida Constitution, and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

> The criteria for proving ineffective assistance of appellate counsel parallel the Strickland [v. Washington, 466 U.S. 668, (1984)] standard for ineffective trial counsel: Petitioner must show (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985)(hereafter Wilson II). See also Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986).

In Wilson, the defendant was convicted of two counts of first-degree murder and one count of attempted murder and sentenced to death. His convictions and sentences were affirmed on direct appeal, this Court specifically finding that "[s]ince for both victims there was at least one aggravating factor and there were no mitigating factors at all, the sentence of death is proper for each crime." Wilson v. State, 436 So. 2d 908, 912 (Fla. 1983)(hereafter Wilson I).

Wilson sought post-conviction relief alleging, inter alia, ineffective assistance of appellate counsel. Finding meritorious his allegations regarding the adequacy of research, briefing and oral argument, the court granted the writ of habeas corpus and ordered appointment of counsel to afford the petitioner a new direct appeal. Wilson II, at 1163.

Despite its conclusion on direct appeal that the death penalty was a proper punishment, this Court found that appellate counsel had rendered ineffective assistance of counsel and granted a new appeal. Thereafter, the death sentence was found inappropriate, even though the trial court had properly found two aggravating circumstances and no mitigating circumstances. Wilson v. Wainwright, 493 So. 2d 1019, 1023 (Fla. 1986)(hereafter Wilson III).

In conclusion, Petitioner's arguments herein demonstrate substantial omissions by appellate counsel. Because "[t]his court's review of the propriety of death sentences and the proceedings in which they are imposed 'is no substitute for the careful, partisan scrutiny of a zealous advocate,'" Fitzpatrick v Wainwright, 490 So. 2d 938, 940 (Fla. 1986), quoting Wilson II, at 1164, the Court cannot know what the outcome would have been had appellate counsel properly raised and argued these issues. Petitioner has, therefore, met the Strickland test and should be granted a new direct appeal. Wilson II, at 1162. Alternatively, this Court should vacate Mr. Sims' convictions and death sentence.

A. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE A COMPLETE RECORD OR FILE A SUPPLEMENTAL BRIEF.

Appellate counsel was ineffective in three respects:

(1) by briefing and arguing the case without a complete record;

(2) by failing to file a supplemental brief arguing the denial of a reconstructed record; and

(3) by failing to submit a statement of the record once a remand for reconstruction had been denied.

1. It was ineffective to brief and argue the appeal without a complete record.

It is the duty of an appellant to ensure that a complete record is before the appellate court. Fla. R. App. P. 9.200(e); Carter v. Carter, 504 So. 2d 418, 419 (Fla. 5th DCA 1987); Bei v. Harper, 475 So. 2d 912 (Fla. 2d DCA 1985). Specifically, this is the duty of the appellant's counsel. Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. 1952). Further, the failure to properly supplement a record can result in the loss of an appeal. Ahmed v. Travelers Indemnity Co., 516 So. 2d 40 (Fla. 3d DCA 1987); Carter, 504 So. 2d at 419; Maner Properties, Inc. v. Siksay, 489 So. 2d 842, 844 (Fla. 4th DCA 1986); Bei, 475 So. 2d at 915; Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979).

Here, appellate counsel affirmatively violated that duty, in the first instance, by motioning the Court to allow the parties to brief and then argue the entire case in spite of the obvious absence of critical portions of the record.[26] Compare Delap v. State, 350 So. 2d 462, 463 n.1 (Fla. 1977)(finding no waiver but affirmative and timely request for record). (Of particular note here is that counsel for Mr. Sims was also appellate counsel for Mr. Delap. Id. at 462.) Even though this Court had ordered the filing of briefs, counsel was under a duty to motion this Court

[26]On June 19, 1981, appellate counsel filed a Motion to Allow Filing of Initial Brief While Cause is on Remand and Pending Reconstruction of Record (herein "Motion to Allow Filing"). The Initial Brief of Appellant was served a few days later on June 28, 1981. R 1854.

for an extension of time to obtain a complete record prior to any briefing and argument. Nevertheless, paragraph 4 of the Motion to Allow Filing specifically indicated that no extension of time was being requested. Motion to Allow Filing at 2. What possible justification can there be for proceeding with a capital appeal without such critical portions of the record? There can be no justification for actually suggesting that the Court proceed without a complete record, and case law certainly does not suggest any.

