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CERTIFICATE OF FONT STYLE AND SIZE

Pursuant to this Court's Administrative Order of July 13, 1998,
Counsel for Appellant hereby certifies this Brief contains the following
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PRELIMINARY STATEMENT

Appellant was the Defendant, and Appellee the Prosecution, in the Trial Court of the Fifteenth Judicial Circuit, In and For, Palm Beach County, Florida, Criminal Division, the Hon. Edward A. Garrison presiding.

In this Brief, the parties shall be referred to as they appear before this Honorable Supreme Court.

The symbol "R" shall refer to the Record on Appeal, and the symbol "T" shall refer to the Transcript of the trial proceedings.

NOTICE ON RECORD: Although this Honorable Court ordered transcription of all transcripts in this proceeding by Order of July 23, 1998, and although the Trial Court entered a Supplemental Order to transcribe all pre-trial hearings in this cause on May 10, 1999, counsel for Appellant is awaiting receipt of the transcript of a pre-trial hearing of October 31, 1997, which was specifically ordered transcribed June 8, 1999 and not yet received. Appellant's Initial Brief is being submitted at this time to comply with this Honorable Court's Order setting June 15, 1999 as the extended deadline for the filing of Appellant's Initial Brief.

Counsel will supplement the Record herein upon receipt of said transcript and respectfully requests this Honorable Court to allow Appellant to supplement any argument contained herein based upon the contents of said Supplemental Record.

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STATEMENT OF THE CASE AND OF THE FACTS

On May 11, 1994, Appellant was arrested for First Degree Murder, Armed Burglary, and Grand Theft Auto in Case No. 94-4885 CF, but the charges in that case were nolle prossed on July 14, 1994 (R 1, R 46, T 91).

Based upon the conduct alleged against Appellant and arising from Case No. 94-4885 CF, on May 8, 1997, Appellant was indicted in the case at bar for alleged offenses occurring on or about July 8-9, 1993 for: Count One, First Degree Murder with a firearm, contrary to Sections 782.04(1)(a) and 775.087(1)(2), *Florida Statutes*; Count Two, Armed Robbery with a firearm, contrary to Sections 812.13(1) and (2)(a) and 775.087(1)(2), *Florida Statutes*; Count Three, Burglary of a dwelling, contrary to Sections 810.02(1) and (3), *Florida Statutes*; and Count Four, Grand Theft Auto – Hate Crime, contrary to Sections 812.014(1) and (2)(c), and 775.085, *Florida Statutes* in Case No. 97-5175 CF A02 (R 2-3).

On June 13, 1997, Ann Perry, Esq. was court-appointed to represent Appellant (R 5, R 53). Appellant's jury trial was set for a time certain October 20, 1997 (R 5).

On June 18, 1997, Appellee filed its Notice of Intent to Seek the Death Penalty (R 56).

On June 26, 1997, Ms. Perry filed a Motion to Appoint Co-counsel in this cause, and requested Jose Sosa, Esq. to assist because he was one of the counsel of record in Appellant's 94-4885 CF case and was qualified to act as penalty phase co-counsel because he was on the Circuit's official "second chair list" (R 66-67). On June 30, 1997, Mr. Sosa was court-appointed as "second chair" co-counsel for Appellant (R 73).

On September 23, 1997, Appellee filed its Notice of Intent to Offer Evidence of Other Crimes, Wrongs, or Acts, pursuant to Section 90.404(2)(a)(b), *Florida Statutes* for Appellant's alleged involvement in a murder occurring May 8, 1995 (R 207-208).

On September 26, 1997, the Trial Court granted a defense motion for continuance and reset the trial for March 2, 1998 (R 8).

On October 23, 1997, the Trial Court received a handwritten letter from Appellant stating Appellant had spoken with Ms. Perry and she had told him it would be in his best interests to obtain new counsel. Appellant's letter also requested the Trial Court to appoint new counsel and replace both Ms. Perry and Mr. Sosa (R 269).

On October 31, 1997, the Trial Court granted Appellant's Motion to have Ms. Perry removed from Appellant's case and ordered Mr. Sosa, the number two chair counsel, to remain as Appellant's sole counsel (R 9, 291).

By letter dated November 21, 1997, Appellee notified Mr. Sosa the Appellee decided to seek the death penalty at Appellant's trial (R 299).

