IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY

STATE OF FLORIDA
Plaintiff,

CASE NO: 23-CF-2935

Vs.

TOMASZ KOSOWSKI,
Defendant.
_____/

MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL (UNRELIABILITY)

COMES NOW, the defendant by and through undersigned counsel, moves to have Florida's death penalty declared unconstitutional under the state and federal constitutions based on the following:

1. This Defendant is charged with First Degree Capital Murder.
2. The State of Florida has filed notice in this case under Fla.R.Crim.P. 3.202 that at this point it seeks imposition of the death penalty pursuant to Section 921.141, Florida Statute.
3. Capital punishment is unconstitutional if it is arbitrarily and/or and capriciously used by the states. ***Furman v. Georgia***, 408 U.S. 238 (1972). The Florida Legislature, in the performance of its constitutional responsibility, enacted laws hoping to avoid arbitrary use of the death penalty. The Supreme Court of Florida, when first reviewing that legislation, upheld Florida's capital punishment statutes in the belief they could and would be consistently and reliably applied. ***State v. Dixon***, 283 So.2d 1 (Fla.1973). The United States Supreme Court in 1976, three years after the enactment of Florida's capital legislation, mirrored that determination. ***Proffitt v. Florida***, 428 U.S. 242 (1976).

4. Heightened Due Process concerns are required for imposition of capital punishment. Imposition of capital punishment must meet heightened Due Process requirements under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The highest standard of due process applies to imposition of capital punishment because there is an "acute" need for reliable fact-finding since the punishment is irrevocable:

> **Even assuming,** however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in Bullington, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," id., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at

all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998). The constitutional requirement for reliability in fact finding in the context of capital punishment has been expressly recognized and embraced by the Florida Supreme Court. See ***Arvelaez v. Butterworth***, 738 So.2d 326, 326 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent **and reliable manner** . . . ") (emphasis added).

5. The vacillation in application of the aggravating and mitigating considerations and the legal standards for imposition of capital punishment found in Florida's appellate decisions form an unreliable basis for imposition of the death penalty in Florida. The vacillation in holdings at the appellate court level has a direct influence on the manner in which the trial courts determine whether imposition of the death penalty is appropriate. In fact, the overall review of the propriety of imposition of the death penalty vacillates and is unreliable. For example, in 1975, imposition of the death penalty for Charles Proffitt was upheld. ***Proffitt v. State***, 315 So.2d 461 (Fla.1975). Thirteen years later, in 1985, the death penalty was found to be inappropriate. ***Proffitt v. State***, 510 So.2d 896 (Fla.1987). Implicit in that determination is that the underlying facts justifying imposition of the death penalty no longer formed a valid basis for the death penalty. This is not an isolated occurrence. See ***Songer v. State***, 322 So.2d 481 (Fla.1975) (death penalty approved); ***Songer v. State***, 544 So.2d 1010 (Fla.1989) (fourteen years later, death penalty "inappropriate"). The determination of the propriety of a death sentence by trial courts during that period of time is called

into question by the substantial change in the legal standard as to when it is appropriate (proportional) to impose a death sentence.

Vacillation likewise occurs in the meaning and applicability of the statutory sentencing considerations themselves, shown by the following examples that are not intended to be all inclusive, but which are illustrative only:

Section 921.141(6)(b), Florida Statutes ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.") - In ***Meeks v. State***, 333 So.2d 186, 190 (Fla.1976), the Court expressly and unequivocally stated that "contemporaneous convictions do not qualify as an aggravating circumstance . . . under Section 921.141(5)(b)." In ***King v. State***, 390 So.2d 315, 320-21 (Fla.1980), the Florida Supreme Court overruled ***Meeks*** by expressly and unequivocally holding that, "The legislative intent is clear that ***any*** violent crime for which there was a conviction ***at the time of sentencing*** should be considered as an aggravating circumstance." (emphasis added). In 1987, eleven years after ***Meeks***, the Florida Supreme Court adjusted the meaning of this aggravating circumstance by holding that Section 921.141(5)(b), Florida Statutes cannot be found for contemporaneous crimes committed on one victim. ***Wasko v. State***, 505 So.2d 1314, 1318 (Fla.1987). See ***Pardo v. State***, 536 So.2d 77 (Fla.1990).

