IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,328

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The following symbols are used in this brief: "R" (the record on appeal), "S.R." (the first supplemental record on appeal), "S.S. R." (the second supplemental record on appeal), "R1" and "T1" (the record and transcript in Case No. 54,572), and "R2" and "T2" (the record and transcript in Case No. 61,176). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS[1/]

The resentencing proceeding in this cause was ordered by this Court on January 5, 1987, on defendant's appeal from the judgment and death sentence entered by the trial court on August 1 and 4, 1981 (R2 1042-44, 1057). *Valle v. State*, 502 So.2d 1225 (Fla. 1987).[2/] Trial commenced on February 3, 1988 (R. 53).

The facts of the offense were set forth by this Court as follows:

[1/] In an effort to avoid duplication and an unnecessarily-lengthy brief, the facts pertinent to each claim will be fully developed therein, with the forthcoming statement intended as an overview.

[2/] Defendant was indicted (on charges of first-degree murder, attempted first-degree murder, possession of a firearm by a convicted felon, and grand theft) on April 13, 1978 (R1 7-10). His first trial began on May 8, 1978, and he was sentenced to death on the first-degree murder conviction on May 10, 1978 (R1 21, 33, 333, 334, 339-48). On the other counts, the court imposed consecutive terms of 30 and 15 years (on the attempted murder and firearm convictions), and a concurrent five-year term (on the grand theft conviction, following defendant's post-trial guilty plea on the count, which had been severed prior to trial) (R1 334, 337).

This Court reversed the convictions on the first-degree murder, attempted murder, and felon-firearm counts on February 26, 1981. *Valle v. State*, 394 So.2d 1004 (Fla. 1981)[*Valle I*]. Following a retrial, defendant was found guilty by the jury of first-degree murder and attempted murder and by the court on the felon-firearm count, and was again sentenced to death on the murder conviction (R2 46, 47 1042-44, 1045-50). On the other counts, the court imposed consecutive terms of 30 and five years of imprisonment (R2 1057).

This Court affirmed the judgment and sentence on July 11, 1985. *Valle v. State*, 474 So.2d 796 (Fla. 1985)[*Valle II*], *vacated and remanded*, 476 U.S. 1102 (1986). On remand from the Supreme Court of the United States, this Court reversed and ordered a resentencing. *Valle v. State*, 502 So.2d at 1226 [*Valle III*].

> On April 2, 1978, Officer Louis Pena of the Coral Gables Police Department was on patrol when he stopped appellant and a companion for a traffic violation. The events that followed were witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, appellant was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a license check on the car appellant was driving. According to Spell, appellant then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. Appellant also fired two shots at Spell and then fled. He was picked up two days later in Deerfield Beach. . . . .

Valle II, 474 So.2d at 798.

In the resentencing hearing below, the state called the following witnesses during almost two days of testimony: Becky Little (the police dispatcher), Officer Spell, Dr. Wright (the medical examiner who performed the autopsy), Officer Rodriguez (one of the Deerfield Beach police officers who arrested defendant), Detective Wolf (the lead investigator, who took defendant's post-arrest statement), and Vincente De La Vega, an interpreter who translated a sentence of defendant's statement (R. 3780-95, 3796-826, 3867-74, 3877-92, 3927-38, 3980-4070, 4100-04). The state also introduced before the jury the dispatcher's tape, Spell's bulletproof vest, a photograph of Spell's back, Officer Pena's bloodstained clipboard, a large photograph of the scene, a photograph of Pena, and defendant's recorded post-arrest statement (R. 381-98, 3816-17, 3824-26, 3964, 4028-55, R2 925, 939, 959).[3/]

In mitigation, defendant sought to establish that he would adjust favorably to the prison environment if given a life sentence, through the following expert witnesses: Lloyd McClendon, a New

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[3/] For additional facts pertinent to the state's case, see Point III(A), *infra*.

Mexico corrections official, who, based upon his evaluation of defendant and review of his record, testified that defendant would be a nonviolent prisoner and would make a satisfactory adjustment if sentenced to life imprisonment (R. 4210-11, 4284-85), John Buckley, a former sheriff in Massachusetts, who testified to his opinion that defendant would be a nonviolent and productive prisoner (R. 4552-70), Dr. Brad Fisher, a correctional psychologist and prisoner-classification expert, who testified that defendant, when scored by accepted classification methods, would not be violent in prison if given a life sentence (R. 4888-913), and Robert DiGrazia, a veteran law enforcement officer and former police chief in several jurisdictions, who testified that defendant would not be a violent prisoner (R. 5171-79, 5229-34). In rebuttal, the state called a corrections officer from Florida State Prison to testify regarding defendant's disciplinary reports, and defendant's classification officer, who testified that he had not been a satisfactory prisoner (R. 5536-55, 5605-58).[4/] The second component of defendant's mitigation case was his abusive family background and mental status at the time of the offense, as to which he presented family members and two expert witnesses (R. 4996-5024, 5081-89, 5315-27, 5450-62, 5471-74).[5/]

The jury recommended death by an 8-4 vote on February 25, 1988 (R. 90, 882, 6027).[6/] The court conducted a further hearing on March 6, 1988 (R. 91) and, finding three aggravating circumstances and no

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[4/] For additional facts pertinent to this aspect of the defense case, the state's cross-examination of defense witnesses, and the state's rebuttal case, see Point III(C), *infra*.

[5/] For additional facts pertinent to this aspect of defendant's case, see Point III(D), *infra*.

[6/] For facts pertinent to the state's arguments on aggravating and mitigating circumstances, see Points III(C)-(F) and IV, *infra*.

mitigation, imposed a death sentence on March 16, 1988 (R. 897-908).[7/] Notice of appeal was filed on April 15, 1988 (R. 911).

SUMMARY OF ARGUMENT

1. Six of nine peremptory challenges exercised by the prosecution in this case were used to strike black prospective jurors The trial court's refusal to conduct an inquiry into the state's use of peremptory challenges is reversible error.

2. After the jury was sworn, but before any evidence was taken, the state informed the court and defendant's counsel that the deceased's former wife, who was in attendance, had had financial dealings with one of the jurors. The trial court, in violation of Fla. R.Crim.P. 3.310, refused to permit counsel to use a peremptory challenge to strike the juror.

3.(a) The court permitted a virtual retrial of the prosecution case on guilt, allowed inflammatory testimony and argument on guilt-related issues, and permitted the state to create the erroneous impression before the jury that the prosecution case was limited.

(b) The court permitted repeated references by the state to the two prior death sentences in this case. In addition, cross-examination of key defense witnesses was geared to impeachment which could persuasively have been rebutted only by defendant going forward with proof that he had been twice sentenced to death.

(c) In seeking to challenge the defendant's mitigation case, and in purported rebuttal of the testimony of defense witnesses, the state introduced unreliable evidence and used nonstatutory aggravating circumstances in the guise of responsive evidence.

(d) Defendant's psychological expert was subjected to unfounded

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[7/] For additional facts regarding the trial court's findings, see Point V, *infra*.

character attacks on a false charge that he previously had held himself out as a psychiatrist and to cross-examination regarding his opinion of defendant's legal sanity. Further, the state was allowed repeatedly to argue to the jury that valid mitigation could be shown only if defendant showed a legal excuse for the homicide.

(e) The state improperly was permitted to argue to the jury three aggravating circumstances, §§ 921.141(5)(e), (g), and (j), Fla.Stat. (1987), which arise from a single aspect of the offense. Subsection (5)(j) is an invalid *ex post facto* law, having been enacted subsequent to the commission of the offense in this case.

(f) The prosecutors unlawfully were allowed to argue to the jury that a finding that aggravating circumstances outweighed mitigation resulted in a mandatory death sentence.

4. The state made a blatantly improper appeal for the jury to consider the victim's status in the community and the anguish caused to his family.

5. The trial court erred in applying § 921.141(5)(i), Fla. Stat. (1987), where the evidence did not establish the calculation required for application of that aggravating circumstance. The trial court further erred in rejecting the uncontradicted evidence of defendant's abusive and deprived family background, on the ground that such did not constitute relevant mitigation.

ARGUMENT

I

THE TRIAL COURT ERRED IN FAILING TO MAKE A FULL INQUIRY INTO ALLEGATIONS THAT THE PROSECUTORS HAD UTILIZED THE STATE'S PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Six of nine peremptory challenges exercised by the prosecution

in this case were used to strike black prospective jurors (R. 64, 65, 69, 3081, 3082, 3122, 3629, 3631, 3694-97).[8] The trial court refused to conduct an inquiry into defendant's claim that the state was using peremptory challenges unlawfully to eliminate black persons from the jury venire (R. 3696-702, 3850-57). This refusal requires reversal of the sentence under the principles established by this Court in *State v. Neil*, 457 So.2d 481 (Fla. 1984), and *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2873 (1988).[9]

In *Neil*, this Court declared that if a party to a criminal trial uses peremptory strikes to "challeng[e] prospective jurors solely on the basis of race," a violation of Article I, Section 16 of the Florida Constitution has occurred. *State v. Neil*, 457 So.2d at 487. This Court refined the *Neil* standard in *Slappy*, declaring that "the issue is not whether several jurors have been excused because of their race, but whether *any* juror has been so excused, independent of each other." *State v. Slappy*, 522 So.2d at 21 (original emphasis). *Slappy* emphasized that to "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor," and stressed the obligation of the trial court to make an inquiry if the "objection was proper and not frivolous," and that, upon such a determination being made, "the burden of proof shifts" to the prosecutor to "rebut the inference created when the defense met its burden of persuasion" with a "'clear and reasonably specific' racially neutral explanation for the state's use of its peremptory

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[8] Two blacks served on the jury, and one alternate juror was black (Tr. 3856, 6059).

[9] Defendant, although not himself black, may present this issue to this Court. *Kibler v. State*, 546 So.2d 710, 712 (Fla. 1989).

challenges." *State v. Slappy*, 522 So.2d at 22 (citation omitted).[10]

The trial court in this case failed to carry out the responsibilities placed upon it by *Slappy*.[11] The prosecution used its first three peremptory challenges to strike black prospective jurors (R. 3081-82, 3122), thereafter used two challenges against non-black persons (R. 3628), and then struck three more black persons from the jury panel (R. 3629, 3631-32).[12] Prior to the jury being sworn, counsel presented the court with the state's use of its peremptory challenges (R. 3694-95), *see State v. Castillo*, 486 So.2d 565 (Fla. 1986) (defense is obligated to make objection "prior to the swearing of the jury"), and the following transpired:

> The Court: If there is a problem, I want the state to be able to respond in whichever manner they wish to.
>
> Ms. Brill [assistant state attorney]: Before we do that, are you making a finding that the state has . . . somehow improperly excused jurors because of --
>
> The Court: No. The Court is making no such finding. What the Court is doing, since Miss Gottlieb [counsel for defendant] is making a record. Mr. Laeser wants to respond for the record, I've been asked to make no findings and I am making no findings but for record-keeping purposes she has some objection to the state's action and, of course, I'm giving the state an opportunity to respond in time [sic].
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> * * *
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> The Court: The state wants to respond without me asking. I'm giving them an opportunity.

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[10] These principles are fully applicable to the jury-sentencing proceeding in this case. *E.g., King v. State*, 514 So.2d 354, 356-57 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2916 (1988).

[11] *Slappy* was decided on March 10, 1988, shortly after the completion of the trial proceedings in this case, but nonetheless is binding as the law in effect at the time of appeal. *State v. Safford*, 484 So.2d 1244 (Fla. 1986); *see Griffith v. Kentucky*, 479 U.S. 314, 322-24 (1987); *Lowe v. Price*, 437 So.2d 142, 144 (Fla. 1983).

[12] The last peremptory challenge was used to strike a black person as an alternate juror (R. 3632).

(R. 3696-97). The lead prosecutor, Mr. Laeser, then gave "explanations" for the peremptory challenges (R. 3698-702, 3850-53).[13/] When he finished, the court stated: "Same [c]ourt ruling." (R. 3857).[14/]

Where, as here, the state uses six of nine peremptory challenges to strike members of a cognizable racial group, it is not difficult to conclude that a prima facie case of racial discrimination has been shown. *E.g., State v. Slappy,* 522 So.2d at 19, 23 (four of six state challenges used to strike blacks); *Blackshear v. State,* 521 So.2d 1082, 1083-84 (Fla. 1988)(eight of 10 challenges used to strike blacks); *Sampson v. State,* 542 So.2d 434 (Fla. 4th DCA 1989)(first two state challenges used to strike blacks). However, the court ut-

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[13/] The proffered reasons were as follows: (1) for striking Helen Brooks, a black woman, that she had worn sunglasses and a cap or scarf "pulled over her head" (R. 3081, 3699), (2) for striking Candace Williams, a black woman, that she had been dressed "rather sloppily," had possibly been "taking notes," and had told one of the prosecutors during questioning that he "gave her a headache" (R. 3082-83), (3) for striking John Johnson, a black man, that he did not believe the death penalty served a "'useful purpose,'" although the trial court had refused to strike him for cause (R. 3122-23, 3700-01), (4) for striking Rosalino Baldwin, a black woman, that her brother had been in prison and that she had "equivocated" on capital punishment although "she was a legally acceptable juror" whom the state did not seek to strike for cause (R. 3701-02, 3850-51), (5) for striking Woodrow Clark, a black man, that his son was then facing criminal charges and that an investigation by the prosecutor had purportedly established that Clark had been "untruthful" in statements regarding his friendship with a police officer, although the juror was not questioned further on this after the state's investigation and was not challenged for cause on that ground (R. 3631, 3851-52; see R. 3277-78, 3300), and (6) for striking Ethel Ford, a black woman, that she had a "biased opinion" on capital punishment and that her son had been represented by the public defender, although she had not been challenged for cause on these grounds (R. 3852-53).

[14/] It would have been proper for the court, although not finding that defendant had met his preliminary burden of proof, to have weighed the volunteered explanations of the prosecutor in determining whether defendant had made a *prima facie* showing of racial discrimination. *Reed v. State,* No. 70,069 (Fla. March 1, 1990)(slip opinion at 4-7)(prosecutor asked to explain strikes despite court's refusal to conduct inquiry; consideration of explanations in finding that strikes had not been exercised on racial basis held proper). But, as set forth above, the court in this case did not do so.

terly failed in its obligation to try the question whether the state had established racially-neutral bases for its strikes. As this Court stated in *Slappy*,

> Part of the trial judge's role is to evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.
>
> . . . [A] judge cannot merely accept the reasons proffered at face value, *but must evaluate those reasons as he or she would weigh any disputed fact.*

State v. Slappy, 522 So.2d at 22. "The state's explanations must be critically evaluated by the trial court to assure that they are not pretexts for racial discrimination." *Roundtree v. State*, 546 So.2d 1042, 1045 (Fla. 1989); *accord, Tillman v. State*, 522 So.2d 14, 16-17 (Fla. 1988)("[i]t is incumbent upon the trial judge to determine whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record")(footnote omitted).[15/]

[15/] The record in this case stands as compelling evidence of the need for a trial court's active participation in resolving a claim that the prosecution has unlawfully stricken black prospective jurors. For example, as noted earlier, see n.13, *supra*, the prosecutor sought to justify his strike of a black woman, Ms. Brooks (R. 64, 3081), because she wore sunglasses and either a scarf or a cap "pulled over her head." (R. 3081, 3699). In response, defendant's counsel pointed out that the courtroom usually was cold (R. 3081, 3699) -- a condition that had been noted by another juror (R. 1749-49), by the challenged juror herself earlier in the proceedings (R. 2376), and several times by the trial judge (R. 2376, 3700), including on one occasion when the judge suggested to prospective jurors that they bring "bunches of layers of clothes" because "it's usually very cold in here." (R. 3291-92). Defense counsel also commented upon the fact that a white male juror who wore sunglasses during questioning had not been excused by the state on a peremptory challenge (R. 3696). Another black woman, Ms. Williams, similarly was stricken upon the proffered justification that her "running or jogging outfits" were inappropriate attire and because she apparently had been "inattentive," in that she had been "taking notes on proceedings." (R. 3082-83). Defendant's counsel observed that Williams' clothing was "appropriate[] . . . for the five days in the courtroom," and that she had been "probably one of the most talkative jurors on this (Cont'd)

The trial court's failure to perform its duty leaves this Court without a meaningful basis upon which to find the state's proffered explanations to be racially neutral, *Stokes v. State*, 548 So.2d 188, 196 (Fla. 1989)("[t]he proper tribunal to conduct the inquiry was the trial court, not the appellate court"), and constitutes reversible error. *Thompson v. State*, 548 So.2d 198, 202 (Fla. 1989)(reversal required where "trial court conducted an improper inquiry because it failed to question state as to *each and every* peremptory challenge exercised against blacks")(emphasis by the court).

II

THE TRIAL COURT ERRED IN REFUSING DEFENDANT AN OPPORTUNITY TO EXERCISE A PEREMPTORY CHALLENGE SUBSEQUENT TO THE SWEARING OF THE JURY BUT PRIOR TO THE TAKING OF TESTIMONY, BASED UPON INFORMATION IMPARTED BY THE PROSECUTION AT THAT TIME, IN VIOLATION OF RULE 3.310 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Defendant used nine of his 10 peremptory challenges during jury selection (R. 64, 69, 70). A 12-person jury panel (with two alternates) was chosen at the close of proceedings on February 11, 1988, but the jury was not sworn that evening (R. 3632). The jury was sworn on the following morning (R. 3707), and opening statements were made (R. 3711-50). Thereupon, Assistant State Attorney Laeser informed the court and counsel that one of the jurors, Mr. Zollo, had loaned money to the deceased's first wife approximately 15 to 20

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panel." *Ibid.* The record of Williams' questioning bears out counsel's observation (R. 2366, 2427-29, 2535-37, 1600-01, 2625-26, 2678, 2724-26, 2985-88). It thus appears that the state's proffered reasons most probably were a mere pretext for racial discrimination. *E.g., Roundtree v. State*, 546 So.2d at 1045 (prosecutor's claim that black men were excused because "inappropriately dressed" pretext where casually dressed white man not challenged); *State v. Slappy*, 522 So.2d at 22 (explanation will be deemed pretext when prosecutor based challenge "on reasons equally applicable to juror[s] who were not challenged" and state must "support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself")(citation omitted).

months earlier, (R. 3759-61, 3765).[16/]

Defendant had one peremptory challenge remaining and sought to use that challenge to strike Zollo (R. 3761), invoking Rule 3.310 of the Florida Rules of Criminal Procedure, which rule provides:

> The State or defendant may challenge an individual prospective juror before the juror is sworn to try the cause; except that the court may, for good cause, permit it to be made after the juror is sworn, but before any evidence is presented.