On December 10, 1997, the Trial Court received a letter from Appellant to advise the Court that Appellant had no contact with Mr. Sosa, his remaining court-appointed counsel, since the Court removed Ms. Perry October 31, 1997 (R 300-301). Appellant had "...come to the conclusion Mr. Sosa does not want to represent me in this case, nor do I wish to retain him as counsel any longer. I would appreciate you setting up another hearing as to clear up this matter" (R 300-301). Appellant also advised the Trial Court Appellant has not seen the

paperwork regarding his case and requested the Trial Court to instruct Mr. Sosa to provide him with it (R 300-301).

On January 5, 1998, the Trial Court received another letter from Appellant asking for a hearing to be set for the purpose of having Mr. Sosa taken off Appellant's case (R 302). As of that time, the case was still set for trial March 2, 1998 (R 9).

On January 8, 1998, the Trial Court conducted a hearing on the issue of counsel at Appellant's request (R 1061). Appellant testified his only contact with Mr. Sosa since Mr. Sosa was Appellant's sole counsel was once in three and one half to four weeks by telephone and that was limited to whether Mr. Sosa would continue to represent Appellant (R 1062). Appellant complained Mr. Sosa was not giving him any information or discovery on his case, had no meaningful contact with him and Appellant was not able to communicate with Mr. Sosa to give counsel input that would help Appellant's counsel establish a defense (R 1063-1064).

"I still haven't had any conversation with him (Mr. Sosa), had not went over any statements, any depositions, went over things pertaining

to my case, it being set for March. I don't see where my case is going to be ready for March...." (R 1064-1065).

Rather than questioning Mr. Sosa, the Trial Court stated to Appellant:

"You understand that you started with two lawyers; you are down to one lawyer. If I remove him, that makes you the lawyer; is that your understanding?" (R 1066).

Appellant stated he wanted information on the case so that he could assist Mr. Sosa as co-counsel. "I have received none since the day I got here, I have not received paper one or any motion that has been filed." (R 1067).

The Trial Court responded "Listen to me. Listen to me. At this point you need to cooperate with Mr. Sosa. If he's going to be your lawyer, if you want to be your own lawyer, you need to tell me that now." (R 1067).

Appellant's response of "Yes, sir" (R 1067) was taken as a request to proceed *pro se*, regardless of the representation by Mr. Sosa, no testimony was taken of Mr. Sosa, and the Court conducted a *Faretta*

hearing and removed Mr. Sosa as Appellant's sole remaining counsel in the case (R 1067-1092). Appellant, who had a limited ninth grade education (T 1070) was not sure if he wanted a jury trial (T 1076).

On February 13, 1998, the Trial Court received another letter from Appellant advising the Court Mr. Sosa had come to see him in the County Jail February 10, 1997, and "I am pleased that you will allow Mr. Sosa to sit beside me during trial." (R 326). Appellant also told the Court he agreed to a non-jury trial (R 327).

A non-jury trial was held March 11, 12 and 16, 1998 with Appellant present without counsel, but Mr. Sosa was standing by (R 18-22).

For purposes of this appeal, few facts regarding the testimony at trial as to the homicide are in dispute. There were no witnesses called by the Appellant, Appellant himself did not testify, and there was no effective cross-examination of Appellee's witnesses (T 1- 366).

On July 9, 1993, a body of a man later identified as Richard Kunkel was found off the side of a road in a canal area near orange groves in western Palm Beach County (T 16). Cigarette butts were found about forty feet from the body (T 46-47). The lead crime scene investigator did not recall if the body had a wallet or any possessions (T 47). Budweiser

beer cans and bottles were found in the area (T 49, 52). A single bullet hole was found on the middle back of the shirt found on the decedent, with the hole located approximately eight inches down from the shirt collar (T 49-50). A matchbook from H.G. Rooster's was found in the decedent's right front pocket (T 56). Police found Kunkel's car July 9, 1993 in western Palm Beach County.

Dain Brennault testified Appellant was the boyfriend of the witness's mother and he had known the Appellant since the end of 1992 (T 68). In July of 1993, Brennault was 17 years old.

On the evening of July 8, 1993, Brennault, Appellant, and co-defendant Timothy Pearson together left the West Palm Beach residence which Appellant shared with the Brennault family and Pearson (T 70-72). Unknown to Brennault at the time they first left, Pearson had with him a Glock 9mm pistol (T 74-75).