Section 921.141(5)(c), Florida Statutes ("The defendant knowingly created a great risk of death to many persons.") - In ***King v. State***, 390 So.2d 315, 320 (Fla.1980), the Florida Supreme Court upheld application of this factor where the defendant set fire to a house occupied by a single person because the

defendant "should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." Seven years later, in the same case and on the same facts, the court rejected application of the "great risk to many" factor, stating, "this case is a far cry from one where this factor could properly be found." ***King v. State***, 514 So.2d 354, 380 (Fla.1987). In ***Alvord v. State***, 322 So.2d 533, 540 (Fla.1975) the Florida Supreme Court upheld the "great risk to many" factor where three persons were strangled to death in separate bedrooms of a house. In ***White v. State***, 403 So.2d 331, 333 (Fla.1981), the Florida Supreme Court disapproved the factor where eight victims were shot in two different rooms of a house.

Section 921.141(5)(h), Florida Statutes ("The capital felony was especially heinous, atrocious or cruel.") Compare ***Simmons v. State***, 419 So.2d 316, 319 (Fla.1982)("The fact that the victim was murdered in his own home offers no support for the [HAC] finding.") with ***Troedel v. State***, 462 So.2d 392, 390 (Fla.1984)(HAC shown because "the fact that the victims were killed in their homes sets the crime apart from the norm") and ***Perry v. State***, 522 So.2d 817, 8921 (Fla.1988)("We note also that this vicious attack was within the supposed safety of Mrs. Miller's home, a factor we have previously held adds to the atrocity of the crime."). In ***Proffitt v. State***, 315 So.2d 461 (Fla.1975), the Florida Supreme Court upheld the use of the HAC factor where a man was stabbed to death while asleep in his home. Thirteen years later, in ***Proffitt v. State***, 510 So.2d 896, 897 (Fla.1987), the HAC factor was not again found to exist based on the same facts.

Section 921.141(6)(a), Florida Statutes ("No significant history of prior criminal activity.") – In ***Ruffin v. State***, 397 So.2d 277, 278 (Fla.1981), the Court expressly and unequivocally held that "in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, 'prior' means prior to the sentence of the defendant and does not mean prior to the commission of the murder for which he is being sentenced." Seven years later, the Court receded from ***Ruffin*** and held that "a 'history' of prior criminal conduct can [not] be established by contemporaneous crimes." ***Scull v. State***, 533 So.2d 1133, 1143 (Fla.1988).

Section 921.141(6)(g), Florida Statutes ("The age of the defendant at the time of the crime.") Compare ***State v. Dixon***, 283 So.2d 1, 10 (Fla.1973) ("Thus, the Legislature has chosen to provide for consideration of the defendant - **whether youthful, middle aged, or aged** - in mitigation. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable per se")(emphasis added) with ***Campbell v. State***, 679 So.2d 720, 722 (Fla. 1996) ("Chronological age standing alone thus is generally of little import, warranting no special instruction.").

6. The vacillation that occurs in the law concerning the meaning of the statutory factors used to impose capital punishment in Florida, and the changes in the law concerning the procedures for imposition of the death penalty, see, e.g.., ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Espinosa v. Florida***, 505 U.S. 1079 (1992), renders imposition of a death sentence at any given time unreliable and constitutionally infirm. As shown by the examples set forth in paragraph 5, the laws and facts used to impose death sentences at one point in time are years later found to be improper. In the interim,

lower courts are imposing (and not imposing) death sentences in reliance on precedent that changes too much to be constitutionally reliable in the context of capital punishment. The history of the use of Florida's death penalty in the 27 years since its enactment shows that the legal and factual bases for imposition of capital punishment are demonstrably unreliable. The standards used to impose capital punishment in Florida lack the heightened reliability and stability needed in the context of capital punishment. The death penalty is thus constitutionally infirm under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. The initial determination of guilt and the extent of the conduct of the accused are not sufficiently reliable to constitutionally support imposition of capital punishment. Convictions for first degree murder are not reliable because innocent persons in Florida have demonstrably been, and continue to be, convicted of first-degree murder and sentenced to capital punishment. The convictions and death sentences are the results of intentional inappropriate conduct by state officials, mistaken identification of defendants by witnesses, faulty science and/or good faith errors. Examples follow:

   In ***Rogers v. State***, 782 So.2d 373 (Fla.2001) the Florida Supreme Court reversed a conviction for first-degree murder and imposition of a death sentence because the prosecutor suppressed exculpatory evidence. In ***Rogers***, witnesses were coached by a prosecutor and police in a case where the State was seeking imposition a death sentence. The coaching was discovered only because Rogers' defense attorneys eventually obtained a cassette tape of the coaching:

The next category of Brady evidence alleged to have been withheld from Rogers is a cassette tape of a June 19, 1984, telephone conversation among the State's investigator, Flynn Edmonson; the prosecutor, John Whiteman; and McDermid, which Rogers claims revealed substantial coaching of McDermid for his trial testimony. The tape cassette, which was transcribed by an attorney of Covington & Burling, provided two excerpts reflecting the State's attempt to influence McDermid's testimony.

The first excerpt reflects McDermid telling the State that, after the robbery, he had reached the getaway car first and then laid down on the floorboard in the back seat while his partner, Rogers, lagged behind, shot the store manager, and then entered the car and drove away. The transcript of the tape reflects McDermid stating that Rogers arrived at the car about ten seconds after he had reached the car. After this representation, the transcript reflects the State explaining to McDermid that there were two witnesses who stated that they only saw McDermid run to the getaway car, get into the driver's seat, and drive away. At that point and after suggesting to McDermid that maybe the witnesses were mistaken or that maybe they just had not seen Rogers because he was too close behind, McDermid stated, "[Rogers] wasn't far behind me. I'll say that."

The second excerpt reveals McDermid's response when asked where the getawaycar had been parked was that it was parked [o]n the other side of the Holiday Inn, about 5 parking spaces down from the office.... It would be somewhere in those first five. Ah, I remember we didn't want to park right next to the stairwell [the first spot] and decided to park a couple down so I could look on

both sides you know what I mean, without the stairwell being in the way.... Not being parked too close to the office too was another thing I had in mind.

However, later in the conversation, when again he was asked where he had parked, McDermid responds: "I think it was either the first or the second slot, but I can't be sure." In response, Mr. Edmonson stated that there were several State witnesses who were adamant in their testimony that McDermid had parked the car in the first parking space and that "it would probably be a better idea if it was parked in the first spot.... I would think that you would have parked in the first space." In response, McDermid stated, "That's another thing. I mean like you said we might have parked in the first one." At trial McDermid testified that the getaway car was parked in the first spot, next to the stairwell.

This evidence of coaching and conflicting accounts clearly was favorable to Rogers. Whenever the government's case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness's credibility is an important issue in the case. See Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir.1989); Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir.1986); Craig v. State, 685 So.2d 1224, 1226 (Fla.1996). In this case, McDermid was the State's chief witness, and with the tape, Rogers could have impeached McDermid and shown the degree to which the State had coached him to overcome the inconsistencies between his testimony and that of the other State witnesses. This was especially important because the State did present eyewitnesses who testified that they saw someone drive off who met McDermid's

description. This testimony conflicted sharply with that of McDermid, who testified that he laid down in the back seat and waited until Rogers came and got in the driver's seat and drove off.

Rogers v. State, 782 So.2d 373, 384-385 (Fla.2001).

The prosecutor did not disclose timely the cassette tape of state witnesses being coached. While it is not improper to go over the testimony of a witness, actually coaching a witness about what to say and/or what not to say is unethical and improper. It is a sad truism that there are unethical attorneys. Coaching happens. ***Rogers*** documents that. However, to the unethical prosecutor who coaches a witness in how to testify and what to say, the lesson learned by ***Rogers*** is not to record such sessions. This is unfortunate, because while the practice will surely continue based on the track record established to this point, it will not be as readily detected.

Prosecutors have long been admonished that their conduct must be beyond reproach, and that their duty is not to simply seek convictions, but instead to scrupulously honor the requirements of law. See ***Berger v. United States***, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) ("the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Yet, prosecutors in capital cases routinely suppress evidence favorable to the accused. See ***Kyles v. Whitley***, 514 U.S. 419, 442-43, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (reversible error in capital case to suppress eyewitness statements given to police describing assailant as five feet four inches or five feet five inches tall and of medium build that matched

description of an alternative suspect who was six feet tall and thin). The practice occurs in Florida, in capital cases. See ***Hoffman v. State***, 26 FLW S438 (Fla.2001) (prosecutor did not disclose exculpatory results of scientific hair analysis); ***State v. Huggins***, 788 So.2d 238 (Fla.2001) (prosecutor did not disclose witness who contacted him during trial with testimony favorable to the accused); ***Rogers***, supra.