The trial court refused to permit the exercise of the challenge, (R. 3764, 3775), a ruling which was based upon a fundamental misinterpretation of the rule's "good cause" provision.

Rule 3.310 is taken almost verbatim from former Section 913.04,

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[16/] The first wife, with her daughters and the deceased's second wife, had been in attendance at the trial during the jury-selection proceedings (R. 3765-66, 3770), and the family remained present during the remainder of the trial (R. 3820, 5823-24). On examination by another prosecutor in the case, Zollo had said earlier that he did not "know anyone connected with this trial" (R. 2469); it is not clear from the record whether the first wife was present at the moment the question was asked of the juror. Laeser stated that "she says he hasn't acknowledged [her]" during the proceedings (R. 3761). He represented that Mrs. Pena did not "believe" that Zollo had recognized her "because she looks different now," and further that there had been "some question whether or not [Zollo] knew that she was a member of Officer Pena's family." (R. 3759-60).

Laeser told the court and counsel that the information concerning the relationship between Zollo and Mrs. Pena, which he termed "fairly tangential," had been imparted to him "just a few moments ago." (R. 3759). He depicted the transaction between Zollo, who had described himself under questioning by the court as a retired painting contractor from New York (R. 2469), and the first Mrs. Pena, as follows:

> [She] attempted to borrow money from her direct employer and he didn't have the funds available and went to a third party to borrow some of it . . . perhaps 15 or 20 months [ago] . . . . . .He . . . said you can go to Mr. Zollo, and . . . I can borrow the money for you and you can pay me back. . . . . Then at some point there was a question whether or not payment had been made . . . and . . . it was verified payment had been made.

(R. 3759-61).

Florida Statutes (1965), *see In re Florida Rules of Criminal Procedure,* 196 So.2d 124, 158 (Fla. 1967), which statute was first enacted in 1939. Ch. 19554, § 187, Laws of Fla. (1939). Section 913.04 was a significant departure from Florida common law, which flatly had prohibited post-swearing juror challenges. *Bradham v. State,* 41 Fla. 541, 26 So. 730, 731 (1899)("right of peremptory challenge . . . must be seasonably exercised before the jurors are sworn in chief; otherwise, it is waived")(citation omitted); *accord, Mathis v. State,* 45 Fla. 46, 34 So. 287, 291 (1903); *Myers v. State,* 43 Fla. 500, 31 So. 275, 276 (1901).[17] While this Court has not directly addressed the meaning of the "good cause" requirement of the statute and superseding rule, the only decision touching on that provision assumes that which is tacit in the departure from the common law prohibition on post-swearing challenges -- that such a challenge is proper and must be allowed if based upon information acquired after the challenged juror was sworn. *Ex parte Sullivan,* 155 Fla. 111, 19 So.2d 611 (1944)(habeas corpus action raising claim that deputy sheriff had served as juror; held, citing statute, that, if claim was true, such "was a matter of record available to the petitioner at the trial and should have been seasonably raised").[18]

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[17] The legislature plainly intended to create a hitherto-unrecognized right to exercise a challenge after a juror was sworn. Two basic principles of statutory construction mandate this conclusion: (1) "the legislature is presumed to be acquainted with judicial decisions on a subject concerning which it subsequently enacts a statute," *Ford v. Wainwright,* 451 So.2d 471, 475 (Fla. 1984), so the legislature in this instance is deemed to have been aware of the common law ban on post-swearing challenges at the time the statute was enacted, and (2) "[i]n construing legislation, courts should not presume that the legislature acted pointlessly," *Neu v. Miami Herald Publishing Company,* 462 So.2d 821, 825 (Fla. 1985)(citation omitted), so that it must be presumed that the addition of the clause permitting post-swearing challenges was intended to be meaningful.

[18] *See also Young v. State,* 234 So.2d 341, 348-49 (Fla. 1970)(no abuse of discretion in refusing to allow peremptory challenge after jury was sworn because attorney "had been erroneously informed by the (Cont'd)

Moreover, the only reasonable interpretation of the rule is that the "good cause" requirement relates only to the point in time at which the basis for the peremptory challenge is known and/or reasonably available to the party seeking to use the challenge, and *not* to the persuasiveness of the reason underlying the desire of a party to strike the juror. This is so because the rule, on its face, applies *both* to peremptory challenges *and* to challenges for cause. *See, e.g., Jackson v. State,* 464 So.2d 1181, 1183 (Fla. 1985).[19] Where a party seeks to exercise a post-swearing *cause* challenge, the court obviously must pass upon the sufficiency of the reason for the challenge under the established principles which govern challenges for cause, *i.e.,* it must determine whether there is a sound factual basis for finding that the juror cannot impartially try the case. *E.g., Singer v. State,* 109 So.2d 7, 23-24 (Fla. 1959). If the court, when faced with a peremptory challenge, were authorized to make the same determination as to the persuasiveness of the proffered basis for the strike, then the challenge would no longer be "peremptory," but would be a *de facto* cause challenge. *See State v. Neil,* 457 So.2d at 483 n.1 ("'[t]he essential nature of the peremptory challenge is that it is exercised without a reason stated, without inquiry, and without being subject to the court's control'") (citation omitted).[20] This

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clerk that all ten challenges had been exhausted" absent showing that "there was a particular juror whom he wanted removed").

[19] Had the legislature, in enacting former Section 913.04, and this Court, in promulgating its rule, intended to limit the right to post-swearing challenges to those made for cause, the rule would read very differently. In construing a statute, "[t]he courts cannot and should not undertake to supply words purposely omitted," *Armstrong v. City of Edgewater,* 157 So.2d 422, 425 (Fla. 1963), and, where the language of a statute "is clear, plain, and without ambiguity, effect must be given to it accordingly." *Graham v. State,* 472 So.2d 464, 465 (Fla. 1985)(citation omitted).

[20] Of course, *Neil* imposes the same limitation on post-swearing peremptory strikes as it does on those exercised prior to jurors be-
(Cont'd)

result would rewrite Rule 3.310, limiting its application to cause challenges, and thus must be rejected.

It plainly appears that, under the only proper interpretation of the rule, "good cause" is shown if the party has a belatedly-discovered reason to exercise a peremptory challenge on the juror.[21] It

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ing sworn, and, if a party objects to a post-swearing peremptory on racial grounds, the principles set forth in Point I, *supra*, would control. There was no such suggestion in the present case.

[21] This is the conclusion reached in other jurisdictions which have similar rules or statutes. In *State v. Jackson*, 43 N.J. 148, 203 A.2d 1 (1964), a juror who had been sworn after being questioned by the parties subsequently told the court that his cousin was a local police officer, and that he had been mistaken when he previously had stated that he did not know any law enforcement officers. 203 A.2d at 8. Defense counsel sought to exercise a peremptory challenge, advising the court that he would have excused the juror earlier if he had known this fact. *Ibid.* The court refused to permit the challenge, and, on appeal, the court relied upon the New Jersey version of Rule 3.310 to hold as follows:

> [T]here was no deliberate withholding by defense counsel who sought to exercise peremptory challenge just as soon as the true facts were disclosed. Although the applicable court rule provides that a challenge to a juror must be made before he is sworn, it also provides that the "the court for good cause shown may permit it to be made after he is sworn but before any evidence is presented." . . . . We know of no just reason which would warrant withdrawal from the trial court of the rule's discretionary power in the circumstances here.
> . . . . When the truth did appear, the defendants immediately offered to exercise peremptory challenge, and since the presentation of evidence had not begun, the challenge could readily have been honored without any disruption of the proceedings. The trial court's refusal to take such action constituted error . . . .

Ibid (citations omitted); *accord, In re Mendes*, 23 Cal.3d 847, 153 Cal.Rptr. 831, 592 P.2d 318, 322 (1979)(trial court, under statute allowing for post-swearing peremptory challenge "if there is good cause for the failure of an earlier exercise," properly permitted belated peremptory challenge by prosecution because jury composition was changed by excusal of juror due to death in juror's family after swearing of jury); *State v. Lupino*, 268 Minn. 344, 129, N.W.2d 294, 302-03 (1964)(under statute almost identical to Rule 3.310, court upheld permitting prosecution strike upon post-swearing discovery that prosecutor in case had prosecuted juror's brother, despite denial of challenge for cause on juror), *cert. denied*, 379 U.S. 978 (1965).

is on this critical aspect of the rule that the trial court committed manifest error in refusing to permit exercise of the challenge: the court, despite counsel's protestations, seemingly believed that its role was to pass upon the *merit* of the peremptory challenge (R. 3764, 3771).

Indeed, when first confronted with the issue, the court treated the strike as a challenge *for cause*, ruling that "I am not going to allow you to challenge this person for cause based on the [bare] assertion at one time there was a live [sic] transaction." (R. 3763). Despite counsel's repeated protestations that the defense was seeking to use a *peremptory* challenge (R. 3764, 3771), the court continued to suggest that the parties question Zollo to determine whether he remembered Mrs. Pena (R. 3764-71). And the court's ultimate ruling reflects this failure to accept the proper application of Rule 3.310, *i.e.*, the court found that there was not "good cause" for the use of the challenge because "I don't have a *factual foundation* at this point to allow you to exercise the peremptory challenge." (R. 3764, 3775).

The court's refusal to permit exercise of the remaining peremptory challenge directly violates Rule 3.310. The failure of a trial court to permit exercise of an otherwise-proper peremptory challenge is *per se* reversible error. *E.g., Jackson v. State*, 464 So.2d at 1183; *Rivers v. State*, 458 So.2d 762, 764 (Fla. 1984).

III

EGREGIOUS PROSECUTORIAL MISCONDUCT DENIED DEFENDANT A FAIR AND RELIABLE JURY SENTENCING HEARING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Overkill In The State's Case-in-Chief.

From the very outset of the resentencing proceedings, the state

evinced its intent to retry the entire prosecution case, to which the court responded with repeated admonitions that such would not occur (R. 918, 972, 981, 6208-09). Defendant requested the trial court, prior to commencement of the hearing, to limit the state's case appropriately and to exclude irrelevant and impermissibly-prejudicial evidence (R. 146-50). The court declined to truncate the state's case before the evidence was presented,[22] and declined to rule on the admissibility of the challenged items of evidence until the state sought to introduce evidence at the hearing (R. 1284, 1289, 1293-95). However, as the case proceeded to trial, the court *did* permit the prosecution to retry its case, and defendant's objections to the volume of evidence, as well as to specific items and testimony, were overruled (R. 3667, 3870-72, 3947, 3967-68, 3752-94, 3868-72, 3876).

"A resentencing is not a retrial of the defendant's guilt or innocence." *Chandler v. State*, 534 So.2d 701, 703 (Fla. 1988), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2089 (1989)(citation omitted). Thus, "one of the problems inherent in holding a resentencing proceeding is that the jury is required to render an advisory sentence . . . without the benefit of having heard and seen all of the evidence presented during the guilt determination phase." *Teffeteller v. State*, 495 So.2d 744, 745 (Fla. 1986). This Court has resolved the considerable tension between the need to provide the jury with the "underlying facts of the case," *Chandler v. State*, 534 So.2d at 703;

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[22] The court ruled that the state had "the right to establish the framework, his guilt, and . . . the aggravating circumstances that they need to prove beyond a reasonable doubt," but that it would "stop" the prosecutors if they "bring[] in lots and lots of witnesses that they absolutely do not need." (R. 1284). Reaffirming its original inclination to limit the state's case, the court stated that "[w]e are not going to spend two days on the guilt of Mr. Valle," and that, "[a]s soon as I see that they are trying to overdo it, I am going to limit them." (R. 1289, 1293).

accord, Teffeteller v. State, 495 So.2d at 745 ("[w]e cannot expect jurors . . . to make wise and reasonable decisions in a vacuum"), and the proper scope of a resentencing hearing, *King v. State,* 514 So.2d 354, 357 (Fla. 1987)(trial court properly ruled that "the presentation of evidence would be limited to evidence going to aggravating and mitigating circumstances"), *cert. denied,* ___ U.S. ___, 108 S.Ct. 2916 (1988), as follows: "it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence." *Teffeteller v. State,* 495 So.2d at 745.
A trial court's abuse of discretion in ruling on the admissibility of evidence in a resentencing is subject to review by this Court. *King v. State,* 514 So.2d at 357.

In determining whether the court in this case abused its discretion in admitting the entire state case, this Court must focus not only on the sheer volume of the evidence, but on the special prejudice which accrued from the manner in which the case was tried. The jury was told at the very outset of the proceedings that defendant had been found guilty in a previous proceeding, that his guilt would not be at issue, and that the court would "not permit the prosecution to prove guilt." (R. 1752, 2357-58). The prosecutor, in the course of jury selection, repeatedly emphasized to the jury that the state would be holding back evidence, and that only a limited case would be presented in resentencing:

> We don't have to prove he is guilty. We are not going to do that at this hearing. We are just going to present limited evidence to argue what the proper sentence for the defendant in this case, is death in the electric chair. . . . . . . It will be like an abbreviated trial. . . .

(R. 2623).

> [S]ince you folks don't know much about what happened, we have to put on evidence . . . but we don't have to put on as much proof as we did in the guilt or innocence phase.

(R. 3371-73).[23]

However, the court -- candidly recognizing its change of heart (R. 3667, 3870-71) -- thereafter permitted the state to present as complete a case on guilt as had been presented in defendant's 1981 trial.[24] Defendant's counsel objected to the presentation of vir-

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[23] Defendant's counsel objected to these comments on the ground that it would prejudice the jury to believe that there was additional pertinent evidence which would not be heard in the resentencing (R. 2627-30, 3392). In response to those objections, the court instructed the jury as follows: "you won't hear the full trial . . . but you will hear a full . . . presentation of all relevant facts so that you can make an intelligent decision in this case. (R. 2630-31; see R. 3378-79, 3400). Of course, this instruction only reinforced the state's characterization of its case.

[24] In 1981, the state presented 10 witnesses: Becky Little, the police dispatcher; Officer Gary Spell, the eyewitness to the shooting; Officer Robert Reynolds, the officer who located the car defendant had been driving; James Casey, a Metro-Dade police technician who took photographs of the scene; Wilfred Strong, the owner of the stolen automobile defendant had been driving at the time of the incident; Officers Edward Rodriguez and James Twiss, the Deerfield Beach police officers who arrested defendant; Robert Hart, a Metro-Dade firearms expert; Detective Richard Wolf, the lead investigator; and Dr. Ronald Wright, the medical examiner who performed the autopsy of the deceased (T2 782-1047). The state also introduced physical and documentary evidence: the dispatcher's tape recording of the stop and shooting, 11 photographs of the scene of the incident, three photographs of the injury to Officer Spell and of his clothing, Officer Spell's shirt, bulletproof vest, and T-shirt, a photograph of Felix Ruiz, the passenger in defendant's car, the vehicle registration for the car defendant had been driving, three shell casings, two expended projectiles, three photographs of the bloodstained interior of Officer Pena's car, Officer Pena's clipboard, the pistol used in the shooting, the rights-waiver form signed by defendant, defendant's oral and written confessions, and two photographs of the deceased. *Ibid.* Detective Wolf and Dr. Wright were the state's witnesses at the penalty phase of the 1981 trial (T2 1211-19).

In the resentencing hearing below, the state called most of the witnesses who had testified in 1981; Becky Little, Officer Spell, and Officer Rodriguez all testified identically to their 1981 testimony (R. 3780-95, 3796-826, 3867-74, 3877-92, 3927-38, 3980-4070; T2 782-90, 791-817, 1216-17, 902-23, 942-1001, 1211-14). As is set forth *infra*, the court permitted a full range of testimony from Dr. Wright, excluding only that portion of his 1981 testimony in which he (Cont'd)

tually the entire prosecution case on guilt (R. 3667, 3870-72, 3947, 3967-68, 3752-94, 3868-72, 3876), and also objected on the ground that the prosecutors had questioned the jurors "repeatedly on how the state was not going to be permitted to present the complete evidence" and were now "retrying the whole case" (R. 3871). The objections were overruled and counsel's motion for mistrial was denied by the court (R. 3872). As the state's case progressed, counsel requested the court to instruct the jury that "they are in fact hearing all evidence pertinent to the question of guilt," and the court refused to do so (R. 3967-68).

The prejudice to defendant from this series of events -- totally apart from the impropriety, in the first instance, of allowing the quantum of evidence permitted by the court -- is patent: the jurors repeatedly were told that the the state's case would be limited by the court and that evidence as to defendant's guilt would be withheld from them because this was a resentencing hearing; the state thereafter was permitted to put on virtually its entire case on defendant's guilt; and the court refused even to attempt any curative approach on the matter, thereby leaving the jurors with the clear --but erroneous

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depicted the precise degree of pain suffered by the deceased prior to death (T2 1216-17; R. 3869-72). Detective Wolf's testimony was almost identical to his 1981 testimony (T2 902-23, 942-1001, 1211-14); if anything, it was more extensive on "technical" facts, *e.g.*, fingerprint comparisons and similar matters (R. 3935-38, 4019, 4066), after the defense agreed to stipulate to these facts to prevent the state being permitted to call five additional witnesses who testified in 1981 to these matters (R. 355-56, 1285-90, 3941-445, 3965). In addition, the state called Vincente De La Vega, a professional interpreter who translated a sentence of defendant's post-arrest statement which had been written out in Spanish (R. 4100-04). De La Vega had testified in defendant's 1978 trial (T1 1062-65) but was not called by the state in 1981; instead, the prosecutor in that proceeding translated the sentence in closing argument, without objection from the defense (T2 1105). The state also introduced the dispatcher's tape, Spell's bulletproof best, a photograph of Spell's back, Officer Pena's bloodstained clipboard, a large photograph of the scene, a photograph of Pena, and defendant's post-arrest statements (R. 381-98, 3816-17, 3824-26, 3964, 4028-55; R2 925, 939, 959).

-- impression that there was even *more* evidence against defendant and the likely assumption that this evidence must be very bad indeed. The prejudicial effect of implying to a jury that there is other evidence which was not presented in court has been repeatedly recognized by the Florida courts. *E.g., Williamson v. State,* 459 So.2d 1125, 1126-27 (Fla. 3d DCA 1984); *Richardson v. State,* 335 So.2d 835, 836 (Fla. 4th DCA 1976). In this case, the state had it both ways, *i.e.,* it presented virtually all of its evidence, yet had the jury believing that more damning evidence existed; the prejudice to defendant from this conundrum cannot be denied.