After going to a bar called Splash for between thirty and sixty minutes, the trio drove to another bar called H.G. Rooster's (T 76-77). There was no particular reason for going to H.G. Rooster's (T 77). After using the men's room at H.G. Rooster's, Brennault went back to the parking lot since he was under legal drinking age and could not remain

in the bar due to its carding policy (T 78). After a few minutes at H.G. Rooster's, Appellant and Pearson exited the bar (T 80). After Appellant left the bar, the decedent got into his car and pulled next to their car (T 82). The trio told Kunkel they were going to a party in Royal Palm and Appellant asked Kunkel if he wanted to go with them (T 83-84). Kunkel agreed (T 84).

While they were in separate cars from Kunkel, the trio agreed to "beat him up and rob him" (T 85, 134).

Kunkel joined the Appellant and the others in Brennault's car with Appellant driving and rode toward western Palm Beach County while they were drinking bottles of Budweiser (T 134-138).

During the ride, Brennault saw a Glock 9mm between the center console and the passenger seat and he recognized it to be Timothy Pearson's gun (T 140).

The car stopped twice when all the occupants got out to urinate (T 141-143). Before they resumed the trip after their second stop, Brennault testified Appellant had the gun in his hand, pointed it at Kunkel, told Kunkel to turn around, take his jeans off, and then fired one shot striking the victim (T 147-149). After the shot, Appellant started

running around like he had ants in his pants, going in circles like he was crazy (T 150).

The testimony reflected Appellant had Pearson go through the victim's pockets while he was still alive and they carried him off the side of the road leaving him along a canal bank (T 151-153).

Brennault agreed to a plea to being an accessory after the fact and was sentenced to five years probation (T 189, 586).

Co-defendant Pearson pled guilty to robbery and being an accessory after the fact and was sentenced to three years in prison (T 586).

The Trial Court found Appellant guilty of all charges (R 418, T 366-367).

At the Phase II hearing, which also was conducted non-jury, Dr. Abbey Strauss, a board certified psychiatrist, testified Appellant committed the offense while he was under the influence of mental or emotional disturbances (R 1291, 1301), and was overcome by his mental illness which pervades every area of Appellant's life (R 1305).

Dr. Strauss described Appellant as having significant elements of distrust paranoia who sees the world through his own particular

definitions and very differently due to his paranoid disorder (T 1293-1299).

Dr. Strauss also found it was significant the Appellant had forty plus HRS referrals as a juvenile reflecting something was very much out of control (R 1299-1300).

Dr. Strauss was of the opinion to a reasonable degree of medical scientific certainty that at the time Appellant pulled the trigger in 1993 and in a subsequent case in 1995, Appellant was suffering from an extreme mental, emotional disturbance (R 1301-1302), and it was not possible that the Appellant was just a mean, cold, calculated killer (R 1302).

Although Dr. Strauss found Appellant not to be legally insane for purposes of competency to stand trial, Appellant suffers from dysfunction anxiety and has mental illness that is always present twenty four hours a day, seven days a week (R 1308).

Psychologist Susan Lafehr-Hession testified Appellant was a very disturbed paranoid person with a very severe debilitating type of illness with suffered from severe emotional disturbances (R 1266). She testified his paranoia was very pervasive and an all inclusive illness that

very debilitating and does not change unless he is subjected to a highly structured setting (R1267). Although she testified Appellant does not meet the criteria to be diagnosed legally insane, he does not have free will to make a choice before what he does as criminal activity (R 1270-1273). She testified Appellant's disease would justify any of his activities and his mental illness is very rare, since she has seen it only a few times in her over twenty years of practice, and it was always in a jail or prison setting (R 1284).

As an aggravating factor in support of the death penalty, Appellee cited Appellant's December 8, 1995 murder conviction in Case No. 95-5038 CF A02 (R 394). The underlying offense was committed on May 8, 1995, and was not a prior violent felony (R 207-208, 386).

On May 29, 1998, the Trial Court sentenced Appellant to Death for Count One, (R 427-430), Life imprisonment for Count Two, (R 422), Fifteen Years imprisonment for Count Three (R 424), and Five Years imprisonment for Count Four (R 425).

Notice of Appeal was filed June 18, 1998 (R 438).

SUMMARY OF ARGUMENT

I.

As an indigent facing not only criminal charges but a capital offense, Appellant clearly had a right to not only court-appointed counsel, but effective representation by said counsel. After voicing numerous written concerns to the Trial Court about the apparent lack of interest displayed by court-appointed counsel in any preparation of a defense to the case, the Trial Court removed Appellant's sole counsel and required Appellant to represent himself without conducting an inquiry required by *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

II.