Overreaching by prosecutors in death penalty cases is amply demonstrated by a long history of improper arguments intentionally used in death penalty cases. The improper arguments are routinely made in the face of announcements that capital litigation requires heightened Due Process/reliability. Improper arguments are made in defiance of admonitions that prosecutors should not make certain arguments because they are improper. See ***Card v. State***, 26 FLW S670 (Fla.2001) (prosecutor improperly argued that defendant might be paroled if sentenced to life, that victim impact evidence could be weighed as an aggravating consideration, and that jury is the "conscience" of the community); ***Ruiz v. State***, 743 So.2d 1, 5 (Fla.1999) (argument that prosecutors are representatives of the state "has been soundly rejected by the courts." - argument that defendant was a liar "crossed the line of acceptable advocacy by a wide margin." - prosecutor's recounting service of her father in the Army was an improper "blatant appeal to jurors emotions.") ***Muhammad v. State***, 782 So.2d 343, 360 (Fla.2001) (prosecutor's argument “asked the jury to imagine the victim's fear, anger and terror." -- argument previously held to be unacceptable and strongly condemned in ***Garron v. State***, 528 So.2d 353 (Fla.1988)); ***Urbin v. State***, 714 So.2d 411, 420

(Fla.1998) (prosecutor's argument that it was the duty of the jury to impose a death sentence was previously condemned in ***Redish v. State***, 525 So.2d 928 (Fla. 1st DCA 1988)).

Though it is clearly improper, prosecutors continue to argue that a death sentence is justified because a defendant showed no remorse for his actions. See ***McCampbell v. State***, 421 So.2d 1072, 1078 (Fla.1982) ("Henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may be properly considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor."); ***Robinson v. State***, 520 So.2d 1, 6 (Fla.1988) (any consideration of lack of remorse is improper); ***Jones v. State***, 569 So.2d 1234, 1240 (Fla.1990)("This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances.") ***Wike v. State***, 596 So.2d 1020, 1025 (Fla.1992) ("In his closing argument, the prosecutor emphasized Wike's lack of remorse to the jury.") ***Shellito v. State***, 701 So.2d 837, 842 (Fla.1997) (harmless error for prosecutor to argue, "Was he remorseful, was he horrified over having killed Sean Hathorne?")

Though clearly improper, prosecutors continue to appeal to jurors' emotions and passion in seeking imposition of the death penalty. See ***Bertolotti v. State***, 476 So.2d 130, 134 (Fla.1985) ("We are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed the incidents of prosecutorial misconduct in several death penalty cases. (citations omitted). . . . The proper exercise of closing argument is

to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law."); ***Garron v. State***, 528 So.2d 353, 359 (Fla.1988) ("When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a while and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct."); ***King v. State***, 623 So.2d 465, 488 (Fla.1993) ("We agree with King that the instant prosecutor went too far" by inflaming the minds and passions of the jurors); ***Taylor v. State***, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994) (Prosecutors "activities were designed to evoke an emotional response to the crimes or to the defendant, and fall outside the realm of proper argument."); ***Urbin v. State***, 714 So.2d 411, 421 (Fla.1998)("the prosecutor's comments constitute a subtle 'golden rule' argument, a type of emotional appeal we have long held impermissible."); ***Thomas v. State***, 787 So.2d 26, 30 (Fla. 2d DCA 2001) ("Closing argument 'must not be used to inflame the minds and passions of the jurors.' (citation omitted). It is improper for the State to evoke the jury's sympathy regarding the victim.' (citation omitted). Although we do not conclude that the error during closing argument was so prejudicial as to vitiate the entire trial, (citation omitted), we are particularly disturbed by the prosecutor's blatant

persistence in making improper comments despite a sustained objection, a court warning and a curative instruction.");***Lewis v. State***, 780 So.2d 125, 129 (Fla. 3d DCA 2001) ("Such appeals to sympathy by the prosecution have long been held to be improper."); ***Brooks v. State***, 762 So.2d 879, 899 (Fla.2000) ("as appellant notes in his brief, it appears that many of the comments in this case are the same as those made in Urbin, 'with only the names of the victims and the defendants changed.")(emphasis added); ***Gonzalez v. State***, 786 So.2d 559, 570 fn. 4 (Fla.2001)("The underlined portions of the arguments represent the statements the defense now claims constitute improper comments and, therefore, reversible errors. In this instance, the comment was not objected to and thus not preserved for appellate review. We stress, however, that prosecutors should be careful about the language used in these arguments. We certainly do not approve of this type of language.").