Moreover, the prejudice to defendant was greatly exacerbated by the introduction of irrelevant and prejudicial testimony from the state's guilt-case witnesses. Prior to the trial-in-chief, the court excluded the "heinous, atrocious, or cruel" aggravating circumstance, § 921.141(5)(h), Fla.Stat. (1987), as factually inapplicable,[25] and

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[25] The facts of the shooting, as set forth in this Court's prior decision and in the record of this trial (R. 3806-08) are that defendant "approached Officer Pena and fired a single shot at him, which resulted in his death." *Valle II,* 474 So.2d at 798. Although the eyewitness testimony and that of the medical examiner was that the officer had survived for between one and five minutes (R. 3814, 3873-74), it is now firmly established that, as (5)(h) was construed in *State v. Dixon,* 283 So.2d 1 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974), "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." *Lewis v. State,* 398 So.2d 432, 438 (Fla. 1981); *accord, e.g., Cochran v. State,* 547 So.2d 928, 931 (Fla. 1989). Nor does the fact that the deceased lingered before his death give rise to this aggravating factor. *Teffeteller v. State,* 439 So.2d 840, 846 (Fla. 1983), *cert. denied,* 465 U.S. 1074 (1984). This Court, in cases almost identical to the present one, repeatedly has ruled that (5)(h) did not apply as a matter of law. *E.g., Rivera v. State,* 545 So.2d 864, 866 (Fla. 1989); *Brown v. State,* 526 So.2d 903, 907 (Fla.), *cert. denied,* ___ U.S. ___, 109 S.Ct. 371 (1988); *Cooper v. State,* 336 So.2d 1133, 1140-41 (Fla. 1976), *cert. denied,* 431 U.S. 925 (1977); indeed, two members of this Court, in a special concurring opinion on defendant's prior appeal, specifically concluded that "this Court has previously determined that these facts do not support the finding that the murder was especially heinous, atrocious, or cruel"). *Valle II,* 474 So.2d at 806 (Ehrlich & Overton, JJ., concurring)(citing *Teffeteller*).

defendant accordingly sought exclusion of the testimony of the medical examiner regarding the nature of the fatal wound and suffering of the deceased, and of the dispatcher's tape from the incident, particularly the deceased's last words on the recording after he was shot (R. 149-50, 3637, 3664-70, 3869-72). With the exception of limiting Dr. Wright's conclusions as to the specific pain suffered by the deceased, the court permitted the introduction of the challenged evidence without, however, any indication of how it was relevant to the resentencing (R. 3667-70, 3869-72).[26/]

The very first evidence presented to the jury in the state's case was the dispatcher's tape, which was introduced in a highly-theatrical manner: the state used a huge "infrared sound system" to broadcast the tape in the courtroom as well as providing headsets for the jurors (R. 3752-58).[27/] Although this dramatic presentation purportedly was to ensure the jury's comprehension of the tape, *ibid*, each juror thereafter was also provided a transcript of the recording to follow along as it was played during the dispatcher's testimony

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[26/] The trial court had permitted counsel to preserve for review the admissibility of the challenged evidence without further objections after the pre-testimony litigation (R. 3667, 3770).

[27/] Counsel for defendant noted that the recording had been played in the 1978 and 1981 trials without the use of this equipment (R. 3753-54; see T1 584-89, 1483; T2 785-90), which was first wheeled into the courtroom at the conclusion of opening statements (R. 3752). The court, after testing one of the headsets, found that "acoustically, it's superior" with the new equipment (R. 3754-55). Defendant's renewed objections on the prejudicial impact of hearing the recording in this manner were overruled (R. 3756-57). At defendant's request, the court permitted a videotape to be made for the purpose of preserving the courtroom scene for review (R. 3755-59); pursuant to the agreement of the parties as set forth in their pleadings pertinent to defendant's request of this Court for a relinquishment of jurisdiction, a copy of the tape has been transmitted to this Court.

(R. 3783).[28] While the state was entirely correct that the tape was relevant insofar as it reflected the length of the incident and that the deceased was a police officer who had stopped defendant in connection with a traffic violation (R. 3634, 3665; see R. 374-75), the highly-charged (and technologically-enhanced) broadcast, through headsets, of Officer Pena's final words, "I'm shot" (R. 375), served no valid purpose. *Johnson v. State*, 534 So.2d 1212 (Fla. 4th DCA 1988)(trial court committed reversible error "in admitting into evidence a tape made by police at the stabbing victim's deathbed which recorded the anguished sounds of the victim in his last moments of life")(citations omitted), *review denied*, 545 So.2d 1369 (Fla. 1989).

The prejudicial impact of the recording was cemented by the testimony of the medical examiner, which, while purportedly avoiding the question of the deceased's suffering, hardly even paid lip service to the trial court's ruling: Dr. Wright testified that the bullet had passed through the deceased's neck and that the wound "filled the larynx with blood and every time that he would attempt to take a breath he would not breathe air but breathe blood, and he drowned on his own blood," that Pena could not make intelligible sounds after the shooting, and that he had remained conscious for between one and five minutes after being shot (R. 3873-74). The prosecutor, who had

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[28] The prosecutors did not mention their intent to use transcripts until the dispatcher was on the stand, long after the parties had completed their arguments on the admissibility of the tape and the propriety of the "sound system" (R. 3752-58, 3782-83). The state previously had sought to justify its dramatic presentation as necessary "to make sure [the jurors] hear the tapes, so they're not missing any of the evidence" (R. 3752), and secured a ruling from the court that the equipment was helpful in that regard (R. 3755). However, it thereafter was stipulated that the transcripts were accurate renditions of the recording (R. 3784-86), and, as defendant's counsel pointed out when the prosecutors produced the transcripts while the dispatcher was before the jury, the purported justification for using the headsets and associated equipment completely disappeared once the jurors were provided with copies of the transcript (R. 3786-87).

presaged this testimony in his opening statement (R. 3711), played directly to the jury's reaction to Wright's testimony in closing argument: "Lou Pena looks up, sees that barrel maybe before that bullet rips through his neck severing his carotid artery and languishes and drowns in his own blood 10-15 minutes." (R. 5928).

Thus, not only was this resentencing an unconstitutional "retrial of the defendant's guilt or innocence," *Chandler v. State*, 534 So.2d at 703, it was so laced with prejudicial harpoons as to prevent any possibility of an impartial and measured result. This evisceration of the very purpose of a resentencing utterly undermines the validity of the resulting death sentence.

B. Prejudicial Reliance Upon Prior Death Sentence.

One of the major components of defendant's mitigation case was his positive adaptation to prison life during almost 10 years of incarceration (R. 153, 990-1000).[29/] The necessity of addressing before the jury defendant's behavior while on death row led his counsel to request that the jury be instructed of the existence of *a* prior death sentence (R. 307-08, 706-07, 2343-48). This request was granted by the court, and the prospective jurors were told that defendant had been "previously sentenced to death in an earlier trial," that a new hearing had been ordered "because evidence that the jury should have heard in that trial was excluded from the previous jury," and that the resentencing jurors would "not be permitted to give any weight whatsoever to the previous sentence." (R. 710-11, 2357-58, 3150-52).

During the course of jury selection, counsel for both parties mentioned the fact of the prior death sentence, with defendant's

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[29/] This testimony was excluded in defendant's 1981 trial, which led ultimately to this Court's decision ordering a new hearing at which the testimony could be presented. *Valle III*, 502 So.2d at 1226.

counsel probing whether that fact would influence any prospective jurors in their consideration of the case (R. 2780, 3471-73). As this Court has recognized, mere mention of a prior death sentence is not *per se* error, but care should be taken lest the resentencing jury be swayed improperly. *Teffeteller v. State*, 495 So.2d at 745 ("prior sentence, vacated on appeal, is a nullity" of no probative value and "could conceivably be prejudicial to a defendant"); *see Rutherford v. State*, 545 So.2d 853, 856-57 (Fla. 1989); *Huff v. State*, 495 So.2d 145, 152 (Fla. 1986).

Defendant's claim in this case is not merely that the jury was neutrally instructed, as his counsel requested, of his prior death sentence. Rather, it is that the state, apparently informed by a view that prior sentences *are* relevant,[30] set out to make defendant's *two* prior death sentences a feature of this trial, and, secondarily, that the state's strategy continued to visit upon defendant the taint of the two previous constitutionally-invalid proceedings.

1. Prior Death Sentences as a Feature of the Resentencing Proceeding.

The state's efforts began, in a somewhat veiled fashion, in *voir*

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[30] As the lead prosecutor argued to the trial judge prior to the imposition of sentence:

> [T]here is history to this case.
> With all of its wrongdoing, . . . this case is here, not for the first time, not for the second time, but for the third time. And I'll grant you perhaps there should be no value given to the fact that other jurors in the past who heard the facts of this case have made similar recommendations, but at some point we have to say to ourselves, the voice of this community by a two-third or greater majority, has three times spoken upon the matters that were presented to them, saying that this is the type of case in which they would recommend the death sentence . . . .

(R. 6139).

dire: in the guise of questioning prospective jurors on their exposure to publicity, all but four of the first 42 jurors questioned by the prosecutor were asked variations on a question in which the prosecutor told them that the offense had occurred in 1978 and that there also had been "publicity" about the case (for unspecified reasons) in 1981 (R. 1759).[31/] Prior to questioning of the second group of jurors, defense counsel requested the court to ensure that the jurors were not led to believe that this was a third sentencing proceeding, and the court, which previously had noted that "[t]here is no reason for them to know that he's been sentenced twice" (R. 2522), agreed (R. 3146, 3158).[32/]

At the commencement of the trial-in-chief, defendant's counsel repeated their concerns that the jury not be aware of two prior death sentences, requesting that all state exhibits be marked with the original 1978 date stamps and that the overlapping 1981 date stamps be removed (R. 3844, 3912, 3973-74). However, the lead prosecutor, in his first question on cross-examination of defendant's first witness, nakedly attempted to inform the jury of the 1981 proceedings:

> Q. Mr. McClendon[,] *I'm certain you recall the sentencing proceeding on this matter in 1981.* Do you remember that?
> A. Yes, sir.

(R. 4286). Counsel's objection to this question was sustained, but the court denied a subsequent motion for mistrial (R. 4286-90, 4878-

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[31/] The first version of the question appears at the cited page; the question was repeated with only minor changes in language (R. 1774, 1784-85, 1791-92, 1801-02, 1809-10, 1845-46, 1866, 1888, 1899, 1906-07, 1920-21, 1936-37, 1945, 1954-55, 1963-64, 1973-74, 1982-83, 2006-07, 2017-19, 2041-42, 2062-63, 2071, 2096-97, 2105-06, 2127-28, 2137-39, 2147-48, 2169-70, 2182-83, 2196-97, 2251-52, 2259-60, 2268-69, 2283-84, 2293-94, 2304-05, 2314-15, 2322-23).

[32/] The prosecutor, for reasons which do not appear of record, did not question the second group of jurors as he had the first.

79).[33] The prosecutors renewed their efforts in this direction during cross-examination of another defense witness, Sheriff Buckley, who also had been excluded in the 1981 sentencing hearing (T2 1505-11), asking the witness such questions as "in 1981, you were going to testify that the defendant would be a model inmate; is that correct," and referring to the fact that he "also gave an opinion in 1981." (R. 4674-75).[34]

And the same effort was made -- and was unchecked by the trial court -- during the testimony of Dr. Toomer, a mental-health expert who had been permitted to testify for defendant in the 1981 penalty phase (T2 1402-43). The state, during the prosecutor's *voir dire* of the witness, brought out that he previously had testified before another jury, which, in and of itself, might have been believed by the jurors in this case to have referred to the 1978 proceeding; however,

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[33] During the discussion of this issue, the court commented to the prosecutor that he was "going to make a problem" with this line of questioning (R. 4287), and, sustaining defense counsel's objection to the question -- and to the prosecutor's apparent wish to point out to the jury that the witness had been excluded in 1981 -- the court instructed the prosecutor not to mention prior trials; but, observing that "[s]o far as I can tell there is not the slightest problem here," denied the motion for mistrial (R. 4287-90, 4878-79).

[34] After counsel's motion for mistrial, based upon this questioning, had been denied (R. 4705), the prosecutor, in the course of questioning the witness regarding defendant's statement to him of his wish to have contacted the deceased's family, underscored for the jury that there had been a trial in 1981:

> Q. . . . Do you know when he thought of it?
> A. No. But it was at the last -- before the last trial.
> Q. *'81?*
> A. Back in '81.

(R. 4856). Defendant's subsequent motion for mistrial, based upon this questioning and the previous cross-examination of Mr. McClendon, was denied, with the court finding that the 1981 proceeding had not been mentioned before the jury; as the court commented, "I told the state what they ought to do, try not to bring out the two sentencings. I haven't heard them do it so far." (R. 4878-85).

not content with leaving this ambiguity, the prosecutor then elicited from the witness that he had first seen defendant in 1981 (R. 5312, 5317, 5360). As counsel pointed out in objecting to this examination, the link between the year of Dr. Toomer's initial contact with defendant and a prior jury trial at which he testified would have led the jury unerringly to realize that there had been two previous trials of defendant (R. 5339-40).[35/]

The state's final attempt to bring before the jury the two prior death sentences occurred during direct examination of their rebuttal witness, Ted Key, a classification officer at Florida State Prison, as follows:

> Q. When the defendant . . . was at Florida State Prison, did you review his file to see if he was psychologically screened?
> A. Yes, sir.
> Q. Was he screened?
> A. He was. He received psychological screens on *both his initial arrival and, as a result, returned back, I believe, in 1981.*

(R. 5639). Defendant's objection to this testimony was overruled, and his motion for mistrial was denied (R. 5639-41, 5651).[36/]

The state plainly succeeded in its efforts to bring before the jury the fact that defendant had been sentenced to death not once, but twice, and that juries had been involved in the prior proceedings. *Cf. Teffeteller v. State*, 495 So.2d at 745-47 (no reversible error in mention of prior sentence, without reference to jury's rec-

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[35/] The trial court's only ruling on this objection was, "Everybody knows what they're not supposed to say." (R. 5340).

[36/] When defendant's counsel reminded the court that they had, earlier that day, brought the state's predilection for mentioning the second proceeding to the court's attention and requested the court to act on the matter (R. 5640), the lead prosecutor acknowledged that "[w]e do have a problem," and the prosecutor who had been conducting the examination of the witness conceded that he "could have" made efforts to instruct the witness, but had not done so (R. 5640, 5651). The court refused to take any corrective action (R. 5641).

ommendation, where fact of prior sentence was first elicited from defense expert before state expert testified and reaffirmed that fact, and alleged error in state witness' testimony and prosecutor's argument was not preserved for review). The obvious intent behind this strategy was to influence this jury to cast its lot with previous sentencers,[37] in violation of the fundamental Eighth Amendment principle that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

2. Tactical Advantages For Prosecution From Prior Death Sentences.

The state also used the fact of Sheriff Buckley's exclusion in 1981, in combination with defense counsel's clearly-stated desire to avoid telling the jury that defendant had twice been sentenced to death, to insulate from rebuttal the state's efforts to impeach the witness with evidence of his compensation. Buckley was twice asked on cross-examination the amount that he was charging for his work, and testified that he would bill defendant $1500 per day, in addition to reimbursement of expenses (R. 4708-10). While trial courts are vested with broad discretion in allowing cross-examination of expert witnesses regarding their fees, *e.g.*, *Pandula v. Fonseca*, 145 Fla. 395, 199 So. 358, 359-60 (1940); *Langston v. King*, 410 So.2d 179, 180 (Fla. 4th DCA 1982), it is fundamental that a party is entitled to

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[37] In this respect, the state's strategy dovetailed all too neatly with its repeated efforts, as set forth in Point III(A), *supra*, to convince this jury that, unlike the previous jury (or juries), it did not have all the available facts of the case. The temptation on the part of the resentencing jurors to rely upon two prior juries' resolution of the case must certainly have been too great to resist under this combination of prejudicial circumstances.

rehabilitate an impeached witness. *E.g., Lawhorne v. State*, 500 So.2d 519, 520-21 (Fla. 1986). Defendant was denied this right: as his counsel explained to the court in moving for a mistrial based upon the cross-examination of Buckley, the only comeback to the state's attack on the witness' credibility in this regard would have been to show -- as the record before this Court and the trial court establishes -- that Buckley's bill had not been paid in 1981 because the court had excluded his testimony, that the bill had gone unpaid for almost seven years until the commencement of the resentencing proceedings in the trial court, and that Buckley, despite this cavalier treatment, had remained willing to be retained for the new proceedings (R. 925-29, 938-56, 960-69, 4879-81, 6195-202). Of course, such a response would also have underscored two other things: that defendant had been resentenced in 1981, and that a court had ruled Sheriff Buckley's testimony inadmissible in that proceeding, *i.e.*, precisely what the state had attempted to show at the very outset of defendant's mitigation case (R. 4286-90).

With defendant thus hamstrung in any effort to rehabilitate the witness, the state took full advantage in closing argument, making the question of Buckley's fees a key feature of their attack on defendant's mitigation case:

> What's the most natural thing to say about somebody -- he was paid, he was bought off. That's sort of an off the cuff remark we might say about somebody when you are getting $1500 a day plus air fare and room expenses . . . . Then just maybe if you changed your opinion, you weren't going to get on the witness stand. Just maybe if you agreed that the other side might be right, you weren't going to get that $1500 a day.
>
> Maybe that will flavor your opinion a little bit. I'm not saying you are going to do it consciously and say, "Hell, I'm going to sell out for $1500 a day." You have to understand if somebody is putting that kind of money in your

> pocket, you will feel strongly aligned with those people? What kind of clues do we get about those experts? You get real good clues about them.

(R. 5890-91).[38] The trial court's allowance of this unfair advantage to the state (R. 4880-81) only exacerbated the prejudice from the state's insidious attempts to bring defendant's two prior sentences before the jury.

And, as they had done with Sheriff Buckley, the prosecutors, in their cross-examination of Dr. Toomer, also sought to gain an unfair advantage from the defense's fear of telling the jury that there had been two prior death sentences, and, in doing so, perpetuated the taint of defendant's two constitutionally-tainted trials. This was accomplished by setting forth, as the focus of Dr. Toomer's cross-examination, the fact that he had first examined defendant in 1981, and that an earlier examination, *i.e.*, closer to the time of the crime, might have yielded more accurate results (R. 5356). Of course, as defendant's counsel explained in objecting to this questioning, the reason that there had not been evaluations in the 1978 trial proceedings had been because defendant's original counsel had not been afforded any time to prepare for the trial, and 1981 had been the first time that such preparation had been allowed (R. 5356-58). *Valle I*, 394 So.2d at 1005-08.