Although Appellant may be deemed to have waived his right to counsel at pre-trial proceedings, the Trial Court had an obligation to meaningfully renew the offer of assistance of counsel at each subsequent stage of the proceeding. Appellant, who did not finish ninth

grade and who was previously diagnosed with severe mental and emotional disturbances who could not coherently answer questions by the Trial Court as to Appellant's waiver of counsel prior to trial, could not be deemed to have knowingly and intelligently waived counsel for trial.

III.

Appellant's prior criminal conviction was used as an aggravating factor to impose the death penalty, despite the circumstance the date of the offense of said prior conviction was two years after the offense in the case at bar. Section 921.141(5)(b), *Florida Statutes*, is unconstitutional on its face and was applied in a vague, overbroad, arbitrary and inconsistent manner.

ARGUMENT

I.

**THE TRIAL COURT ERRED BY FAILING
TO CONDUCT A MEANINGFUL
NELSON INQUIRY IN RESPONSE TO
APPELLANT'S PRE-TRIAL MOTION TO
HAVE APPELLANT'S COURT-
APPOINTED COUNSEL DISMISSED
AND NEW COUNSEL APPOINTED.**

Where a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court-appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reasons for the request to discharge. *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA

1973); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988); *Haugabook v. State*, 689 So.2d 1245 (Fla. 4th DCA 1997); *Dunn v. State*, 730 So.2d 309 (Fla. 4th DCA 1999).

On October 23, 1997, the Trial Court received a handwritten letter from the Appellant expressing dissatisfaction with Ann Perry, the Appellant's first chair court-appointed counsel, and requested the Court to appoint new counsel. (R 269). The Appellant did not request to proceed through trial *pro se* (R 269).

In said letter, Appellant specifically requested the Trial Court to appoint new counsel to replace Ms. Perry as first chair counsel because,

"... the way she has handled my case up to this point is not satisfactory to me. I would appreciate a hearing to be set in front of you concerning this matter of appointing me new counsel...." (R 269).

Based upon the October 23 letter, which the Trial Court treated as a "Pro See (*cq*) Motion for Discharge of Counsel", the Trial Court

granted the Appellant's request to remove Ms. Perry as first chair counsel at trial, relieved her of all responsibility involving this matter, but did not appoint replacement or substitute first chair counsel for the Appellant, leaving Jose Sosa, second chair counsel, as Appellant's sole trial attorney (R 291).

Based upon the record herein, the removal of Ms. Perry as first chair counsel occurred in open court October 31, 1997 (R 9).

On December 9, 1997, Appellant wrote the Trial Court to advise the Court Appellant's remaining court-appointed counsel, second chair Mr. Sosa, had no contact with the Appellant since Appellant was last in Court to remove Ms. Perry from Appellant's case (R 300-301).

"I have come to the conclusion that Mr. Sosa does not want to represent me in this case, nor do I wish to retain him as counsel any longer," wrote Appellant (R 300).

Appellant again requested substitute counsel be appointed to represent him (R 301).

On January 5, 1998, the Trial Court received another letter from the Appellant, complaining the Trial Court had ignored his previous request for a hearing to have Mr. Sosa removed as Appellant's counsel, and again requested a hearing (R 302).

In response to Appellant's request for a hearing, the Trial Court brought Appellant before the Court January 8, 1998 (R 1061).

Appellant advised the Court he had only spoken to Mr. Sosa one time (that being by telephone) in the last three and one half to four weeks since Ms. Perry was removed from the case, and that was solely about Mr. Sosa filing a Motion to Withdraw from the Appellant's case (R 1062-1063).

Appellant's testimony at the hearing January 8, 1998 is as follows:

"I don't know what the problem is as far as Mr. Sosa's behalf—on my behalf," (R 1063).

"I still have no further knowledge of my case. I have asked Ms. Perry for specific items pertaining to my case, which I believe

I have a lot of input that would help the lawyers, as well as myself, for them to establish some kind of defense or to have common knowledge as to what's going on with my case,” (R 1063-1064).

“I still haven't had any conversation with him (Mr. Sosa), had not went over any statements, any depositions, went over things pertaining to my case, it being set for March... I don't see where my case is going to be ready for March if I go the way that my lawyers are wanting my case to go because I was here in June 5th in the county jail,” (R 1064-1065).

“...(W)e are not compatible in this case and the Judge refuses, or like the Court stated before that they refuse to appoint me counsel. I am completely aware of that. I completely know – to me that what you say is you are not going to appoint me counsel. You stated you are not going to,” (R 1065-1066).