Prosecutors continue to improperly argue that the jurors should show the defendant the same mercy shown the victim. See ***Urbin v. State***, 714 So.2d 411, 422 (Fla.1998)("This line of argument is blatantly impermissible under ***Rhodes v. State***, 547 So.2d 1201, 1206 (Fla.1989) and ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla.1992)."); ***Brooks v. State***, 762 So.2d 879, 901 (Fla.2000)("Similarly, the prosecutor's 'mercy' argument in this case tracks almost word for word the argument in Urbin which was classified as 'blatantly impermissible' by this Court."); ***Kearse v. State***, 770 So.2d 1119, 1129 (Fla. 2000) (prosecutor improperly urged jury to show "this Defendant the same mercy he showed Officer Parrish."); ***Thomas v. State***, 748 So.2d 970, 985 (Fla.1999)(continuing to express

intolerance for prosecutorial misconduct, Court reaches otherwise moot point to note that prosecutor violated ***Urbin***, ***Rhodes*** and ***Richardson*** by arguing, "Today is Robert Thomas's day of reckoning. I ask you to show him the same mercy that he shoed to Imara Skinner on that day.").

Improper argument by prosecutors is a visible tactic that is capable of review by the appellate courts only because it is necessarily a visible part of the record. Hopefully, a valid harmless error analysis can adequately address these serious constitutional errors that are intentionally, repeatedly and injected by unethical prosecutors in capital trials. See ***State v. Diguilio***, 491 So. 1129 (Fla.1986) (holding that constitutional errors such as prosecutor improperly commenting on the exercise of constitutional right to remain silent is subject to harmless error analysis[1]). The more troubling aspect is that Florida prosecutors so openly ignore their oath and obligation to seek justice and are instead openly using patently improper arguments to achieve convictions and death sentences. The foregoing examples show that, clearly, prosecutors statewide openly and intentionally engage in improper tactics in the context of death penalty prosecutions. Prosecutors are not heeding the ethical constraints precluding improper arguments and/or the repeated admonitions of the Florida Supreme Court to refrain from making improper arguments. See, e.g., ***State v. Murray***, 443 So.2d 955 Fla.1984) (attorneys engaging in improper argument should be referred to the Florida Bar for disciplinary investigation); ***Urbin***, supra; ***Ruiz***,

[1] Interestingly, ***State v. Diguilio***, 491 So.2d 1129 (Fla.1986) has been cited more than 1,200 times to review instances of State infringement of a constitutional right. There is no way to know how many times a PCA has been issued based on a determination that *reviewed* constitutional error was harmless.

supra; ***Bertolloti***, supra. The tactic of making improper arguments occurs openly, in seeming defiance of the admonitions of the appellate court and despite higher Due Process requirements for capital litigation. In light of the visible disdain for ethical constraint that is shown by the use of improper arguments, there can be no confidence that undisclosed/concealed conduct of all prosecutors comports with ethical requirements. The lack of confidence in the ethical performance of all prosecutors in Florida serves as another basis to conclude that the highest standard for reliable fact finding in the context of the capital punishment is not being met.

Another detailed example of overreaching by a prosecutor in a capital case is found in the case of ***State v. Melendez***, CF-84-1016A2-XX (Appendix A). In 1984, Juan Melendez was convicted, imprisoned and sentenced to death based almost solely on the uncorroborated testimony of two people. 16 years later, it has been determined that the prosecutor obtained the conviction and death sentence by suppressing exculpatory information:

> The *Brady* evidence withheld by the prosecution in this case seriously undermines the credibility of the two key State witnesses who testified at trial. The evidence also helps to substantiate the defense theory that someone other than the Defendant committed the homicide. The fact that police reports were not prepared at the time of the investigation but rather six months later, provides an opportunity to question law enforcement regarding its methods, procedures, and motives in conducting its investigation. The prosecutor's notes regarding the statement made by Vernon James to Arthur Meeks, the handwritten report and assistant state