The court, observing that counsel could address this on redirect examination (R. 5358),[39] refused to prohibit the cross-examination

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[38] These comments were reprised several times during the prosecutor's closing (R. 5898-99, 5901).

[39] As counsel pointed out, such redirect examination would have played directly into the state's hands -- by forcing defendant to bring before the jury the *two* prior death sentences (R. 5358-59).

of Dr. Toomer on this subject (R. 5360),[40] and the prosecutor thereafter repeated his questions (R. 5360-61).[41] The court's refusal to prohibit this questioning of the witness served ineluctably to visit upon defendant the effect of having had an unfair first trial.

This Court, in reversing defendant's first conviction and sentence because his counsel had been afforded 24 days of preparation time between arraignment and trial, *Valle I*, 394 So.2d at 1005-06, noted that counsel had requested an opportunity to investigate defendant's mental status and other mitigatory factors prior to sentencing and that such had been denied by the trial court, *id.* at 1006-07, and *specifically* held that the trial court had committed constitutional error in so ruling. *Id.* at 1008. The reversal of the first death sentence in *Valle I* rendered a nullity the proceedings which led to its imposition. *E.g., Kaminski v. State*, 72 So.2d 400, 401 (Fla. 1954), *cert. denied*, 348 U.S. 832 (1955).[42] And where, as here, a defendant's case in a second sentencing trial is weakened by constitutional error in the first proceeding, the second trial continues to be tainted by the initial error. *Evans v. Lewis*, 855 F.2d 631, 637-

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[40] The penultimate exchange on the objection was as follows:

> The Court: Let's just proceed. If I think there is a problem, I'll correct it.
> Mr. Scherker [defense counsel]: That's your ruling?
> The Court: Yes.

(R. 5360).

[41] And the prosecutor took full advantage of the trial court's failure to prevent this series of events, disparaging Dr. Toomer's testimony in his closing argument because the witness did not evaluate defendant until "four years later." (R. 5906).

[42] As this Court has recognized, "at a new trial the parties may present new evidence or use different theories than were presented in the first trial." *Huff v. State*, 495 So.2d at 152 (citation omitted). However, in preparing and presenting mental-status testimony for defendant's second trial, his counsel did nothing more than what this Court had suggested as appropriate for competent representation.

39 (9th Cir. 1988)(ineffective assistance of counsel in first sentencing phase due to failure to investigate defendant's mental condition; death sentence imposed after remand for resentencing by state court on other grounds tainted by deficiencies in first sentencing because newly-retained expert witness opinions were weakened by passage of time from offense).43/

In sum, the state's double-barreled strategy worked in this case: the state succeeded in bringing before the jury that two better-informed juries had recommended death sentences for defendant, thereby unconstitutionally diminishing the jurors' belief in the importance of their role, *Caldwell v. Mississippi,* 472 U.S. at 320-23, and, perhaps more perniciously, reaped concrete tactical advantages from the trial court's failure to take any corrective action. Defendant's Eighth Amendment right to a fair resentencing proceeding -- one in which the constitutional errors of the previous trials would be cured -- was hopelessly compromised.

C. Unfair And Prejudicial Cross-Examination Of Defense Witnesses And Denial Of Opportunity For Rebuttal.

There were two components of defendant's mitigation case: (1) his potential for a favorable adjustment in prison, and (2) evidence of his character and mental status. Prior to trial, the state announced its intention to rebut the prison-adjustment component of de-

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43/ The trial court, in the face of one of counsel's objections to the advantage accruing to the state from the circumstances of the trial, observed that "the history [of the case] isn't per se the state's doing. The history of the case is the history of the case." (R. 4884). This is not entirely accurate: it was the *state* which willingly assisted the original trial judge in ramrodding this case to trial, conviction, and sentencing in record time, and which defended its actions as entirely proper, *Valle I,* 394 So.2d at 1005-07; it was the *state* which secured the exclusion of defendant's penalty-phase witnesses in the second trial (T2 1498-1511); and it was the *state* which benefited in this trial by being able to challenge critical defense witnesses without meaningful rebuttal.

fendant's case with evidence of his behavior on death row at Florida State Prison (FSP) and at the Dade County Jail (DCJ), and with the testimony of Detective Toledo of the Sweetwater Police Department regarding a 1976 encounter with defendant (R. 261-62, 1219-20, 1349-53, 3690; S.R. 20-22, 23, 28-29, 85, 90-91, 291). Defendant's motions to exclude this testimony as unreliable and prejudicial were denied by the court (R. 1217-26, 4116-34, 4151-52, 5511; S.R. 104-05). The evidence relied upon by the state, and the manner in which it was presented to the jury, violated two fundamental Eighth Amendment precepts: that evidence relied upon in support of a death sentence must be reliable, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983)("because there is a qualitative differences between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment'")(citation omitted), and that a capital defendant be afforded the opportunity to rebut the state's case for death, *e.g.*, *Gardner v. Florida*, 430 U.S. 349, 362 (1977)(denial of due process to sentence defendant to death "on the basis of information which he had no opportunity to deny or explain"). The state's efforts went virtually unchecked by the trial judge, and resulted in a skewed and unreliable sentencing proceeding.

1. Unreliable Evidence to Challenge and Rebut Defendant's Potential for Favorable Prison Adjustment.

Upon learning of the state's intended rebuttal to his prison-adjustment mitigation,[44/] moved to exclude unreliable and prejudicial

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[44/] On remand, defendant listed the excluded witnesses in discovery and formally advised the state that he would go forward with the previously-excluded testimony (R. 120-22, 152-54, 925-29, 1003, 6195-202; S.R. 18). Early in the pretrial proceedings, on August 20, 1987, counsel requested that the state be compelled to list its contemplated rebuttal witnesses; the prosecutor responded that he would (Cont'd)

testimony regarding uncharged acts of misconduct allegedly committed by defendant in prison (S.R. 104-05; R. 1176-84, 1211-25). The trial court ruled that uncharged acts would generally be admissible as rebuttal (R. 1217-19), but that "the specific items I will go through piece by piece to see if I don't think that they are things that are to be admitted" and to "make sure that I thought it was a relevant area to cross-examine" the witnesses (R. 1221-22, 1225).

Of the meager evidence actually introduced by the state, the major component was a packet of eight FSP disciplinary reports, two of which -- in terms of the state's cross-examination of defendant's witnesses -- were significant: one dated July 18, 1984, charging defendant with attempted escape after he was found in a cell in which bars had been cut (R. 365), and one dated January 13, 1987, in which defendant was found in possession of an alleged handcuff key and money (R. 368).[45/] The July 18th incident was the only matter as to

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first take the depositions of the defense witnesses and would then list rebuttal witnesses (R. 973-74, 982). At a subsequent hearing on defendant's motion to compel discovery of rebuttal witnesses (R. 120-27), the prosecutor agreed to list his witnesses (R. 1006-07). With the hearing set for January 25, 1988 (R. 1036), the prosecutor filed discovery, listing witnesses employed in the state correctional system and the local jail, beginning on October 27, 1987 and continuing through the day that the hearing was to commence (R. 261-62; S.R. 20-21, 23, 28, 29, 34, 87, 164, 291). Accordingly, defendant litigated some matters in his pretrial motion and others at trial; ultimately, all objections to the proposed testimony were found by the trial court to have been preserved by appropriate motions and objections, without the necessity of renewal at each point at which objections could have been lodged in the first instance (R. 4151-52).

45/ The reports (R. 360-68) were introduced in the state's case, over defendant's renewed objection (R. 5511, 5534), after the matters set forth therein had been explored on cross-examination of defendant's witnesses. See *infra*. In addition to the two reports noted in the text, as to which there was considerable controversy at the hearing, defendant's disciplinary record was as follows: (1) on October 14, 1980, he burned a hole with a cigarette in a plastic meal tray as part of a group protest over cold food (R. 360, 4232-33), (2) on December 14, 1980, he failed properly to stand at his cell door when a new "count" procedure was instituted (R. 362, 4233-35), (3) on February 8, 1983, he and 44 other death row inmates flushed their toilets, flooding the wing, in a group protest regarding a particular (Cont'd)

which actual testimony was presented in the state's rebuttal case (R. 5535-600), and all other "evidence" of defendant's behavior during his time in FSP and prior to the hearing in the local jail was elicited on cross-examination of the defense witnesses. The trial court was in serious error in failing to check the state's efforts improperly to bring before the jury, in the guise of cross-examination, this purported "evidence."

The issue first arose during the hearing on cross-examination of Lloyd McClendon, a corrections official in New Mexico, who has been employed in the field for many years,[46] and was accepted by the trial court as an expert witness (R. 4181-200). On direct examination, he detailed the disciplinary reports (R. 4232-84),[47] and concluded, based upon those reports, his review of defendant's criminal record and entire prison file, and his own evaluations, that defendant would be a nonviolent prisoner who would make a satisfactory adjustment if sentenced to life imprisonment (R. 4210-11, 4284-85).

On direct examination, Mr. McClendon testified that he had reviewed the FSP reports regarding the July 18, 1984, incident in which the bars in defendant's cell were found to have been cut: from those reports, he found that the flat steel crosspieces in the cell door had been cut and replaced with painted and puttied cardboard "shims,"

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officer (R. 363, 4237-39), (4) on May 7, 1983, he kicked a door in a maximum-security visiting area when his family visit was delayed (R. 364, 4239-43), (5) on November 11, 1984, he was found in possession of unassigned canteen coupons (R. 366, 4245-46), and (6) on June 10, 1986, he protested when his exercise period was cut short due to the officers' belief that a rainstorm was imminent (R. 367, 4246-48).

[46] As is discussed in more detail *infra*, Mr. McClendon is also himself a former death row inmate (R. 4189-90).

[47] The court, after allowing defendant to preserve his objections to the introduction of uncharged criminal acts without repeated renewals, see n.44, *supra*, recognized that its ruling was such that counsel would be eliciting some of the challenged evidence on direct examination in anticipation of the state's cross-examination (R. 4171).

but that no implements or escape paraphernalia had been found in defendant's cell (R. 4269-72).[48] Evaluating this incident, the witness testified that escape is of the "highest" concern to prison officials, but that it is also "the most common fantasy" of prison inmates (R. 4277, 4278). He stated that defendant's version was not controlling in his evaluation, and that any effort by defendant to escape would be "stupid but it is also nonviolent and I don't see it as an [escape] attempt because anyone living in that unit certainly knows that the possibility of a successful escape with that beginning and with that security is not possible." (R. 4277-78).[49] Mr. McClendon further testified that the remaining disciplinary reports were nonviolent in nature and did not indicate that defendant would be a problem inmate in a non-death row environment (R. 4259-61).[50]

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[48] The reports further indicated that the cut bars in defendant's cell had been found after officers doing a routine "shakedown" in another cell on the same wing had found cut bars, after which they searched the other cells on the wing; hacksaw blades, "shims," and putty had been found in the first cell, but not in defendant's cell (R. 4272-73). The officers subsequently found that a metal towel bar in defendant's cell had been cut and puttied back into place (R. 4276). Mr. McClendon testified on direct examination that defendant had told him that he had not cut the bars, that he had been told by another inmate that the bars had been cut before he had been placed in that cell, and that he had not cut the towel bar (R. 4276).

[49] Lt. David Rice, the corrections officer who discovered the cut bars and who testified as a prosecution rebuttal witness (R. 5536-40), agreed with this assessment: he testified that the security at FSP is such that there is "no way off the wing." (R. 5556-59, 5600-01). Mr. McClendon also relied upon the description of the incident by the superintendent at the time of the incident (and now Secretary of the Department of Corrections), Mr. Dugger, who labelled it a "nonviolent escape attempt" and accordingly reduced the penalty assessed by the disciplinary team (R. 4279-82; see R. 365).

[50] With regard to the incident in which the handcuff key and money were found in defendant's cell in 1987, Mr. McClendon testified that the FSP incident reports indicated that the key was outdated, that keys are often found in inmates' possession at the prison, and that defendant, under his questioning, had admitted that he had received these items from another inmate as part of a gambling debt; he stated that gambling is common among prison inmates (R. 4249-51, 4259). Mr. McClendon addressed the remaining disciplinary reports as follows: the food protest carried out by burning the meal tray was de-
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The cut-bars incident was the focus of the state's cross-examination of Mr. McClendon (R. 4319-4402).[51] Over defendant's objections, the court permitted the prosecutor to draw a chart, on which he listed items purportedly found in defendant's cell and the other inmate's cell,[52] and to question Mr. McClendon regarding escape par-

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scribed as a common occurrence in prison; defendant's failure to comply with the new "count" procedure would be "expected" when a new rule is promulgated; the toilet-flushing incident also involved a common protest method; the incident in which defendant kicked the door, while not condoned by corrections professionals, is an "extremely common circumstance" in prison which was dealt with appropriately both by the officers and by defendant, who stopped when told to and was permitted to have his visit; the coupon violation is an "insignificant item that occurs daily among most of the population" in prison, and the incident on the exercise yard, while a concern because of possible "insubordination," did not result in any actual misbehavior by defendant and was therefore not considered serious (R. 4232-49). The witness noted that none of these reports had changed the prison officials' view of defendant, and that his progress reports throughout this period of time noted that he was *not* a "management problem," despite these rule violations (R. 4235-36, 4244).

[51] The alleged handcuff key was the subject of some cross-examination of Mr. McClendon, particularly as to whether the key had been one which still was used in the prison (R. 4382-85). As was established in documents filed by defendant's counsel in connection with their objections to other matters raised in cross-examination, see p.39 & n.56, *infra*, the key had been destroyed long before the hearing (R. 630-33), barring any definitive resolution of the factual issue. The same question arose on cross-examination of John Buckley, another corrections expert called by the defense (R. 4781-86).

[52] The trial court drew a replica of the chart (R. 4396-97), as follows:

Valle	"X"
	blade (2)
cut towel bar	cardboard
braided rope	putty
rubber pad	compass
paint	flashlight
	4 - 25¢
address phone list	gloves
glove & hats with holes	hats/holes

(R. 349). The other inmate, whose cell bars were found to have been cut first, was Theodore Bundy (R. 576). The court prohibited the state from mentioning Bundy's name before the jury (R. 1204-07); the lead prosecutor colorfully chose to refer to Bundy in his cross-examination of Mr. McClendon and other witnesses as inmate "X" (R. 349).

aphernalia allegedly found in defendant's cell, *e.g.*, hats with cut-out eyeholes, a rubber pad, paint, an address and phone list, and gloves (R. 4321-24, 4390-402). Counsel objected on the ground that the state would not be able to to prove that these items were obtained from defendant's cell; the court ruled, "That's a matter for surrebuttal, redirect, whatever you like," and overruled the objection (R. 4321-22).[53/]

The same series of events occurred on cross-examination of defendant's second expert witness, John Buckley,[54/] who, after brief questioning on direct regarding the cut-bars incident (R. 4650-52),[55/] was extensively cross-examined, using the same chart, on items allegedly found in defendant's cell (R. 4812-18). Counsel renewed their objections to this questioning, and the court, while allowing the state to proceed, deferred ruling on possible curative in-

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[53/] The objection was thereafter renewed, and the prosecutor acknowledged that the state "couldn't prosecute an attempted escape because the property is no longer available." (R. 4385-89). Counsel for defendant asserted that, absent some showing of a chain of custody, the evidence was unreliable as rebuttal of defendant's mitigation case (R. 4387-89), and the court ruled as follows:

> I made my position clear. I'm overruling the objection. If you show me at some time that there is some [in]accuracy or you challenge its accuracy, you show that it prejudices the defendant, then we will have to talk about it again. Right now, I don't see that.

(R. 4389).

[54/] Mr. Buckley was the sheriff of Middlesex County, Massachusetts, from 1970-81, responsible for two detention facilities (R. 4552, 4556-57), and has been a consultant in corrections matters since that time (R. 4557-62, 4589-90). He was accepted as an expert witness by the trial court (R. 4586, 4588).

[55/] As was the case with Mr. McClendon, counsel elicited testimony in advance of the state's cross-examination. See n.47, *supra*. Mr. Buckley testified that defendant was guilty of a "nonviolent" escape attempt, and one which is to be expected: "people in prison do cut bars and it's a regular occurrence." (R. 4650-52).

structions (R. 4812-14), as follows:

> Later on I will take a look at some of this stuff. If I think I can come up with some instruction, I'll come up with some instruction on who's got what where.

(R. 4814). Counsel thereafter filed a packet of FSP investigative reports and depositions from the corrections officers involved in the incident, which documents established, as counsel had argued, that the state could not prove the discovery of escape paraphernalia in defendant's cell (R. 380-680).[56] The court, after reviewing the ma-

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[56] The investigative report filed by the two officers who discovered the bars, Lt. Rice and Officer Morrison, states that they had found cut bars in Theodore Bundy's cell, and that all cells on the wing had thereafter been checked, which resulted in the discovery that the flat steel in defendant's cell had been cut (R. 574-76). The only item recovered from either cell by these two officers was a pill bottle containing putty, which was found in Bundy's cell (R. 573-74). Both cells were searched on the following day by Sgt. Jones and Officer Chisholm, who found numerous items of escape paraphernalia in Bundy's cell (R. 577). Jones' report, however, states that the only item found in defendant's cell was the cut towel bar (R. 577). Evidence receipts filed by Inspector Ball, the chief investigative officer, verify the items found by these officers in Bundy's cell and the discovery of the towel bar in defendant's cell (R. 569, 570, 572).

Other documents prepared by Ball, however, indicate that other items were found in defendant's cell (R. 565, 566, 571), and it was upon these documents that the state rested their cross-examination (R. 4812-13). Ball prepared two reports, one on July 18th (the day the bars were discovered) and a second on July 23rd (R. 565, 566). The first report states that "[a] complete search of the cell areas revealed several items of escape paraphernalia" after Rice had found the cut bars, and that Ball had "ordered the officers to remove all property from the cells and bring it to" his office (R. 566). The July 23rd report states that Ball had "searched and inventoried" the property of the two inmates and found unspecified "escape paraphernalia" (R. 565), and an evidence receipt signed by Ball places paint, gloves and similar items in defendant's cell (R. 571).