The Trial Court responded:

“You understand that you started with two lawyers; you are down to one lawyer. If I removed him, that makes you the lawyer; is that your understanding?” (R 1066).

Appellant responded it was his understanding he was to be informed of the status of the proceedings, and had yet to even receive one paper or copy of any motion that was filed pertaining to the case (R 1066-1067).

When the Appellant advised the Court that Appellant was not being informed as to any case preparation or activity, the Court admonished Appellant:

THE COURT: *“Listen to me. Listen to me. At this point you need to cooperate with Mr. Sosa. If he’s going to be your lawyer, if you want to be your own lawyer, you need to tell me that now,”* (R 1067).

THE DEFENDANT: *“Yes, sir.”*

THE COURT: *"You do?"*

THE DEFENDANT: *"Yes, sir."*

The Court continued:

THE COURT: *"Understanding, as I told you previously, and I know we had a lengthy discussion about what your rights to counsel are, what your choices may be, I am not going to pick and choose lawyers because you change your mind. You may have gotten rid of Ms. Perry; that was your choice. If you fire Mr. Sosa, I am not going to appoint another lawyer; do you understand that?"*

THE DEFENDANT: *"I understand that completely,"* (T 1069).

In spite of the fact it was apparent Appellant sought to replace Mr. Sosa solely because Mr. Sosa had not demonstrated anything to Appellant to indicate Mr. Sosa was effectively prepared and competent to represent Appellant, the Trial Court failed to question Mr. Sosa as to his ability to render competent representation in this matter, especially in light of the circumstances Mr. Sosa was initially appointed to be second chair, and not first chair, counsel.

THE COURT: *“You learned a certain amount of skills looking things up in the law books.”* (R 1070-1071).

THE DEFENDANT: *“It’s all basic knowledge.”*

THE COURT: *“But you feel that’s enough to represent yourself in this matter?”*

THE DEFENDANT: *“At this point, no, I don’t.”*

The Court went on to state:

THE COURT: *“We already appointed two lawyers at State expense and obviously it’s at no cost to you. If you decide*

to fire Mr. Sosa, it will not happen again, you are going to be entirely on your own for this trial. Do you understand that?" (R 1074)

THE DEFENDANT: "Yes."

THE COURT: "And you do not wish to have an attorney, Mr. Sosa, Ms. Perry to represent you?"

THE DEFENDANT: "No. Neither one of them, no, sir."

The Court then conducted a hearing as contemplated under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 45 L.Ed.2d 562 (1975) as to waiver of counsel for self-representation purposes without conducting a *Nelson* inquiry (T 1074-1091).

As an indigent, Appellant's Sixth Amendment right to court-appointed counsel includes the right to effective representation by such

counsel. *Anders v. State*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); *Chalk v. Beto*, 429 F.2d 225 (5 Cir. 1970).

The procedures for the trial court to take when a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court-appointed counsel, are set forth in *Nelson, supra*.

In *Nelson, supra*, the Court required the trial judge, in order to protect the indigent's right to effective counsel, to make an inquiry of the defendant as to the reason for the request to discharge. If incompetency is assigned by the defendant as to a reason for the request to discharge, the trial judge should make a sufficient inquiry of the defendant and his court-appointed counsel to determine whether there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. If reasonable cause appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise

the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute. *Buehler v. State*, 724 So.2d 171 (Fla. 3rd DCA 1998); *Rios v. State*, 696 So.2d 469 (Fla. 2nd DCA 1997).

In the case at bar, Appellant complained on numerous occasions to the trial court about the lack of representation of Mr. Sosa, including the circumstance that Mr. Sosa had only spoken to him once after he became sole counsel, and that was when the Appellant was in Court for the discharge of Appellant's lead counsel October 31, 1997 (R 269, R 300).

Appellant was held in the Palm Beach County Jail on the charges in the case at bar since June 5, 1997 (R 1065) and stated at the hearing January 8, 1998, he had not received or read a copy of his Indictment (R 1083), nor any other materials, reports or pleadings of the case. The record is clear the Appellant wanted assistance of counsel, and fails to reflect the trial court properly conducted a *Nelson* hearing which would have protected Appellant's right to effective assistance of counsel and made a sufficient record to permit a prompt and accurate disposition of post conviction attacks on the judgment.