2. It was ineffective to fail to file a supplemental brief.

Mr. Sims' appellate counsel was again ineffective for failing to file a supplemental brief after this Court refused to remand for reconstruction. Even though counsel's Motion to Allow Filing requested -- and this Court's Order of June 22, 1981, granting that motion specifically allowed -- filing of the briefs "without prejudice to file a supplemental brief should it become necessary," Motion to Allow Filing at 2; Order at 1, no supplemental brief was ever filed. The Court's file reflects that nothing more was ever heard on the subject. At a minimum, counsel could and should have argued the Court's error in denying a complete record and could and should have at least attempted arguments on the issues flagged in the motion for new trial and existing partial record[27], e.g., Mr. Sims' absence from the jury charge conference.

[27]See the discussion of prejudice in Issue I, supra.

3. It was ineffective to fail to proffer a statement of the record.

Likewise, once a remand for reconstruction pruposes was denied, Mr. Sims' appellate counsel should have immediately prepared and filed a proffer of his statement of the record. This alternative to a remand for reconstruction is well accepted. Fla. R. App. P. 9.200(a)(3),(b)(4),(f)(1); see B.K.G. Corp. v. Sullivan, 396 So. 2d 254 (Fla. 1st DCA 1981); Padovano, The Appellate Process § 9.7. Thus, the failure of Mr. Sims' experienced appellate counsel to have pursued this remaining alternative was inexcusable. Prejudice is apparent for the reasons set forth in Issue I, supra.

B. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE DENIAL OF MR. SIMS' RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL.

As set out in Issue V, supra[28], Mr. Sims had a fundamental right to be present at the jury charge conferences in his capital trial, and the denial of this right became apparent at least by the time of Judge Waddell's Order of February 26, 1982.

The failure of appellate counsel to file a supplemental brief raising this error constituted the ineffective assistance of appellate counsel under both the Florida Constitution and the United States Constitution.

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[28]The law cited in Issue V, supra, is specifically adopted in this argument.

It was incumbent upon reasonably competent appellate counsel to raise this issue, since otherwise Mr. Sims would be (and was) deprived of meaningful appellate review. The prejudice to Mr. Sims is apparent, for the reasons set out in Issue V, supra.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE DENIAL OF THE MOTION FOR CHANGE OF VENUE.

Even though trial counsel laid a strong foundation for appellate challenge of the trial court's denial of the motion for change of venue, this issue was omitted on the direct appeal.

Trial counsel filed a lengthy Motion for Change of Venue citing the barrage of unfavorable publicity which had blanketed the area from which the venire would be drawn; this publicity included a full-length picture of Mr. Sims in handcuffs, the constant reference to the victim's status as a law enforcement officer, numerous victim impact statements, and emphasis of the "extra security" thought necessary for Mr. Sims' arrest and escorting. R 876-96. The motion was accompanied by four affidavits of residents of Seminole County that a fair trial could not be obtained in that venue. R 893-96. This motion was heard on December 11, 1978[29], taken under advisement, and later denied. R 953. Despite the intense pretrial publicity, the

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[29]It is possible this issue was not raised due to the fact that there was no transcript of this pretrial hearing, so that a reconstructed record was necessary to full presentation of this issue. See Issue I, supra.

trial court denied individual voir dire, and a jury was sworn by page 224 of the record. R 224.

A motion for change of venue can form the basis for reversal of a conviction, Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, 366 U.S. 717 (1961); McKaskill v. State, 344 So. 2d 1276 (Fla. 1977), sometimes years after the conviction and sentence. Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). When a community is sufficiently infected with prejudice toward an accused, a motion for change of venue must be granted because of the probability that the trial jury -- despite protestations to the contrary -- will be rendered biased by that environment; in such extreme cases, prejudice is presumed. Id. at 1540; Rideau v. Louisiana, 373 U.S. 723, 727 (1963). Short of a finding of an atmosphere in which prejudice must be presumed, the venire in this case suffered actual prejudice which could not clearly and emphatically be set aside. Murphy, 421 U.S. at 803; McKaskill, 344 So. 2d at 1278.