However, *none* of the officers involved in the discovery of the bars or the search of the cells reported having found *any* of these items in defendant's cell (R. 437-48, 468-72, 485, 596-97), and Sgt. Jones, the officer who actually conducted the full-scale searches, testified on deposition that the cut towel bar "was all" that he had found and that there had been "nothing else of a suspicious, or contraband nature in Valle's cell." (R. 519). This apparent contradiction is clarified in Ball's deposition, in which he testified that other officers had "tag[ged]" the property taken from the cells "either Bundy or Valle and they bring it to me," after which he "inventor[ied]" the items and prepared the evidence receipts, "relying on the tags." (R. 636). Thus, there simply was no evidence that (Cont'd)

terials, refused to give a curative instruction (R. 5058-59, 5694-95, 5859-61, 5973-74).[57]

Mr. Buckley also was cross-examined regarding alleged events in the Dade County Jail (R. 4833-48), as to which the state had filed extensive discovery, listing two jailhouse informants, the investigative officer for the jail, several corrections officers, and documentary evidence (R. 238-42, 258-59, 261-62, 265; S.R. 23, 28, 34, 291), and presented nothing at trial.[58] He was questioned by the prosecutor[59] regarding an alleged conversation between defendant and a correctional counselor, Mr. Vaughn, whom defendant had known from previous incarceration in the jail, in which defendant had purportedly asked for help in an escape, and defendant's purported escape

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anyone involved in the searches had found the disputed items in defendant's cell, Ball had no personal knowledge of where *anything* had been found, and some unidentified individual who wrote the name "Valle" on a tag is the person upon whom the state was actually relying upon to link the "escape paraphernalia" to defendant.

[57] After the court reviewed the materials (R. 5059), and counsel renewed the request for an instruction, the court stated, "I'm not fashioning an instruction. I'm not going to do that." (R. 5859-60). The court noted that the defense objection to its refusal was preserved (R. 5861). Thereafter, when the objection was renewed after closing arguments and before the jury was instructed, the court ruled: "The Court is not giving an instruction on that. Does not see any reason to do that based on the evidence." (R. 5973-74).

[58] One of the jailhouse informants, Kenneth Ward, invoked the Fifth Amendment when defendant's counsel attempted to take his deposition; the court found the invocation valid, and also ruled that Ward's hearsay statements to others could not be introduced at the hearing (R. 1551-54, 1586-87). The court refused to suppress notes allegedly written by defendant to Ward (R. 3660), but those notes were not introduced at trial. Similarly, the court denied a motion to suppress statements allegedly made by defendant to the second informant, Jose Martinez (R. 1588-1633, 1666-87), but this witness was not called at trial. The state, for reasons which do not appear of record, declined to call the jail investigator, Mr. Sobel, to testify to statements allegedly made to him by defendant (R. 1639), and, indeed, did not present any of the listed DCJ witnesses at trial.

[59] As was the case with the FSP incidents, defendant's counsel touched on the area in direct examination (R. 4654, 4662, 4665) after the court had ruled the testimony admissible and that defendant's objections had been preserved for review (R. 4151-52, 4171).

plans with a jailhouse informant, Jose Martinez (R. 4833-48).[60/]

The principles which govern this issue are fundamental components of Eighth Amendment and Florida capital-sentencing law. Indisputably, defendant's alleged actions, which did not result in convictions, are inadmissible as aggravating evidence. *E.g., Dougan v. State*, 470 So.2d 697, 701 (Fla. 1985), *cert. denied*, 485 U.S. 1098 (1986); Applying the rudimentary notion that "[t]he state may not do indirectly that which . . . they may not do directly," *Dragovich v. State*, 492 So.2d 350, 355 (Fla. 1986) -- and contrary to the state's position in the trial court (R. 1219-20) -- such evidence cannot be sanitized by putting a "credibility attack" label on it. *Robinson v. State*, 487 So.2d 1040, 1042 (Fla. 1986).[61/] "[E]vidence of crimes for which the defendant has not been charged with or convicted of may not be presented to the jury in an attempt to attack the witness' credibility." *Garron v. State*, 528 So.2d 353, 359 (Fla. 1988)(citing *Robinson*). Rather, the *only* basis upon which the challenged evidence could have been admitted is as follows:

[60/] See n.58, *supra*.

[61/] In *Robinson*, the defendant presented character witnesses in the penalty phase of his trial, who testified that he "was a good-hearted person and a good worker." 487 So.2d at 1042. On cross-examination, "the state brought up two crimes that occurred after this murder and that Robinson had not even been charged with, let alone convicted of," *ibid* (footnote omitted), *e.g.*, asking the witnesses "questions such as: 'Are you aware . . . the defendant went back to the jail and committed yet another rape?'" *Id.* at 1042 n.3. This Court held the evidence inadmissible:

> Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. *A distinction we find meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial.* . . . .

Ibid (citations omitted).

> [T]he state may rebut defense evidence of the defendant's nonviolent nature by means of *direct evidence* of specific acts of violence committed by the defendant, provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.

Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988)(citation and footnote omitted), *aff'd*, ___ U.S. ___, 109 S.Ct. 2055 (1989).[62]

The challenged evidence in the present case does not measure up to the *Hildwin* requirement of "direct evidence." While the state proved defendant's record in prison with "direct evidence," *i.e.*, the disciplinary reports and one witness who testified to finding the cut bars in the cell, the great bulk of its "rebuttal" -- its cross-examination of defense experts -- concerned the prison searches and defendant's alleged misconduct in the local jail, which was not established in any way by the required "direct evidence."[63] Absent an

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[62] *Hildwin* resolved some uncertainty in the state of the law on this issue. In *Parker v. State*, 476 So.2d 134 (Fla. 1985), this Court had upheld the prosecution's questioning of a defense expert on the defendant's admissions of his criminal history, ruling that the defense "opened the door for this cross-examination by the state" into "the history utilized by the expert to determine whether the expert's opinion has a proper basis." *Id.* at 139 (citations omitted). Thereafter, this Court issued decisions in *Robinson* and *Dragovich*, strongly condemning the introduction of uncharged acts of misconduct as rebuttal evidence, see n.61, *supra*, but followed those decisions with *Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882 (1987), in which it was held proper for police officers to testify to crimes with which the defendant had not been charged "to expose the jury to a more complete picture of those aspects of the defendant's history which had been put in issue," *i.e.*, to rebut the defendant's claim that "lapses in [his] upbringing" had caused the crimes, and that he "lacked substantial capacity to plan in advance and execute crimes." *Id.* at 315-16. Prior to *Hildwin*, this Court's most recent discussion of the issue was *Garron v. State*, in which the prosecutor, on cross-examination of the defendant's sister, raised an allegation that the defendant had committed another murder, and this Court, relying on *Robinson*, held the evidence flatly inadmissible. *Garron v. State*, 528 So.2d at 358. *Hildwin* established a clear, bright-line rule, and harmonized the precedent.

[63] Indeed, the prosecutor, in his closing argument, eschewed any significant reliance upon the other disciplinary reports, see n.45, *supra*, in his closing argument: while noting that there had been (Cont'd)

evidentiary foundation for the questioning, the trial court should have prohibited it, and committed error in failing to do so. *Rhodes v. State*, 547 So.2d 1201, 1205 (Fla. 1989)(prosecution must "demonstrate to the court that a good-faith factual basis exists" for challenged questions of defense penalty witnesses regarding uncharged acts of alleged misconduct).

2. Denial of Opportunity to Challenge State's Cross-Examination and Rebuttal.

The prejudice to defendant from the improper cross-examination detailed in the preceding subpoint was aggravated by the trial court's crippling limitations on defendant's efforts to mitigate the damage caused to his case by the state's unfair tactics. It is a hallmark of proceedings under Section 921.141 that a capital defendant be given a fair opportunity to rebut evidence relied upon by the state, *e.g.*, *Chandler v. State*, 534 So.2d at 703, and, indeed, an "elemental due process requirement" where, as here, the state seeks to prove that the defendant is not a good risk in prison. *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986); *id.* at 10-11 (Powell, J., concurring). That opportunity was denied in critical areas of the state's cross-examination in this case.

a. redirect examination of defense witnesses.

The trial court's initial limitation on defendant's ability to respond occurred when Mr. McClendon, the first defense expert, was on the stand. On direct examination, the witness briefly testified that he had been convicted of first-degree murder committed during a robbery and sentenced to death; that the sentence had been reduced to

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"eight disciplinary reports," the only rule violations even described were the two "attempted escapes," which he argued were "real," and that defendant sent "little notes when he came back to [the] Dade County Jail just two or three months ago to his friend, Mr. Vaughn, . . . 'I need help with an escape.'" (R. 5894-95). Objections to these comments were overruled (R. 6026, 6036, 6048).

life after he had been granted a new trial, and that he eventually had been paroled and commenced a career in corrections (R. 4189-90). On cross-examination, he was questioned regarding his own behavior in prison and asked whether he had become "a model prisoner." (R. 4292-93). The prosecutor then turned to a comparison between Mr. McClendon's crime and defendant's acts in this case:

> Q. Would it be fair to state that in spite of the fact that you yourself were convicted for first degree murder, that in that particular incident you didn't plan to go in and kill that clerk during the robbery?
> A. I did not plan that.
> Q. Could you understand why it might be different in the jury's analysis for them to predict the future if they're dealing with --
> Mr. Scherker: Objection.
> The Court: Objection sustained, the way the question is phrased.
>
> * * *
>
> Q. There is a difference, you will agree between that and a planned, cold calculated homicide; wouldn't you agree?

(R. 4408-09). Renewed objections were overruled by the court (R. 4410-11), and, when counsel attempted on redirect examination to elicit details regarding Mr. McClendon's crime, the prosecutor successfully objected on the grounds that "it's not proper redirect examination" and that the testimony was irrelevant (R. 4416-19).[64/]

Similar limitations were laid down during the examination of Mr. Buckley. As set forth earlier, Buckley was extensively cross-examined regarding alleged events in the Dade County Jail (R. 4833-48), including questions about an alleged escape plot with a jailhouse informant, Jose Martinez, with the prosecutor attempting to elicit testimony regarding defendant's alleged statements to Martinez, and spe-

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64/ When counsel pointed out that the state had raised the issue, the court stated: "No one said it was relevant. His was different from what you asked." (R. 4418-19).

cifically asking whether Martinez's depiction of those statements had influenced Buckley's opinion (R. 4848). The questioning elicited the following response: "Martinez is a professional informant. What he has to say has to be taken with grain of salt." *Ibid.* This answer led to the following exchange between the prosecutor and Mr. Buckley:

> Q. Where did you get the idea that Mr. Martinez is a professional snitch?
> A. Mr. Sobel at the jail spoke about, I believe, Mr. Martinez' deposition, spoke about how he had been charged with first degree murder --
> Q. Mr. Buckley --
> A. -- and reduced to second.
> The Court: Mr. Buckley --
> The Witness: That's where I read it.
> Q. That's where you read it. In this case, you know that Mr. Martinez testified here in a hearing and Mr. Martinez made it real clear --
> A. I'm not aware of that.

(R. 4848-49). The court thereupon excused the jury, excoriated the witness for his "trick,"[65/] and ruled inadmissible testimony regarding Martinez's arrangements with the state (R. 4850-55).

In a second aspect of Mr. Buckley's testimony, he was asked on cross-examination whether he had, in the course of reviewing defendant's prison file, "read about a fight that the defendant had with another inmate by the name of Marvin Francois." (R. 4751). At side-

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65/ Neither the court nor the prosecution suggested that Mr. Buckley's description was inaccurate -- nor could they have done so: one of the prosecutors, during a pretrial hearing, represented that Martinez had "cut deals" with the state and the federal government after he was charged with first-degree murder, pursuant to which Martinez cooperated in the notorious "River Cops" case, had the charge reduced to second-degree murder, for which he was sentenced to eight years on a negotiated plea, and was granted immunity for a host of other crimes he had committed (R. 1588-95). Martinez, in his testimony at the suppression hearing, admitted to the same arrangements, and further testified that he had assisted the jail investigator, Sobel, in a matter at the jail, and that Sobel had appeared at his sentencing; Martinez, who had been facing a 12-17 year sentence under his arrangement with the prosecutors, was sentenced to the eight-year term after Sobel spoke on his behalf (R. 1601-18). Sobel testified in the suppression hearing that Martinez had been told that he would receive help in exchange for his cooperation; such assistance is optional with DCH personnel (R. 1647-50).

bar, it was established that Francois had been disciplined in the incident,[66] and the prosecutor, in an apparent effort to label defendant as nonetheless violent, elicited from Mr. Buckley (after a review of the disciplinary report) that both defendant and Francois had had to be taken to the infirmary "to be examined" after the incident (R. 4756-57). Mr. Buckley testified that this incident did not alter his opinion that defendant was a nonviolent prisoner (R. 4757).

On redirect examination, Mr. Buckley testified that his review of the prison file showed no indication that defendant had been disciplined for this incident, and that, in evaluating its importance in his assessment of defendant's potential for a favorable adjustment in prison, other violent behavior by Francois, as well as Francois' pattern of behavior in prison, would be relevant (R. 4862, 4864). The trial court, however, sustained the state's objections to questions of the witness regarding Francois' convictions for six first-degree murders[67] and his other disciplinary reports for violent behavior in prison (R. 4862, 4864).[68]

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[66] Defendant's counsel objected on the ground that Francois, and not defendant, had been charged by the prison officials in this incident for "swinging at Mr. Valle with a two-by-four in the exercise yard," and that the state had not listed any witnesses who could testify to that incident from first-hand knowledge (R. 4752). On redirect, defendant's counsel introduced the report (R. 4862-63), which reflects the statement of a corrections officer that, "[a]t approximately 2:35 P.M., 30 May 1980, on the R-Wing exercise yard, I observed Inmate FRANCOIS . . . pick up a wood board (2" X 4") approximately five feet long and strike Inmate VALLE . . . with it." (R. 379). The report also reflects Francois' claim that defendant had "provoked him by throwing the basketball over the fence, which was verified by the reporting officer." *Ibid.* Francois was found guilty of assault by the disciplinary team. *Ibid.* The state introduced no evidence to indicate that defendant had been disciplined in the incident.

[67] See *Francois v. State*, 407 So.2d 885 (Fla. 1981), *cert. denied*, 458 U.S. 1122 (1982). Francois has been executed (R. 4752, 4873).

[68] After the prosecutor had again made reference to both inmates having been taken to the hospital in the course of his recross-examination (R. 4867), defendant's counsel again requested that they be (Cont'd)

This Court long ago declared that "a party may re-examine a witness about *any matter* brought out on cross-examination." *Noeling v. State*, 40 So.2d 120, 121 (Fla. 1949)(citation omitted); *accord, e.g., Tompkins v. State*, 502 So.2d 415, 419 (Fla. 1986); *Huff v. State*, 495 So.2d at 150. And this rule takes on critical significance with the due process and Eighth Amendment overlay imposed by *Gardner v. Florida*, 430 U.S. at 361-62, and *Skipper v. South Carolina*, 476 U.S. at 5 n.1. It was constitutional error to deny defendant an opportunity to rehabilitate these critical defense witnesses.

b. denial of surrebuttal

Defendant called Dr. Brad Fisher, a psychologist and noted correctional classification expert, who testified that defendant, when evaluated on a standard objective prison-classification scale, would not be a violent prisoner (R. 4888-912).[69/] The state, which previ-

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allowed to address Francois' convictions and prison record to rebut the state's inference that there had been a "mutual combat." (R. 4869-73). The court ruled that Francois' convictions were "interesting but not particularly relevant," that his disciplinary history was "of no evidentiary probative value," and flatly stated, "I'm not letting you follow up." (R. 4870, 4872). When counsel renewed their request at the beginning of proceedings on the following day, and attempted to proffer Francois' disciplinary history for the record, the court ordered counsel, on pain of contempt, to present the proffer at a later time (R. 4885-87).

The issue of Francois' record was again raised when Dr. Fisher testified as a defense witness, and the court stated that its ruling was "hard and fast," and that the question would not be "relitigate[d] . . . for the fourth time with you nor will I permit you to continue to talk about it." (R. 4970). Finally, the court permitted counsel to file the disciplinary reports (R. 689-96) as a proffer (R. 5060-66). Those documents reflect that Francois, between 1979 and 1983, had been involved in at least seven violent altercations with other inmates at FSP, including the assault on defendant (R. 689-96). The trial court restated its ruling that "[t]hose documents are not admissible," and that "the other inmate['s] propensity for violence is not in issue in this case." (R. 5064-65).

69/ Dr. Fisher, a professor at Duke University (R. 4896-97), has an extensive academic background in correctional psychology and prisoner classification (R. 4888-91), and, under the auspices of the United States Department of Justice, developed a classification instrument which is used by the federal government as a national standard, as well as by several states (R. 4891-92, 4897). He has evaluated thou- (Cont'd)

ously had had a purported expert, listed as a witness on the day trial was to commence (S.R. 87), excluded by the court (R. 1437-47, 1533-34, 1568-73, 4137-50, 4164-68), thereafter called defendant's classification officer, Ted Key, who had been listed (and deposed) as a fact witness (R. 5521-31),[70] as an expert witness (R. 5631-32).[71] Mr. Key testified that defendant had not "adjusted well" in prison based upon his disciplinary record (R. 5637) and would be "an extreme escape risk" if given a life sentence (R. 5655). On cross-

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sands of prisoners since beginning in the field in 1969; he also has visited every death row institution in the country and has evaluated Florida death row prisoners on prior occasions (R. 4984-96). Dr. Fisher has testified as an expert witness "[s]everal hundred" times, for correctional agencies as well as individual litigants in civil and criminal cases (R. 4897). The state stipulated to Dr. Fisher being called as an expert witness (R. 4889, 4899).

[70] Defendant's counsel plainly were surprised by this turn of events (R. 5521-31). When the court had excluded the state's late-listed witness, Mr. Kirkland (S.R. 87), the following exchange occurred between the trial judge and the prosecutors:

> The Court: . . . . Do you have any other experts?
> Mr. Laeser: No, Your Honor.
> Mr. Rosenbaum: They deposed everyone.
> The Court: I don't mean experts with surprises. You have other experts?
> Mr. Laeser: On this particular area, no, Your Honor. Other than persons who the Court qualify as experts, not people [who] necessarily studied the matter, people from the prison system.
> The Court: On this issue, you have other people?
> Mr. Laeser: Other people who will testify to some extent about this, their feelings.

(R. 4150). These cryptic statements by the lead prosecutor, when read with the benefit of hindsight, clearly were intended to leave him the opening to call Mr. Key as an expert witness; however, when counsel directly confronted Mr. Laeser before Mr. Key was called with his statement that no other experts would be called, he responded: "That's true. When the Court prevented us from calling him as a witness we are now calling another witness who has factual information." (R. 5527). The court overruled counsel's objection on lack of notice that Mr. Key would be called as an expert witness (R. 5521-31).

[71] Mr. Key had no academic background in classification and had not previously been qualified as an expert witness (R. 5613, 5615).

examination, the witness testified that he uses a completely subjective method in evaluating prisoners:

> Q. In [rating] inmates regarding their potential for violence in prison, what model to you use?
> A. Subjective interpretation of his history.
> Q. There is no form that you follow, no regulations for making that decision?
> A. No, sir.
> Q. Just your best guess?
> A. That's about it.