When the trial court fails to conduct a meaningful *Nelson* inquiry, the Appellant's conviction should be reversed. *Mosley v. State*, 720 So.2d 606 (Fla. 5th DCA 1998); *Brooks v. State*, 703 So.2d 504 (Fla. 1st DCA 1997); *Rivas v. State*, 679 So.2d 358 (Fla. 4th DCA 1996).

Appellate courts apply the standard of review of abuse of discretion in determining whether a trial court conducted an appropriate *Nelson* inquiry. *Kearse v. State*, 605 So.2d 534 (Fla. 1st DCA 1992), rev. den. 613 So.2d 5 (Fla. 1993).

A lower court abuses its discretion when it fails to provide the defendant with an opportunity to explain why he or she objects to court appointed counsel or fails to conduct an adequate inquiry regarding the defendant's desire to discharge defense counsel. *Scull v. State*, 533 So.2d 1137 (Fla. 1988), cert. den. 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989); *Mosley v. State, supra*; *Rios v. State, supra*; *Burgos v. State*, 667 So.2d 1030 (Fla. 2nd DCA 1996); *Marshall v. State*, 665 So.2d 307 (Fla. 2nd DCA 1995); *Williams v. State*, 532 So.2d 1341 (Fla. 4th DCA 1988); *Chiles v. State*, 454 So.2d 726 (Fla. 5th DCA 1984); *Parker v. State*, 423 So.2d 553 (Fla. 1st DCA 1982).

In the case at bar, the trial court failed to conduct a meaningful hearing affording Appellant, on the record, a full and fair opportunity to present his *pro se* arguments showing the lack of effective assistance of counsel. Moreover, the trial court failed to place on the record that there was no reasonable basis for a finding of ineffective counsel, as mandated by *Hardwick, supra*.

Such activity by the trial court constitutes an abuse of discretion, mandating a reversal of the judgment and sentence of the trial court, remanding the cause for a new trial as well as representation of the Appellant by court-appointed counsel. *Beaton v. State*, 709 So.2d 172 (Fla. 4th DCA 1998).

ARGUMENT

II.

THE APPELLANT CANNOT BE DEEMED TO HAVE KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO COUNSEL AT TRIAL WHEN THE TRIAL COURT FAILED TO PRESENT THE ENTIRE PROCESS OF OFFERING COUNSEL AND MAKING A THROUGH INQUIRY OF APPELLANT'S ABILITY TO MAKE A KNOWING AND INTELLIGENT WAIVER OF ASSISTANCE OF COUNSEL PRIOR TO THE COMMENCEMENT OF TRIAL,

**CONTRARY TO RULES 3.111 (d) (2),
(5), *FLA. R. CRIM. P.***

A defendant's waiver of the right to counsel applies only to the stage of the proceedings during which the waiver is made. *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992).

Appellant does not concede the January 8, 1998 hearing wherein Appellant requested substitution of his court-appointed counsel for effective counsel, to be construed as a voluntary, irrevocable waiver of counsel. However for the purposes of this appeal, *arguendo*, if this Honorable Court were to make such a finding, before such a waiver is accepted and can be effective, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceeding. *Sproule v. State*, 719 So.2d 349 (Fla. 4th DCA 1998); Rule 3.111 (d) (5), *Fla. R. Crim. P.*

At the commencement of trial March 11, 1998, the Court called the Appellant to the podium, had him sworn, and the following colloquy took place (T 3-5):

THE COURT: *“Okay. Mr. Knight, if you would step up to the podium, please. Raise your right hand.”*

THE DEFENDANT: *“Yes sir.”*

THE COURT: *“State your full name for the record.”*

THE DEFENDANT: *“Ronald Allan Knight.”*

THE COURT: *“All right. Mr. Knight, did you do your homework assignment this morning?”*

THE DEFENDANT: *“Yes.”*

THE COURT: *“Specifically referring to the transcript I provided you of the hearing January the 8th, 1997 (cq) regarding the full inquiry that I made regarding your choice to represent yourself; did you read that this morning?”*

THE DEFENDANT: *“Yes.”*

THE COURT: *“If I asked that entire series of questions, would your answers be any different?”*

THE DEFENDANT: *“Yes, sir.”*

THE COURT: *“They would?”*

THE DEFENDANT: *“To – I’m sorry, I was--”*

THE COURT: *“Would your answers be any different to the series of questions?”*

THE DEFENDANT: *"No, sir; I mean, yes, sir."*

THE COURT: *"Do you understand what you are doing by representing yourself?"*

THE DEFENDANT: *"Yeah."*

THE COURT: *"Was it your desire to finish representing yourself here today?"*

THE DEFENDANT: *"Yes."*

THE COURT: *"And again, for the record, Mr. Sosa is sitting at the table to be your technical advisor. Are you ready for trial?"*

THE DEFENDANT: *"Yes, sir."*

THE COURT: “*State ready?*”

MR. SHINER: “*Yes.*”

THE COURT: “*All right. You may have a seat, Mr. Knight. Opening statement, Mr. Shiner.*” (R 3-5).