It is abundantly clear from the Motion for Change of Venue that Mr. Sims did not receive a fair trial by impartial jurors. Failure of appellate counsel to even present this issue was clearly ineffective. Wilson III.

D. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE DENIAL OF THE MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.

Mr. Sims' entire defense was that, after being intentionally misidentified by James Halsell and Curtis Baldree to save their

longterm criminal associate, Terry Wayne Gayle, Mr. Sims was then mistakenly identified by some of the witnesses to the robbery-murder. By pretrial motions, trial counsel sought to suppress the identification testimony of witnesses as unreliable, R 958-960, 968-71,[30] and the trial court denied the motions to suppress identification. R 972.

The trial court erred in denying the motions to suppress identification testimony. Due process requires the exclusion of identification testimony following out-of-court identification procedures that are "unnecessarily suggestive and conducive to irreparable mistaken identification." Neil v. Biggers, 409 U.S. 188 (1972); Foster v. California, 394 U.S. 440 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Article I, Section 9 of the Florida Constitution; Fourteenth Amendment to the United States Constitution. In Grant v. State, 390 So. 2d 341, 343 (Fla. 1980), the Florida Supreme Court said:

> The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification . . . "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."

It has been said that "[t]he influence of improper suggestion on identifying witnesses probably accounts for more

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[30]The trial court specifically found in post-conviction proceedings that trial counsel had properly preserved the challenge to the photo display identification. RP 1075.

miscarriages of justice than any other single factor - perhaps it is responsible for more such errors than all other factors combined." Wall's Eyewitness Identification In Criminal Cases, cited with approval in United States v. Wade, 338 U.S. 218, 18 L.Ed.2d 1149 (1967); Judd v. State, 402 So. 2d 1279, 1280 (Fla. 4th DCA 1981). Application of the factors set out in Manson v. Braithwaite, 432 U.S. 98 (1977), to the instant case clearly reveals that the identification procedures here were not only suggestive but also that there is a substantial likelihood that misidentification resulted.

Appellate counsel could and should have presented this credible issue on the direct appeal. Compare Judd v. State, 402 So. 2d at 1280 (two factors affecting court's reversal were that observations were made by fearful and uncertain witness who gave very general description); State v. Sepulvado, 362 So. 2d 324 (Fla. 2d DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979) (victim had extremely short glimpse of assailant under trying conditions, was inconsistent whether assailant was bearded, and was unsure as to identity); see also Collins v. State, 423 So. 2d 516 (Fla. 5th DCA 1982)(conviction reversed due to cumulative effect of weak identification). In Smith v. State, 362 So. 2d 417, 420 (Fla. 1st DCA 1978), the court reversed a sexual battery conviction, stating:

> Moreover when the evidence is not substantial in character, a conviction will be reversed and a new trial ordered where such evidence is not satisfactory to establish the identity of an accused as the participant in a crime of which he has been found guilty. Tibbs v.

State, 377 So. 2d 788 (Fla. 1976). [Quoting McNeil v. State, 104 Fla. 360, 139 So. 791, 792 (1932)].

This case presents the unsettling possibility that the wrong man is sitting on Death Row. Appellate counsel was clearly ineffective for omitting this meritorious issue.

CONCLUSION

Given the foregoing, the affirmance of Mr. Sims' convictions and death sentence did not entail the careful review required by state law and the state and federal constitutions. This Court should set aside that decision, conduct a full appellate review, and order a new trial.

STEVEN H. MALONE
Florida Bar No. 305545
Office of the Public Defender
Fifteenth Judicial Circuit
421 Third Street, 6th Floor
West Palm Beach, FL 33401
(407) 355-7608

GWENDOLYN SPIVEY
Florida Bar No. 295450
Post Office Box 14494
Tallahassee, FL 32317
(904) 668-3593

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U. S. Mail/hand delivery/facsimile transmission to Robert A. Butterworth, Esquire, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 26th day of February, 1993.

GWENDOLYN SPIVEY