(R. 5671).[72]

Defendant sought to recall Dr. Fisher as a surrebuttal witness to testify that "using subjective methods such as Mr. Key does . . . is professionally unacceptable" as a tool for classifying prisoners (R. 5685), proffering that Dr. Fisher would testify that "Mr. Key's system . . . is a subjective and unreliable tool for judging future dangerousness inside and outside prison." (R. 5693). Counsel explained that this "subjective Florida model"[73] had not been addressed in the initial examination of Dr. Fisher because there had been no indication that Mr. Key would testify to such a system (R.

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[72] On further questioning, Mr. Key testified that the only two factors he considers in evaluating death row prisoners is the cleanliness of their cells and their disciplinary record, with a single disciplinary action leading to an unsatisfactory rating (R. 5677). When asked where he had learned that method, he stated, "It's experience of ten years in classification," *ibid,* and that his predecessor as death-row classification officer, Mr. Dayan, had used the same method (R. 5677-78). However, when confronted with one of Mr. Dayan's reports on defendant, which noted a disciplinary report but nonetheless concluded that defendant was a "satisfactory" prisoner, Mr. Key acknowledged that Mr. Dayan must have used a "different" method "[o]n that particular occasion." (R. 5680-81).

[73] There was, at the time of defendant's trial, *no* "Florida model," but, as of July 1, 1989, the Florida legislature has mandated that "[t]he Department of Corrections shall classify inmates pursuant to an *objective* classification scheme." § 944.1905, Fla.Stat. (Supp. 1988). Mr. Key's "system" thus has been invalidated.

5690-91).[74] The state opposed the proposed testimony, arguing, "Well, prove that Key [has] a stupid system. What does that have to do with Key's opinions?" (R. 5692), and the court refused to permit it:

> I'm not going to allow it, over the defense's objection. I'm not allowing Dr. Fisher back. He had four experts for three or four days. The state had one man go about an hour and ten minutes on direct. I'm not allowing you to recall Dr. Fisher. That's in the Court's opinion totally unnecessary. . . . . Totally discretionary.

(R. 5692-93).

Impeachment of a rebuttal witness is within the proper scope of surrebuttal. *Davis v. Ivey*, 93 Fla. 387, 112 So. 264, 270 (1927). While it is true, as the trial court observed in this case, that the admission of surrebuttal testimony is "subject to the trial court's discretion," *Reaves v. State*, 531 So.2d 401, 402 (Fla. 5th DCA 1988) (citations omitted), where the court did *not* have such "[t]otally discretionary" authority was in protecting defendant from surprise -- and therefore ineffectively-countered -- prosecution testimony. *Smith v. Estelle*, 602 F.2d 694, 699-703 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981). As the court observed in that case,

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials."

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[74] The court's initial response was that Dr. Fisher had "already talked about" the Florida model in his testimony in defendant's case (R. 5690); however, there is nothing in Fisher's testimony on this subject (R. 4888-963). Rather, as counsel reminded the court, the trial judge had had an off-the-record, casual conversation with Dr. Fisher during a recess, and these matters may have been mentioned in the course of recollecting a prison-rights case in which both the judge and the witness had been interested (R. 5690; see R. 4912). And, since the defense had been surprised by Mr. Key as an expert, see n.70, *supra*, counsel explained that Key's "system" had not previously been exposed (R. 5690-91).

Id. at 699 (quoting *Gardner v. Florida*). Testimony offered by one party, and "not effectively cross-examined by the other . . . carries no assurance of reliability whatever." *Id.* at 701. Here, defendant not only was forced to confront a newly-created "expert" at trial, but was denied the most effective counter-testimony available under the circumstances. This constitutes reversible error.

3. Prejudicial Misuse of Defendant's Prior Record

The circumstances under which the state may bring a defendant's prior criminal record before a jury in a penalty-phase proceeding have been previously set forth: a defendant's prior convictions may be introduced when relevant to a mitigating circumstance in issue, and, insofar as the state may elicit testimony regarding uncharged acts of misconduct, such may be shown only by "direct evidence," without reference to "arrests or criminal charges arising therefrom." *Hildwin v. State,* 531 So.2d at 128. Of course, overarching these limitations is the fundamental Eighth Amendment requirement that information provided to the jury regarding a defendant's prior criminal record be accurate and reliable. *Zant v. Stephens,* 462 U.S. at 887 & n.23.

A major component of the state's challenge to defendant's mitigation case was an alleged 1976 incident, during which defendant purportedly attempted to run over Detective Toledo of the Sweetwater Police Department, when the officer was chasing him for a traffic violation.[75] Toledo was not called to testify by the state in the

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[75] Toledo testified in a probation-violation hearing prior to defendant's 1978 trial (R. 11, 24, 33; S.S.R. 36-53) and in the sentencing phase of that trial (T1 1456-65), although he never was listed as a witness in the state's discovery (R1 38-39, 45-46, 142, 158). He was not cross-examined in either proceeding. *Ibid;* see *Valle I,* 394 So.2d at 1005-06. At the end of the 1978 proceedings, the state announced that it would not file an information charging defendant with any crimes arising from the incident (T1 1534); the prosecutor in the resentencing proceeding below told the court that "[w]e went (Cont'd)

hearing (R. 5224-29, 5509). Indeed, the prosecutor candidly stated that he wanted to use the incident on cross-examination of defendant's expert witnesses, but did not believe that Toledo would be a "good" witness for him if called to testify (R. 4119-20).[76] Instead, his "testimony" was "presented" on cross-examination of defendant's expert witnesses, in violation of the *Hildwin* requirement of "direct evidence" and prohibition against introduction of mere criminal charges.

The matter first was raised on cross-examination of the first

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ahead and did not file because at that time he already had a first degree murder charge against him" (R. 3639-40), and that "the charge was dropped because he was violated on probation and . . . [w]e have an internal policy to that effect." (R. 4469). Toledo was neither listed nor called as a witness in the 1981 retrial: the state agreed in that proceeding that he would not be called after defendant moved to exclude his testimony regarding uncharged criminal acts (R2 58-65, 158; T2 1191-92). He was listed in the present proceedings several days before the resentencing hearing was to commence (S.R. 85).

Defendant's counsel moved to exclude Toledo's testimony prior to the hearing on the ground that evidence of uncharged criminal acts would be inadmissible; counsel advised the court that the incident at issue had been used in the 1978 probation-violation proceeding but had not been the basis of a criminal prosecution (R. 1174-84, 1349-50). The court initially expressed the view that the incident was "a prior act of misconduct which doesn't, per se, go to [defendant's] prison conduct" and was therefore inadmissible (R. 1403, 1467-69, 1486), but thereafter, explaining that counsel's statements regarding the probation violation had "[s]lipped by me" (R. 4109) and that it had been "under the impression that no court made a finding of this incident whatsoever" (R. 3642), ruled the testimony admissible (R. 3689-92, 4107-19, 4133-34), finding that the probation revocation gave "the state the right, because now the Court did see there was some credible evidence about this incident, to use it to see whether it factored into the expert's opinions." (R. 4461).

[76] After securing the ruling that the testimony would be admissible, see n.75, *supra*, the prosecutor announced his unwillingness to call Toledo, and the court, noting Toledo's false claim in a pretrial newspaper article that he had written to the trial judge "giving his side of the story" in the case and his statement in the same article that defendant should be executed because he "'has no remorse'" (R. 342; see R. 2519-21), observed that Toledo "does definitely have an expressed bias." (R. 4120). The prosecutor agreed: "Absolutely. He probably would not look good on cross-examination." *Ibid.* And, as defendant's counsel predicted (R. 4119, 4121), the state, after extensive cross-examination of defendant's witnesses on the incident, decided not to call Toledo to testify. See n.82, *infra*.

defense expert, Mr. McClendon, with the focus of the questioning on whether there had been court proceedings or a judicial finding on the verity of the detective's version of the incident (R. 4296-97, 4306-08), and whether defendant's probation had been revoked based upon this incident (R. 4488-89).[77] Thereafter, the incident and the probation-violation finding became the feature of Mr. Buckley's cross-examination (R. 4723-808).[78]

The prosecutor first sought to establish, as a matter of fact, that there had been a probation violation after Mr. Buckley mistakenly referred to a "parole violation." (R. 4668, 4723). On defen-

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[77] Despite being instructed by the court, pursuant to counsel's objections, to avoid mention of court findings, the prosecutor asked questions as to what had happened "in the judicial setting" and whether counsel had told the witness that "something had happened in court involving that case." (R. 4304, 4306-08). Renewed objections were overruled and counsel's motions for mistrial were denied (R. 4307-09, 4348). Thereafter, when defendant's counsel sought to mitigate the damage on redirect examination by eliciting from Mr. McClendon that the absence of a formal conviction was of significance in his evaluation because "corrections professionals look to criminal convictions" only (R. 4446-50), the court, on the state's objection, stated that counsel "should never have gotten into the area." (R. 4455). After a recess, the state listed Judge Morphonios, the original trial judge, as a potential prosecution witness to testify regarding the probation revocation (R. 4468, 4472; S.R. 165), and the court suggested to defendant's counsel that they "come up with a question that removes any type of factual credibility" to avoid having the state call the trial judge "to try to show the facts of that issue." (R. 4471-72). Ultimately, while the court permitted defendant to preserve his objections to the testimony (R. 4476), it was agreed upon by the court and parties that Mr. McClendon would testify on redirect examination that defendant's probation had been violated based upon the Toledo incident and that the charges had been abandoned by the state (R. 4476-81, 4488-89).

[78] The incident was touched upon in Mr. Buckley's direct examination (R. 4668-69); as counsel explained to the court, once it had been ruled admissible and brought out, in the first instance, on cross-examination, it was deemed necessary and prudent to mention it before the jury (R. 5199-200). Mr. Buckley testified on direct that he had reviewed the Toledo incident and that "after ten years on death row . . . and the records showing no violence, what happened 12 years ago really has very little [impact] because we know what he has been doing under these harsh circumstances . . . and there is no violence." (R. 4668). It was also significant to this witness that there had not been a conviction (R. 4668-69).

dant's objection, the court directed the prosecutor to pose the question hypothetically (R. 4723-25). Nonetheless, the prosecutor instead questioned Mr. Buckley as to when he had first learned of the Toledo incident,[79] and asked him to "relate to us what you know about" the incident (R. 4728-29). On defendant's further objection (R. 4730-31), the court acknowledged that the prosecutor's questioning "isn't what we discussed." (R. 4731). However, the court ruled that the prosecutor could ask questions regarding the facts of the incident and that it would give an appropriate instruction at a later time (R. 4735-37), and the prosecutor thereafter was permitted to elicit from Mr. Buckley lengthy testimony as to his understanding of the facts of the incident (R. 4743-48).[80]

Defendant thereafter sought to challenge the credibility of Toledo's version of the events, calling Robert DiGrazia, a former police chief and nationally-recognized expert in police procedures, to

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[79] As defendant's counsel pointed out, the state was thus able to take advantage of its late listing of the witness, see n.75, *supra* (R. 4730). Later on in the cross-examination, when the prosecutor was seeking to impeach Mr. Buckley with his failure to have read the probation-violation transcript (due to its having been received by counsel four days earlier, during a weekend session), counsel again pointed out that the state was securing an advantage from its untimely listing of the witness, and the court responded, "That's all together possible." (R. 4803, 4806). The prosecutor had the transcript of the probation-revocation hearing marked by the clerk as a possible exhibit, but did not seek its introduction (R. 4803).

[80] When counsel renewed their objections, the court ruled: "One more question, one more answer and that ends it." (R. 4748). Several more questions followed, and the prosecutor left the issue (R. 4748-50) -- but only temporarily: the Toledo incident was revisited later in Mr. Buckley's cross-examination, with the prosecutor directing the witness to "tak[e] Officer Toledo's deposition as true," and again reciting the purported facts (R. 4795). On counsel's renewed objection, the court ruled that the state had "a right to impeach" the witness on the incident, and overruled the objection (R. 4795-99). The prosecutor continued his questioning with a "hypothetical" question, in which the purported facts of the incident were set forth for a third time (R. 4807-08). The next two defense experts, Dr. Fisher and Evalyn Milledge, were also questioned on the incident (R. 4909-10, 5122-23), with the fact of the probation-revocation being the feature of Dr. Fisher's cross-examination (R. 4959-61).

establish that Toledo's version of the incident was of questionable veracity due to his own violation of police standards during the encounter (R. 5202-07).[81] At this point, the state announced that Toledo would not be called as a witness (R. 5189-212), and the prosecutor agreed that he would "ask one hypothet [sic] of [Mr. DiGrazia], one hypothet [sic] of any succeeding expert witness," and not seek to develop the incident any further (R. 5224-27).[82] Even this agreement, however, was left behind by the prosecutor when he resumed his cross-examination, in which he once again treated the Toledo incident as true (R. 5244-47).[83] And the state continued in this vein in its

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[81] Mr. DiGrazia was one of the witnesses excluded by the trial court in 1981 (T2 1505-11, 1569-72; R2 1059-1115). He began his law enforcement career as a patrolman in 1959, rising to the rank of chief of police in a small California police department in 1964, and from there to superintendent of police in St. Louis County, Missouri, in 1969 (R. 5171-72), followed by service as Boston police commissioner from 1972 to 1976, and as director of police in Montgomery County, Maryland, from 1976 to 1978 (R. 5172-73). He has testified as an expert witness 125-30 times, has served as a consultant for the federal government and local police agencies on many occasions (R. 5175-78), and was accepted by the state as an expert in police procedures (R. 5182, 5186-87). Mr. DiGrazia, in the course of reviewing the newly-provided materials on the Toledo incident, reached conclusions regarding Toledo's disregard of proper police procedures during the incident, as to which he was called to testify (R. 5202-03, 5206-07).

[82] The state objected to Mr. DiGrazia's testimony at the outset, advising the court that a decision had not been made as to whether Toledo would be called (R. 5189-90, 5197), but arguing that "we are not trying the Toledo incident." (R. 5202). The prosecutor thereafter stated that, if Mr. DiGrazia did not testify to "the veracity of that incident . . . there isn't a chance in the world Officer Toledo will [be] . . . called as a witness by the state." (R. 5212). The agreement to which reference is made in the text was then reached, with the understanding that defendant's objections to the Toledo incident being raised in the first instance would continue to be preserved (R. 5224-27). The prosecutor later mentioned Toledo, during a discussion of the state's rebuttal case, noting that the prosecution "[w]asn't going to call him anyway." (R. 5509). See n.76, *supra*.

[83] The prosecutor first, as agreed, asked a hypothetical question, to which the witness responded (R. 5244-45). He then asked:

> Over here we have a person who is about to get a traffic ticket. Attempts to flee once. Then attempts to flee a second time. It is the of-

(Cont'd)

cross-examination of Dr. Toomer, in which, despite numerous court admonitions to ask only hypothetical questions, the prosecutor continued to treat the incident as true (R. 5379-81, 5403-04).[84]

Finally, the state's use of the Toledo incident on direct examination of Mr. Key, its rebuttal witness, proves both the prosecutors' improper intent and the prejudice to defendant from their tactics. As previously noted, the state's purported justification for raising the Toledo incident in the first instance was solely to impeach defendant's witnesses, and the agreement reached during Mr. DiGrazia's testimony expressly so limited the state's use of the incident (R. 4460-62, 4798, 5198, 5212-27). That such were not its intentions be-

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> ficer's belief that in the second attempt he tries to run the police officer over. In the middle, we have the Officer Pena incident in which the defendant, because he did not want to go back to jail on what are nominally not major offenses . . ., and we have the third episode involving the attempted escape, are you now telling me that based upon his actions in the first episode with Toledo, the second episode with Pena which actually killed a police officer and shot a second police officer, that had he been able to escape he would not have committed a further act of violence?

(R. 5246). On counsel's objection, the court found that the prosecutor was "going past what we agreed on." (R. 5247).

[84] All pretense was abandoned during this cross-examination:

> Q. Were you aware in the Toledo episode his license was taken by that officer?
> Ms. Georgi: Objection, Your Honor.
> Mr. Laeser: Seeing if it refreshes his recollection.
> The Court: Hypothetical.
> BY MR. LAESER:
> Q. In the alleged Toledo incident, in the hypothetical Toledo incident, that his hypothetical license was taken by --
> The Court [to defense counsel]: Have a seat.
> Ask the question in a hypothet.

(R. 5403-04).

came clear when this question was asked of Mr. Key on direct:

> [B]ased upon the history of the defendant and his criminal background and including the murder of Officer Pena and the episode involving Officer Toledo, what type of inmate do you think the defendant would be in general population serving a life sentence?

(R. 5655).[85]

This misuse of the probation-violation case violated both of the requirements set forth by this Court in *Hildwin* for the introduction of uncharged acts of misconduct: the incident was not proved by "direct evidence," and, despite the absence of a conviction, the state was permitted to prove "criminal charges," *i.e.*, the probation revocation, arising from the incident. *Hildwin v. State*, 531 So.2d at 128. Without subjecting an admittedly-biased witness to the rigors of cross-examination, without attempting substantively to prove the incident at all, the state was permitted, in the specious guise of impeachment, repeatedly to bring this incident before the jury as the major challenge to defendant's mitigation case.[86] The risk that the

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[85] Defendant's objections to this use of the incident, which continued throughout Mr. Key's testimony, were overruled (R. 5655-58). Over objections, the prosecutors also treated the incident as true in closing arguments (R. 5897-98, 5920, 6022, 6043, 6048).

[86] The only action taken by the trial court was in its final instructions to the jury, after repeatedly refusing to take any steps to mitigate the prejudicial effect of the testimony during the defense case (R. 4304, 4310-13, 4456, 4726) -- at a time when curative instructions might have had some beneficial effect. *E.g., Ferguson v. State*, 417 So.2d 639, 641-42 (Fla. 1982)(curative instruction should be requested and given at time of alleged error). The court told the jury in its final charge that: "[a]ny matters which were related in the course of asking . . . hypothetical questions cannot be taken by you as true unless they were proven by independent evidence" (R. 876, 6002), that "[e]vidence which [was] presented to rebut or contradict mitigation offered by the defendant may not be considered by you as an aggravating circumstance," and that the Toledo incident, "which did not result in a conviction, among other things that have been argued to you as rebuttal, cannot be considered as [an] aggravating circumstance[]." (R. 873, 6000). To the extent that these instructions could have had any efficacy, they did not address the primary illegality, *i.e.*, the absence of direct proof and the introduction of the probation violation.

jury could have bottomed its rejection of some or all of that case upon this incident is palpable, and reversible error accordingly has been demonstrated.