A defendant shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation. Rule 3.111 (d) (2), *Fla. R. Crim. P.*

Under Florida law, a defendant, although competent to stand trial, lacks capacity to stand trial without benefit of counsel, where he had be committed twice to mental institutions, where he had no prior experience

in dealing with criminal proceedings, and where he had limited work experience. *Reilly v. State Dept. of Corrections*, 847 F. Supp. 951 (M.D. Fla. 1994).

The trial court did not inquire of the psychiatric experts prior to the Phase II proceedings. In those proceedings, expert psychiatric testimony from mental health counselor Susan Lafehr-Hession indicated Appellant uncontrovertibly was suffering from a very severe and debilitating paranoia, was severely emotionally disturbed between his initial examination of 1995 and through the time of trial, suffered from a very pervasive, very debilitating all inclusive mental illness, and did not have the free will to make a choice before he acted out his criminal activities (R 1256-1276). Appellant's mental illness was described as "very rare" (R 1284). Psychiatrist Abbey Strauss testified the Appellant was overcome by mental illness that pervades every area of his life (R 1301-1305), and the Appellant, although not legally insane, suffered from dysfunction anxiety all the time and his mental illness was always present twenty four hours a day, seven days a week (R 1308).

In response to questions by the trial court, the Appellant stated he had never suffered from any mental illness of any type (R 1084) but did

receive psychological counseling twelve years previously (R 1085). He had an educational background of "...through to the Ninth Grade" (R 1070) and had been a defendant in a previous murder trial (R 1070). There was no testimony presented as to work experience, although trial testimony indicated the Appellant had worked as a bouncer in a topless bar (T 264).

As of January 8, 1998, Appellant had yet to receive a copy of the Indictment, let alone any discovery materials (R 1083, 1091).

A defendant will be permitted to represent himself only when he "knowingly and intelligently" waives the right to counsel. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

The right to self-representation is not absolute. *Johnston v. State*, 497 So.2d 863 (Fla. 1986).

In exercising that right, Florida courts are required to make a finding that the waiver of the right to counsel is knowingly, intelligently, and voluntarily made. *Reilly v. State Dept. of Corrections, supra* at 960.

The trial court, when forced to decide whether the Petitioner was competent to proceed without counsel even though he was legally

competent to stand trial, should have denied the request to proceed *pro se* due to his limited education and work experience, lack of experience and knowledge of criminal proceedings, and mental impairment. *Reilly, supra* at 960.

On February 18, 1998, the trial court conducted pre-trial hearings on the State's withdrawal of its *William's Rule* motion and ordered Appellant to furnish his witness list within 48 hours (R 11).

On February 20, 1998, Appellant was present in open court while the trial court heard pending motions of the co-defendant (R 13).

On February 27, 1998, the trial court heard and reserved ruling on the Appellant's Motion to Continue (R 14).

On March 2, 1998, the trial court granted a motion to take deposition (R 15).

On March 4, 1998, the trial court granted defendant's motions for deposition and for continuance, and denied the State's motion for continuance. The case was passed until March 11, 1998 (R 16, 17).

The non-jury trial began March 11, 1998 (R 18, T 3).

The waiver of counsel applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented. *Traylor v. State, supra*, 968.

The commencement of trial is a critical stage of the proceeding. *Enrique v. State*, 408 So.2d 635 (Fla. 3rd DCA 1981).

Sixth Amendment violations that pervade an entire criminal prosecution fall within category of constitutional violations that cast so much doubt on fairness of the trial process that, as a matter of law, they can never be considered harmless. *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

Where the trial court fails to renew the process of offering the assistance of counsel at the beginning of trial, the appellate court is compelled to reverse the judgment of conviction and remand for a new trial. *Sproule v. State, supra*.

ARGUMENT

III.