> attorney's letter to the police department regarding Mr. Falcon's involvement in the Reagan incident, and the prosecutor's notes of the sworn statements of John Berrien and David Luna Falcon all contain abundant impeachment evidence. Viewed in its totality, this suppressed evidence calls into question John Berrien's and David Luna Falcon's testimony to the degree that it undermines confidence in the Defendant's conviction and death sentence. Without knowledge of and access to the suppressed evidence, the Defendant did not receive a fair trial. All three *Brady* criteria have been met. On this claim, therefore, the Defendant's conviction and sentence from September 20 and 21, 1984 are set aside and the defendant is granted a new trial.

Appendix A, pages 52-53).

In summary and in addition to the problems concerning the vacillation of the use of capital sentencing considerations by the courts, the historical improper and unethical performance of Florida prosecutors in capital litigation fully justifies declaring capital punishment in Florida unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The fact finding process cannot be deemed sufficiently reliable to justify imposition of the death penalty because state prosecutors have engaged and continue to engage in a course of conduct that demonstrates blatant disregard for the constitutional requirements of fundamental fairness, Due Process and respect for the requirements of law. The history of prosecutors blatantly making improper

arguments indicates that other concealed improprieties, such as coaching witnesses and suppressing favorable evidence as occurred in ***Rogers*** and ***Melendez*** are NOT being timely discovered and reviewed by appellate courts.

8. The fact-finding process itself in the context of capital litigation is so fraught with unreliability that the death penalty is unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Wrongful convictions of innocent defendants charged with first-degree murder have undeniably occurred nationwide and in Florida. For example, in Florida Freddie Lee and Wilbert Pitts were convicted of two first-degree murders and sentenced to death. Their convictions and sentences were upheld by the Courts. See ***Lee v. State***, 166 So.2d 133 (Fla.1966). Belatedly, exculpatory evidence was unearthed and presented that resulted in their full pardon 27 years after their initial wrongful conviction and confinement on death row. The Florida Legislature enacted special legislation to compensate these men in the sum of $500,000 each. See Chapter 98-431, C.S.H.B No. 3035, ("Maurice Rosen Act"). Compensation by the State of Florida for confining two innocent individuals for 27 years on death row is to be commended. Because of the finality and severity of the death penalty, however, compensation to innocent persons whose wrongful sentence of death is in fact carried out by the State of Florida cannot occur. It is for that very reason that the Constitution requires the heightened Due Process and reliable fact finding before a State can ever be allowed to execute one of its citizens. A death sentence, once carried out, is reversible. The unreliability of the fact-finding process itself has caused several moratoriums on the use of capital punishment.

One independent study reviewing imposition of capital punishment for a period of 23 years, from 1973 until 1995, found that an unacceptably high rate of serious error exists in capital cases across the United States. “Over 90% of American death-sentencing states have overall error rates of 52% or higher. 95% have error rates of 60% or higher. Three-fifths have error rates of 70% or higher.” Liebman, Fagan & West, “A Broken System: Error Rates in Capital Cases, 1973-1995,” Executive Summary, p.2. (Appendix B). The study sets forth exhaustive findings and ultimately concluded that, "the capital punishment system revealed by our 23 year study is not a success, and is not even minimally rational." Appendix B, page 122.

The advancement of scientific knowledge has led to the exoneration of innocent persons who have been wrongfully convicted and sentenced to death. Frank Lee Smith died of cancer after being imprisoned on Florida's death row for 14 years and after a unanimous jury recommended the death penalty. Eleven months after dying of cancer, DNA evidence cleared him. Appendix D. The belated exoneration of persons, made capable by DNA, reveals that convictions are not sufficiently reliable to support imposition of capital punishment.

WHEREFORE, this Court is asked to declare Florida's death penalty statutes unconstitutional for the reasons set forth in this motion and as may be further articulated by counsel during argument of this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished electronically to the Office of the State Attorney, on this 29th day of January, 2026.

Respectfully submitted,

/s/ Daniel M. Hernandez

DANIEL M. HERNANDEZ, ESQ.
` DANIEL M. HERNANDEZ, PA
P.O. BOX 173165
Tampa, Florida 33672
info@danielmhernandezpa.com
Florida Bar # 229733
Attorney for the Defendant