4. Unlawful Aggravating Circumstances in the Guise of Cross-Examination and Rebuttal.

a. parole

Defendant is serving 50 years of imprisonment, in addition to the death sentence imposed in this case, and has been serving that term of imprisonment since his initial conviction in 1978 (R. 858; R2 1057; R1 334, 337).[87] Nonetheless, the state took the position at the resentencing hearing that, if the court were to impose a life sentence with the 25 calendar-year minimum-mandatory term required by Florida law, § 775.082(1), Fla.Stat. (1987), defendant would be eligible for parole "some 15 years and several months from now," and sought to question defendant's witnesses on this subject, over counsel's objections (R. 4678-85).[88] The court, finding that the state

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[87] Forty years of imprisonment were imposed on the other counts in this case, and defendant is also serving 10 years of imprisonment on the probation revocation discussed earlier. *Ibid.* All sentences are consecutive to each other and to the death sentence. *Ibid.*

[88] The lead prosecutor, Mr. Laeser, represented to the court that "[t]wenty-five years, six months from the day he is a sentenced prisoner, he is eligible for parole," and the second prosecutor, Mr. Rosenbaum, stated that "[t]he parole commission told us that." (R. 4682, 4686, 4690). Defendant's counsel challenged this representation, pointing out to the court that defendant had been serving his 50-year sentence for the previous 10 years, and would not be credited twice with the same time (R. 4688-89). When counsel asked for the source of the state's information, Mr. Laeser refused "to be cross-examined," and the court declined to "order[] the state to divulge their source on the information." (R. 4694-95). Following a recess, Mr. Laeser proffered that he had had a conversation with a parole commissioner, who "is of the opinion and would testify as an expert and member of the parole commission that this defendant under these circumstances would be eligible for parole on the fifth of April of the year 2,003, 25 years and one day after incarceration." (R. 4700-01). The court, declining to order the state to produce the commissioner as a witness (R. 4703), ruled the proposed cross-examination proper, as will be set forth above.

was correct and that the "[m]inimum mandatory he has left is 15 [years]" if a life sentence was imposed (R. 4691), ruled that "the state has a right to ask [the witness] that hypothetical anyway to test the validity of his opinion, whether factually it ends up being true or not." (R. 4704).[89] Two of defendant's expert witnesses, Mr. Buckley and Dr. Fisher, were thereafter cross-examined with "hypothetical" questions regarding defendant's eligibility for parole 15 years from the date that a possible life sentence would be imposed in the case (R. 4710-11, 4945-53).[90]

The first constitutional problem arising from the injection of possible parole into the trial of this case was the patent inaccuracy of the proffered basis for the prosecutors' cross-examination of the witnesses. As defense counsel explained to the trial court, defendant had served 10 of the 50 years of imprisonment imposed upon him in connection with this case, and could not be credited *twice* with

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[89] The court also stated that it would "later on instruct them as to what will be the state of the law in terms of the sentence, once I actually can figure it out." *Ibid.* When defendant's counsel thereafter requested the court to include in its final charge an instruction that it had discretion to "start the twenty-five year period on the date of sentencing, and not the 1978 date of arrest and original incarceration" (R. 855), the court refused (R. 5805-10).

[90] The issue had first arisen, with regard to Mr. Buckley, after he testified on cross-examination that "lifers" in prison are "going to be there forever" and are good prisoners who "don't want any problems" or disturbances; he described them as "the backbone of long-term institutions." (R. 4678). After the court ruled the testimony admissible, as set forth *supra*, the prosecutor asked whether defendant's "hypothetical" parole eligibility in 15 years would "change [his] opinion," and he answered that it would not (R. 4710-11). However, the state's intentions became clearer when Dr. Fisher was questioned on this issue: he gave no testimony on direct examination regarding "lifers" and no opinion as to defendant's potential behavior outside of prison (R. 4888-912), but the court permitted the state, over defendant's objection, to question him regarding defendant's likely behavior if he was released from prison (R. 4945-51). Dr. Fisher, stating that he could not give an opinion "with the same sort of professionalism" as he could in predicting defendant's behavior in prison, testified that defendant would not be a "safe bet" if released in the near future (R. 4952-53).

the same time served in state prison on a hitherto-unimposed life term (R. 4689, 4701, 5805). §§ 921.161(1) ("[a] sentence of imprisonment shall not begin to run before the date it is imposed," except that defendant must be allowed "credit for all of the time he spent in the *county jail* before sentence"), 947.16(2)(g)("mandatory minimum portion of a concurrent sentence will begin on the date the sentence begins to run as provided in [§] 921.161" and "mandatory minimum portions of consecutive sentences shall be served at the beginning of the maximum sentence," but "in no case shall a sentence begin to run before the date of imposition"), Fla.Stat. (1987). Thus, defendant would not even be interviewed for a parole determination until six months before the expiration of the 25-year minimum-mandatory term, Ch. 23-21.006(4)(a), Fla.Admin. Code ("[i]nmates serving life sentences for capital crimes with twenty-five year minimum-mandatory sentences will be interviewed within the last six months before the expiration of the mandatory portion of the sentence"), and it was wrong of the prosecutor to suggest otherwise. *See Rhodes v. State*, 547 So.2d 1201, 1206 (Fla. 1989)(error for prosecutor to suggest that capital defendant "might be paroled before he had served his twenty-five year minimum mandatory term if the jury recommended life imprisonment" because it was "a misstatement of the law"). "[T]he constitution is violated if the jury receives *erroneous* information" in a capital sentencing, *Banda v. State*, 536 So.2d 221, 224 (Fla. 1988) (original emphasis), and providing a jury with inaccurate information as to parole eligibility violates the Eighth Amendment. *See California v. Ramos*, 463 U.S. 992, 1004-09 (1983).

Moreover, regardless of the accuracy of the "facts" upon which the state based its questioning, the possibility of parole is "an improper consideration" in a capital case. *Norris v. State*, 429 So.2d

688, 690 (Fla. 1983); *accord, Teffeteller v. State,* 439 So.2d 840, 844-45 (Fla. 1983), *cert. denied,* 465 U.S. 1074 (1984); *Miller v. State,* 373 So.2d 882 (Fla. 1979). And this Court flatly has ruled that the number of years to be served by a life-sentenced capital defendant prior to parole eligibility is an inappropriate subject of expert testimony in a sentencing proceeding. *King v. State,* No. 73,360 (Fla. Jan. 4, 1990)(testimony offered by defense to show no parole eligibility for 25 years held irrelevant).[91]

And there can be no doubt that the state's efforts to have the jurors consider defendant's possible release on parole succeeded: as is set forth in defendant's post-trial motions, an unsolicited statement from one of the jurors in the case, after return of the advisory verdict, established that the jury's final vote of 8-4 for death had been influenced by the argument that defendant "would be paroled if

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[91]Even if the state could have justified the questioning of defendant's expert witnesses as a legitimate effort at impeachment, there was no excuse for this closing remark of the prosecutor:

> Dr. Fisher has lots of credentials, he knows a lot about corrections, when asked by Mr. Rosenbaum on cross-examination what about if the defendant got out in general population or got out on parole, his words were: He would not be a safe bet. That's their own expert.

(R. 5900). As this Court has held, "[t]here is no place in our system of jurisprudence for this argument," which was "patently and obviously made for the purpose of influencing the jury to recommend the death penalty" for fear that otherwise "the defendant, in due course, will be released from prison and will kill again." *Teffeteller v. State,* 439 So.2d at 845. However, the only curative action taken by the trial court was its grant of defendant's request to instruct the jury that "possible eligibility for parole cannot be considered . . . as a reason for imposing a death sentence." (R. 874, 6000). This mild admonition did not in any way ensure that the subject of parole would not be considered at all, and, as set forth *infra,* the record shows that the subject very much was considered by the jury.

given a life sentence." (R. 884-89).[92] The prejudice to defendant from the prosecutorial misconduct is thus established beyond any question.

b. lack of remorse

Defendant's pretrial request to exclude evidence of his purported lack of remorse was denied by the trial court on the theory that such was admissible to impeach expected testimony from defendant's witnesses (R. 1231-40, 1366-70, 1404-10, 3965-67),[93] and the lead

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[92] The issue was raised in a petition for writ of error *coram nobis*/motion for new hearing (R. 884-88), supported by an affidavit of one of defendant's counsel, who had received a telephone call from the juror, Ms. Gilbert, after the trial (R. 889-90). The affidavit stated, in pertinent part, that, after an initial 7-5 vote for a death sentence and a request for a second vote, "there were subsequent discussions among the jurors, during which other jurors, in urging a death recommendation, argued that Mr. Valle would be paroled if given a life sentence." (R. 889). Thus, the jury actually considered the forbidden subject of parole, in violation of Florida law, *e.g., Norris v. State*, 429 So.2d at 690 (parole is "an improper consideration by judge or jury")(citation omitted), and did so without reliable information upon which to base any conclusion as to when defendant would be eligible for parole, or when he might actually be paroled; its consideration of this unproven possibility violated the Eighth Amendment requirement of reliability in capital sentencing. *See California v. Ramos*, 463 U.S. at 1004-09. "[W]here jurors consider matters *not* in evidence to the prejudice of a defendant, a new trial is mandated." *Nelson v. State*, 362 So.2d 1017, 1020 (Fla. 3d DCA 1978)(original emphasis; citation omitted); *accord, e.g., Russ v. State*, 95 So.2d 594, 600-01 (Fla. 1957)

Moreover, the juror's affidavit further states that other jurors had argued, in support of death, that "if a death recommendation was returned, the judge might reject it and impose a sentence of life imprisonment." (R. 889). The jury's dimunition of the importance of its recommendation violates both Florida and federal constitutional law: a jury recommendation must be given "great weight and serious consideration" in the imposition of sentence, *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975); *see Spaziano v. Florida*, 468 U.S. 447 (1984), and where, as here, a jury's recommendation is influenced by a belief that the ultimate responsibility lies elsewhere, *e.g.*, with the trial judge, the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), requires the conclusion that the recommendation is invalid under the Eighth and Fourteenth Amendments. *See Mann v. Dugger*, 844 F.2d 1446, 1451-55 (11th Cir. 1988)(en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1353 (1989).

[93] Defendant's pretrial motion *in limine* sought to prohibit the state from eliciting this evidence (R. 130-31). The state responded that it would present evidence of lack of remorse to rebut expected testimony from a defense witness that defendant felt remorse for his (Cont'd)

detective was permitted to testify as follows in the state's case-in-chief:

> Q. Mr. Wolfe, during your conversation with the defendant on April 4th of 1978, did he ever express any remorse for killing Officer Pena?
> A. No, sir, not to me.
> Q. Was he ever upset about what he did?
> A. No, sir.
> Q. Was he ever upset when you talked to him that day about what he did in Coral Gables?
> A. No, sir.

(R. 4068-69).

A purported lack of remorse is inadmissible in capital sentencing proceedings in Florida. *Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1984). However, this Court has held that "lack-of-remorse evidence" can be presented "to rebut nonstatutory mitigating evidence of remorse presented by a defendant." *Walton v. State*, 547 So.2d 622, 625 (Fla. 1989)(citation omitted). That is what the state persuaded the trial court it would do in this case -- but, as the the record shows -- the state had very different intentions.

This is shown, in the first instance, by the complete absence of any cross-examination of defendant's witnesses regarding defendant's purported failure to show remorse in the interrogation by Detective Wolfe. Indeed, Mr. McClendon, defendant's first expert witness, testified on direct examination that defendant had expressed his "very deep concern over the family and friends of that victim and how they had go through life from that point on" (R. 4203), and the subject was not touched on cross-examination. Mr. Buckley gave similar testimony (R. 4597), but was not cross-examined with regard to Detective

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acts (R. 156, 1232). Defendant's counsel objected, proffering to the court that the state's evidence would be defendant's silence (R. 1232-36, 1408-09). The court ruled the testimony permissible, both on direct examination of the interrogating detective, Wolfe, and on cross-examination of defendant's witnesses (R. 1370, 1404, 3966). Defendant was permitted to preserve his pretrial objections for review without further litigation during the trial-in-chief (R. 3867).

Wolfe's version of the events; instead, as pointed out earlier, see p.26 & n.34, *supra*, the state focused on defendant's alleged silence since the 1981 trial (R. 4856), and the prosecutor made this one of the main themes of his closing argument:

> Mr. Buckley says, "In 1981, I asked the defendant if he felt remorse for the victim's family." He said, "Yes." Is that how we prove remorse? It's been ten years now. Have we seen any evidence of remorse? Was there a letter? Was there a phone call? Was there a word spoken saying I'm sorry for the terrible things I did? Was there a sound uttered by the defendant?

(R. 5882).

As this Court noted in *Pope*,

> [R]emorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us -- inferring lack of remorse from the exercise of constitutional rights. . . . .

Pope v. State, 441 So.2d at 1078. That is precisely what the state urged the jury to do in this case -- to infer the alleged untruth of defendant's expressions of remorse from his silence prior to trial, at a time when his right of silence was protected by the Fifth Amendment and the Florida Constitution. *E.g., Doyle v. Ohio*, 426 U.S. 610, 617-20 (1976); *Garron v. State*, 528 So.2d 353, 357 (Fla. 1988);

And the state completely abandoned any pretense of a proper use of such evidence in the prosecutor's final remarks to the jury:

> He's got ice water in his veins. Almost like, you know, all in a day's work. Keep myself out of jail. Kill two officers, walk back to my car and go home. *No remorse*, no concerns.

(R. 5930).[94/] This was nothing less than a naked attempt to have the jury consider defendant's purported lack of remorse in support of an

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[94/] Defendant's objections to this remark and the earlier quoted comment were overruled by the trial court (R. 6042, 6048).

aggravating circumstance, in blatant violation of this Court's precedent, and the court's failure to take corrective action, see n.93, *supra*, constitutes reversible error. *Hill v. State*, 549 So.2d 179, 184 (Fla. 1989).[95]

D. Unfair And Prejudicial Denigration Of Statutory And Nonstatutory Mitigating Circumstances

1. Unfair and Prejudicial Cross-Examination to Challenge Defendant's Mental-Status Mitigating Evidence.

Dr. Toomer, a qualified psychologist,[96] was called as a defense witness in the hearing below to testify to defendant's diminished mental capacity at the time of the offense (R. 5315-27).[97] This

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[95] *Hill* presented the same situation as this case: the prosecutor, arguing an aggravating circumstance, § 921.141(5)(i), Fla.Stat. (1987), stated before the jury, in response to a defense objection, that he was "arguing . . . a lack of emotion, or lack of remorse in regard to the death" of the victim, and that this Court had held such was proper. *Id.* at 183-84. This Court held that "[t]he prosecutor's use of 'lack of remorse' as a synonym for 'lack of emotion'" had been improper, and that the mention of this Court, combined with the trial court having overruled the defendant's objection, "could have left the jury with the belief it could consider lack of remorse as a proper aggravating factor." *Id.* at 184. Rejecting the state's harmless-error argument, this Court held that, since it could not "rule out the possibility that the jury's advisory recommendation was improperly influenced by the exchange," a resentencing trial was required. *Ibid.* Here, where there exists the additional factor of direct testimony to defendant's purported lack of remorse, and no corrective or limiting instructions by the trial court, at least the same possibility of improper influence exists.

[96] Dr. Toomer, has an extensive academic background, and is a professor at Florida International University, where he directs a graduate training program in psychotherapy, and he often has testified as an expert witness (R. 5295-99). This Court has had occasion to note Dr. Toomer's qualifications and to rely upon his expertise. *Hall v. State*, 541 So.2d 1125, 1127-28 (Fla. 1989).

[97] Dr. Toomer spent between 20 and 30 hours evaluating defendant, interviewed his family members and reviewed records of the case (R. 5316-18, 5326-27), and concluded that there had been a "tremendous degree of dysfunction" in defendant's family, including a "significant history of abuse . . . and very rigid expectations" on the part of defendant's father (R. 5319). These factors were further established at trial through the testimony of defendant's father and sister, and the evaluation of Evalyn Milledge, a forensic social worker, as set forth in subpoint D(2), *infra*. Dr. Toomer testified that the "traumatic nature of early experiences" in childhood influences a (Cont'd)

witness was subjected to unfair and prejudicial cross-examination, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, *i.e.*, to personal attacks and to extensive questioning regarding the irrelevant question of defendant's legal sanity, and any opportunity to have his testimony fairly considered by the jury and trial judge was wholly eviscerated.

a. unfounded character attack

First, taking advantage of an error in the 1981 trial transcript,[98] the prosecutor questioned Dr. Toomer as follows in *voir dire* on the question of qualifications:

> Mr. Laeser: Doctor, in the past have you ever made a claim whether on purpose or accidentally that you were a psychiatrist?
> The Witness: I have never indicated that.
> Mr. Laeser: That in fact is not true, you are not in fact a psychiatrist.

(R. 5302). Defendant's counsel objected, explaining that there had been an error in the transcript, and the court, recognizing that Dr. Toomer would not have held himself out as a psychiatrist (R. 5303, 5305), ruled that it would be "ridiculous" to permit further ques-

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person's later life, in that "[w]e may think we are . . . making certain choices because of certain conscious reasons but in reality we are making those choices and those decisions sometimes to our own detriment based on certain unconscious reasons, the links to the past which we may have forgotten over time or suppressed over time." (R. 5316). He concluded that defendant's actions at the time of the homicide were "the result of the culmination of a variety of severe traumatic events . . . that came together to influence his behavior" (R. 5318-19), and that the shooting was "a single event" in defendant's life, *i.e.*, one which was not "indicative of past or future behavior or representative of any kind of trend towards engaging in antisocial, violent acting-out behavior." (R. 5326).

[98] The court reporter in the 1981 proceedings used the words "psychology" and "psychiatry," as well as "psychologist" and "psychiatrist," interchangeably (T2 1220-22, 1229, 1241, 1247, 1260-61). Present counsel sought to have this portion of the record corrected in proceedings before the trial court; the state resisted his motion to relinquish jurisdiction, and this Court denied the motion.

tioning on the subject (R. 5306).[99]

However, the court refused to take any curative action (R. 5306-07), and thereby committed error.[100] First, it is fundamental that, under the provisions of Section 90.609, Florida Statutes (1987), a witness may not be impeached with "general acts of misconduct" but only by "reputation evidence referring to the character relating to truthfulness." *Jackson v. State*, 545 So.2d 260, 264 (Fla. 1989); *accord, Fulton v. State*, 335 So.2d 280, 284 (Fla. 1976). Fraudulently holding oneself out as a medical doctor is a crime, § 458.327(1)(a), Fla.Stat. (1987), and, absent a conviction, a defense witness cannot be cross-examined regarding alleged criminal activities. *Fulton v. State*, 335 So.2d at 284.