**SECTION 921.141(5)(b) FLORIDA
STATUTES, IS UNCONSTITUTIONAL
ON ITS FACE AND WAS APPLIED IN A
VAGUE, OVERBROAD, ARBITRARY
AND INCONSISTENT MANNER AS AN
AGGRAVATING FACTOR IN SUPPORT
OF THE TRIAL COURT'S IMPOSITION
OF THE DEATH PENALTY, WHEN THE
CRIMINAL ACTIVITY CITED AS AN
AGGRAVATING CIRCUMSTANCE
OCCURRED AFTER THE MURDER IN
THE CASE AT BAR.**

Only the criminal activity, not the convictions for that activity, must occur prior to the murder for which the defendant is being sentenced to be considered an aggravating factor warranting the death penalty. *Pardo*

v. State, 563 So.2d 77 (Fla. 1990); *Perry v. State*, 522 So.2d 817 (Fla. 1988). cf, *Daugherty v. State*, 419 So.2d 1067 (Fla. 1982).

In its Sentencing Order, the Trial Court found the Appellant had a prior capital felony conviction, as contained in Sections 921.141(5)(b), *Florida Statutes*, and relied upon same as an aggravating circumstance in support of the sentence of death imposed upon Appellant (T 579-583).

The Trial court also found premeditation regarding the plan to commit the robbery. However, evidence of a plan to commit a crime other than murder, is in and of itself insufficient to support a finding of a cold, calculated and premeditated aggravator. *Jennings v. State*, 718 So.2d 144, (Fla. 1998).

The Trial Court found that the Appellant had been previously convicted of another capital felony or of a felony involving the use of threat of violence to the person, pursuant to Section 921.141(5)(b), *Florida Statutes* (T 579).

The capital offense charged in the case at bar was committed on or about July 8, 1993 through and including July 9, 1993 (R 2-4). The so-called "previous" conviction relied upon by the Trial Court as an

aggravating factor was on December 8, 1995 (R 394) for an offense that took place May 8, 1995, almost two years after the offense in the case at bar and was not a “prior violent felony” (R 207-208, 386).

Even if the aggravating criminal conduct considered as an aggravating factor was contemporaneous, (which it was not), contemporaneous criminal activity *cannot* be considered as *prior criminal activity*. *Pardo v. State*, 563 So.2d 77 (Fla. 1990); *Only the criminal activity, not the convictions for that activity, must occur prior to the murder for which the defendant is being sentenced, in order to be considered an aggravating factor to warrant the death sentence*. *Perry v. State*, 522 So. 2d 817 (Fla. 1988).

Section 775.021, *Florida Statutes*, sets forth the provisions for the rules of construction for Chapter 775, the “*Florida Criminal Code*”:

“The provisions of the code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused. Section 775.021(1), Florida Statutes.

Substantive due process and equal protection principles require a provision of law, including criminal statutes, to be rationally related to its purpose. *Potts v. State*, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd, *State v. Potts*, 526 So.2d 63 (Fla. 1988); *Dunn v. United States*, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979).

The statutory purpose of the Code, in material part, is:

(2) To give fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction. Section 775.012(2), Florida Statutes.

Appellant recognizes the circumstance that Florida courts do not currently require the “prior” conviction used as a basis for imposition of the death penalty to even be final, but may be merely pending appeal. *Ruffin v. State*, 397 So.2d 277 (Fla. 1981). On its face, this aggravating circumstance triggering the imposition of the death penalty may be later reversed, but the executed sentence could not be.

The vague and overbroad application of the definition of “prior” conviction as applied in the case at bar does not relate to the purpose of it as an aggravating factor, to wit: to punish more severely those who have committed violent crimes in the past. Penalty statutes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

The Trial Court’s finding the Appellant’s prior conviction as an aggravating factor was based upon either a misconstruction of undisputed facts or a misapprehension of law. This Honorable Court cannot be bound by either. *Pardo v. State, supra*, at 80.

The sentence of death imposed upon Appellant should be vacated, and this case remanded to the Trial Court.

CONCLUSION

For the reasons contained herein, Appellant requests this Honorable Court to vacate and set aside the Judgments and Sentences imposed on Appellant herein, and to remand this cause to the Trial Court, with Appellant afforded the opportunity to have effective counsel

appointed on his behalf, or in the alternative solely to correct the matters contained in Point III above, and as a request of last resort, to have the sentence of death vacated in Count One of the Indictment and set aside and to remand this cause to the Trial Court to impose a sentence of life imprisonment as to Count One to run concurrently with the sentence imposed in Count Two of the Indictment, and for any and other such relief as this Honorable Court deems reasonable, necessary and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished by First Class U.S. Mail to Sara Baggett, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401 this 14th day of June, 1999.

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