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[99] The prosecutor responded to counsel's explanation of the error by arguing that "[i]f he made a previous claim he's a psychiatrist and in fact it's not accurate, I'm allowed to explore his credentials in that fashion." (R. 5302). Defendant's counsel then inquired of the court, and the trial judge -- who personally knew Dr. Toomer -- acknowledged that he had never heard of the witness holding himself out as a psychiatrist and did not believe that Dr. Toomer had ever done so (R. 5303-05).

[100] Defendant's counsel asked the court to "clear it up for us," to eliminate from the jurors' minds any inference that Dr. Toomer may have misrepresented his background at some point (R. 5306-07). The court, ruling that it could not "comment on Dr. Toomer's credibility," refused to do so. *Ibid.* Thereafter, when counsel properly sought to dispel the cloud left by the questioning, asking Dr. Toomer about the court reporter's mistake, and eliciting the witness' testimony that he had found the error in the transcript and had "explained that to Mr. Laeser when I was deposed that it was an error that was made by the court reporter" (R. 5309-10), see n.102, *infra*, the court ruled that further questioning by the prosecutor would be permitted. *Ibid.* Of course, the court having refused to take any corrective action regarding the questioning by the prosecutor, defendant's counsel was entitled, without being on pain of waiver, to attempt to mitigate the harm already done. *Louette v. State*, 152 Fla. 495, 12 So.2d 168, 174 (1943); *Stripling v. State*, 349 So.2d 187, 193 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1220 (Fla. 1978).

However, in this case, that attempt led to the state being allowed to seek further advantage from the typographical error in the transcript: the prosecutor several times again questioned Dr. Toomer on whether he had held himself out as a psychiatrist in the 1981 proceedings (R. 5113, 5417). Defendant's renewed objections were overruled by the court (R. 5427-28).

But more fundamentally, the complete absence of a good-faith basis for the questioning establishes the court's error. *Zant v. Stephens*, 462 U.S. at 887 (Eighth Amendment requires prosecution to produce accurate and reliable information in support of death sentence); *Rhodes v. State*, 547 So.2d at 1205 (prosecution required to show good-faith basis for cross-examination regarding defendant's specific acts of misconduct). And, when the state utterly failed to introduce any evidence to support its insinuations that Dr. Toomer had engaged in misconduct,[101] the court committed reversible error in overruling defendant's renewed objections (R. 5427-28). *Marrero v. State*, 478 So.2d 1155, 1157-58 (Fla. 3d DCA 1985).

b. use of insanity standard

Over defendant's objections (R. 150, 1304-05), the court ruled pretrial that the state would be allowed to use the standard for legal insanity on cross-examination of Dr. Toomer to "show what level of mental condition the defendant is actually at." (R. 1308-09). Prior to Dr. Toomer's cross-examination, when the issue was relitigated,[102] the court adhered to its pretrial ruling, stating that it would permit cross-examination regarding legal insanity "in terms of

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[101] All but conceding that defendant could establish the error in the transcript (R. 5304), the state never even attempted to move the transcript into evidence.

[102] Through a series of apparent misunderstandings on both sides, Dr. Toomer, who had been deposed prior to defendant's 1981 trial (coincidentally, by the lead prosecutor in the resentencing, who otherwise not been involved in that trial), was deposed for a second time during the resentencing proceedings (R. 3008-22, 3841-44), and it was at that time realized that the witness had given defendant's counsel a written report at the conclusion of the 1981 proceedings (R. 5074). Defense counsel provided a copy of the report, which included a diagnosis that defendant had been legally insane at the time of the crime (R. 697-702), to the state during the proceedings below (R. 5070, 5074). The state then announced that it would question Dr. Toomer, using the report, to "denigrate . . . the degree to which the jury will give his opinion credit." (R. 5332-33).

trying to impeach Dr. Toomer's opinion." (R. 5334).[103]

The statutory mental-status mitigating factors, § 921.141(6)(b) and (f), Fla.Stat. (1987), are applicable to "[m]ental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong," and to disturbed mental states which are "less than insanity." *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). *It is error, in violation of Lockett v. Ohio*, 438 U.S. 586 (1978), to urge rejection of mental-status mitigation because a defendant is deemed legally sane. *Mines v. State*, 390 So.2d 332, 335 (Fla. 1980).

While the prosecution's injection of insanity into the proceedings (R. 5352-55)[104] was therefore improper and violative of *Lockett*, the truly diabolical use of that impermissible factor occurred in closing argument. The prosecutor, going beyond even the use of insanity which the trial court had allowed, used his cross-examination of Dr. Toomer as a springboard for arguing that *defense counsel* did not believe their own witness, and that the jury therefore should disregard him also:

> Psychological evidence was presented to you, and here's an important issue about that[.] [I]n 1981[,] Dr. Toomer thought the defendant was in-

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[103] The court permitted defendant to preserve his objections to this questioning without the necessity of renewal at each stage of the cross-examination (R. 5334-36).

[104] After the court ruled the cross-examination permissible, the prosecutor questioned Dr. Toomer at some length regarding his opinion that defendant had been legally sane. *Ibid.* Indeed, Mr. Laeser even drew a chart, highlighting insanity vis-a-vis the statutory mitigating circumstances, during the cross-examination (R. 5351), a drawing of which was made by the court and included in the record (R. 354, 5437). As the questioning commenced, the court told the jury that "the question of legal sanity has never been and is not now an issue in this case," and that it would later instruct "on the mitigating factors to which you can apply this and other testimony." (R. 5353). At the conclusion of Dr. Toomer's cross-examination, when counsel renewed their objections and unsuccessfully moved for a mistrial (R. 5435-36), the court repeated that instruction (R. 5441).

> sane when he committed this crime. The reason that's important is I think you will figure out very quickly, that *nobody ever believed that, not even the attorneys for the defendant*. In fact, the Judge will tell you in his instructions insanity is not now nor has it ever been an issue in the case.
>
> Now, if nobody believed his 1981 opinion, I'm going to tell you that that is exactly the value of his 1988 opinion. If he thought the defendant was insane and it was never presented as evidence and the Court will tell you that it's not an issue in this cause, *does it have any validity when your own lawyers don't buy it from your own expert*. . . .

(R. 5904).[105/]

As this Court flatly has held, "the state attorney is prohibited from commenting on matters unsupported by the evidence produced at trial." *Huff v. State*, 437 So.2d 1087, 1090 (Fla. 1983). It is well recognized that a prosecutor may not argue his or her own opinion as to the credibility of witnesses. *E.g., Bass v. State*, 547 So.2d 680, 681-82 (Fla. 1st DCA 1989); *Huff v. State*, 544 So.2d 1143, 1144 (Fla. 4th DCA 1989).[106/] "An attorney's personal opinion is irrelevant to

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[105/] On defendant's objections, the court found the remark regarding counsel to be "an inappropriate comment," but concluded that, "[i]f it's error, it's certainly not reversible error." (R. 6037-39).

[106/] Indeed, it is perhaps even more insidious for a prosecutor's opinion to be presented in the guise of a suggestion that *defense counsel* does not believe his or her witness, since such comment has the double-barreled effect of impugning counsel's honesty, as well as unfairly impeaching the witness' credibility. *E.g., Estep v. State*, 129 Ga.App. 909, 201 S.E.2d 809, 814 (1973)("As it is improper for a district attorney to urge his personal belief . . ., it is similarly wrong . . . to comment that opposing counsel . . . knows his client's case is not meritorious")(citation omitted); *People v. Monroe*, 66 Ill.2d 317, 362 N.E.2d 295, 297 (1977)(prosecutor's argument that he did not believe defense at trial because defense counsel "'doesn't believe it himself'" held reversible error); *State v. Reilly*, 446 A.2d 1125, 1128 (Me. 1982)(comment that defense counsel knew defendant "was a liar" held reversible error as "particularly damaging inasmuch as the jury would presume that defense counsel were in a position to know the true facts of the case"); *People v. Hall*, 138 A.D.2d 404, 525 N.Y.S.2d 687, 688 (1988)(comments of prosecutor "which clearly suggest that counsel does not believe his own client's testimony" create a "substantial and unfair risk of prejudice"; remark that defense counsel did not discuss testimony in closing because it was "'a lie'" held reversible error); *Commonwealth v.* (Cont'd)

the task of a sentencing jury" in a capital case. *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985)(en banc), *cert. denied*, 478 U.S. 1020 (1986). Here, the prosecutor succeeded in bringing such "personal opinion" before the jury as a very powerful -- albeit utterly-improper and constitutionally-prohibited -- challenge to a key defense witness.

2. Limitation on Mitigation to Defenses to Crime.

As previously discussed, there were two basic components to defendant's mitigation case: (1) his potential for a favorable adjustment in prison,[107] and (2) his mental status at the time of the offense.[108] At the resentencing hearing, the state made every effort

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Joyner, 469 Pa. 333, 365 A.2d 1233, 1236 (1976)(remark that "'counsel does not believe his own defendant'" held prejudicial).

[107] The testimony of defendant's witnesses on this component of his case are summarized in Point III(C), *supra*.

[108] Dr. Toomer, whose testimony has been discussed in the preceding subpoint, see n.97, *supra*, was one of two expert witnesses called by defendant on this component of his mitigation case. The other was Evalyn Milledge, a social worker of longstanding experience in the Dade County courts and the present coordinator of the circuit court's domestic violence protection unit (R. 4996-5011). Ms. Milledge evaluated defendant and his family, and found that defendant and his sisters had been raised in "a very controlled environment and frequently a punitive environment," were subjected to "harsh beatings" and other cruel discipline by their father during early childhood, and were denied nurturing support by both parents throughout their youth and adolescence (R. 5019-24). She testified that physical abuse and emotional deprivation early in life led defendant to "self-destructive" behavior, *e.g.*, compulsive gambling and criminal activities, as a young adult (R. 5081-89, 5133), leading up to the homicide in this case (R. 5089). Defendant's twin sister, Georgina Martinez, testified that, as young children in Cuba, they were beaten with a "wide leather belt," and that their father "would hit with that and he would hit and hit and hit . . . ." (R. 5450-51). She also testified that, as further punishments, their father would make them study all night and would beat them with the belt if they slept, or force them to kneel on kernels of dried corn on a ceramic floor, beating them if they leaned back (R. 5454-55). Georgina testified that there had been no exchanges of affection with their father, and that, later in defendant's life, the father had remained demanding and emotionally detached from defendant (R. 5457-62). Defendant's father testified and confessed to his abuse of defendant (R. 5471-74). He explained that "[i]t's the way that I learned from my parents," and "that's the way we did it" in Cuba at that time (R. 5471, 5474).

to convince the jury and court that these were not matters which should be taken into account as mitigation and that the only possible mitigatory considerations would be legal defenses for the crime. This violated the Eighth Amendment and constitutes reversible error.

The rule of *Lockett v. Ohio* and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), recently has been reaffirmed by the Supreme Court of the United States in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2954 (1989):

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Id. at 2947 (citation omitted). To be sure, the jury "may determine the weight to be given relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. at 114-15, but it first must be free "to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Penry v. Lynaugh*, 109 S.Ct. at 2951.

The state's efforts to prevent this began in jury selection. The prosecutor, in the course of discussing mitigating circumstances, gave two examples -- an elderly person who commits a "mercy killing" of a dying spouse and a very young person who commits felony murder (R. 2670) -- and then stated:

> Mitigating [circumstances] are those things which show that *the defendant had an excusable reason possibly for committing that murder*; young age, under mental distress, was involved with the vic-

> tim in committing a crime, let's say, or was under the [duress] of another person.

(R. 2673).[109] On defendant's objection,[110] the court instructed the prospective jurors that they would "get a list later on of . . . mitigating factors but you also need to know a mitigating factor does not have to go just to an excuse for the crime but also goes to the character of the defendant or anything else that you as a juror believe[] is a relevant mitigating factor." (R. 2675-76).[111]

However, when the prosecutor repeated this limitative view of mitigation in opening argument (R. 3734), the court overruled counsel's objections (R. 3734-35). And, during the cross-examination of Mr. McClendon, when the prosecutor sought to denigrate potential prison adjustment as mitigation,[112] the court overruled counsel's

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[109] The prosecutor revisited these examples in his closing argument, and implicitly told the jury that a determination had been made, in the decision to seek a death sentence, that the homicide in this case was "worse," *i.e.*, more deserving of death, than his examples (R. 5923-24). Defendant's objections to these remarks were overruled (R. 6043-44, 6048), and improperly so: this Court years ago condemned prosecutorial reliance in jury arguments on the decision to seek a death sentence in a given case, *Pait v. State*, 112 So.2d 380, 384-85 (Fla. 1959), and, more recently, such have been held to be constitutional error. *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985) (en banc)("it is wrong for the prosecutor to undermine [the jury's] discretion by implying that he . . . has already made the careful decision required" because "[t]his kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint"), *remanded on other grounds*, 478 U.S. 1016 (1986), *adhered to on remand*, 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

[110] Counsel objected and, at sidebar, requested the court to instruct the jury that "mitigating circumstances are not limited to excuses for the crime." (R. 2673). The court ruled that it would tell the prospective jurors that there is a "list of aggravating and mitigating, but then mitigating factors are also anything else that they believe would be mitigating in this case" (R. 2673-74).

[111] Thereafter, and with the court's permission, the prosecutor stated to prospective jurors, in discussing mitigation, that "mere sympathy should not play a part in your verdict." (R. 3416; see R. 3190-99). This aspect of the prosecution attack on defendant's case figured more prominently in closing argument. See pp.75-76, *infra*.

[112] Mr. McClendon, in response to a question from the prosecutor, (Cont'd)

objections and refused to take any curative action (R. 4525-29).[113]

But the prosecution's penultimate effort was made in closing arguments, in the course of which petitioner's mitigation case was depicted as presenting only irrelevant considerations. First, the lead prosecutor, Mr. Laeser, told the jury that the evidence of defendant's abusive and emotionally-deprived childhood, see n.108, *supra*, had been presented "only to pull on your heart strings," that "[y]ou have to put that type of sympathy out of your mind" (R. 5875, 5886). This argument is "fundamentally opposed to current death penalty jurisprudence," under which "[t]he ultimate power of the jury to impose life, no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale." *Drake v. Kemp*, 762 F.2d at 1460.[114]

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testified that "as I understand the system and some of the purposes is that those we are putting to death are those that we in corrections cannot handle." (R. 4525). The prosecutor then followed up by repeatedly asking "questions" regarding whether the witness "kn[ew] the law is [defendant] can be put to death and punished for his crimes without worrying about whether or not there is an alternate facility" for incarcerating him (R. 4525-26). *But see Skipper v. South Carolina*, 476 U.S. at 5 ("evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating")(footnote omitted).

[113] On both occasions, the court stated that it would give appropriate instructions at a later time (R. 3735, 4529). During the exchange between the prosecutor and Mr. McClendon, the court, as it had during jury selection, also told the jury that appropriate instructions would be provided (R. 4530).

[114] This conclusion flows inexorably from the Supreme Court's consistent recognition, under the Eighth Amendment, that mercy may be meted out by sentencers in capital cases. *E.g., Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985)(referring to the "mercy plea" made to the jury in a capital case, which an appellate court is not equipped fairly to consider); *Eddings v. Oklahoma*, 455 U.S. at 110 (capital sentencing must be "humane and sensible to the uniqueness of the individual"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(individualized mitigation must be allowed to provide for consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind"); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)("[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution").

Moreover, with regard to the specific mitigation presented by defendant, the prosecutor flatly argued that the mental-status evidence and abusive background proved at trial should not be considered because it did not establish a legally-sufficient *excuse* for the crime; that is, because there was no "cause and effect relationship" between defendant's deprived background and "why he committed the crime," and the mitigation therefore was not "something that should in any way be balanced" against the crime." (R. 5878-89, 5881-82, 5886-86, 5911). This argument runs afoul of the constitutional command that such evidence be considered in the weighing process. "It is well settled that evidence of family background and personal history may be considered in mitigation," *Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989)(citations omitted), and evidence of impaired mental status at the time of a homicide is undeniably a proper subject of mitigation, *e.g.*, *Penry v. Lynaugh*, 109 S.Ct. at 2951-52; *Cochran v. State*, 547 So.2d 928, 932 (Fla. 1989). As this Court has held, "[m]itigating evidence is *not* limited to the facts surrounding the crime but can be *anything* in the life a defendant which might militate against the appropriateness of the death penalty." *Brown v. State*, 526 So.2d 803, 908 (Fla.)(citations omitted), *cert. denied*, ___ U.S. ___, 109 S.Ct. 371 (1988).[115]

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[115] In their final comments to the jury, the state sought to ensure that the jurors would give no weight to the forthcoming defense argument on mitigation by telling them that defendant's counsel would be trying -- inappropriately -- to play on their sympathy:

> I'm going to sit down in just a little while. When I do, you're not going to hear from the State of Florida anymore. . . . . *Defense counsel is going to get up here next, and as is her custom in these cases she's going to cry, she's going to hug the defendant.*

(R. 5932). There was no support in the record for this characterization of defense counsel, which she disputed as untrue; the best the (Cont'd)

And the same parched view of mitigation was advanced in the prosecutor's challenge to the prison-adjustment component of defendant's case:

> I'm telling you right now that that doesn't mean anything. That's not an issue that should be important to any of the 14 of you. It doesn't matter if he's going to be good in jail, bad in jail, never hurt anybody, kill somebody else. *None of that should matter.* The issue, what's the proper penalty for what he already did? What's the proper sanction for the violent acts that he already committed?

(R. 5884 see R. 5910-11). Contrary to these arguments, there can be no possible dispute that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Skipper v. South Carolina,* 476 U.S. at 5 (footnote omitted); *accord, Valle III,* 502 So.2d at 1226.

The trial court overruled defendant's objections to these remarks and denied his motions for mistrial (*R.* 5973, 6021, 6040, 6044-45, 6048),[116] in violation of the fundamental Eighth Amendment

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prosecutor could say was that "[s]ince we have 209 lawyers and some of them related to [us] that, perhaps she has done this in other cases other than capital cases, we thought that it was appropriate." (R. 6046-47). The court sustained defendant's objection to the remark, but denied his motion for mistrial (R. 5932, 6046-48).

The courts of this state have long condemned such remarks: vilifying defense counsel is perhaps one of the most discredited and despicable weapons in an unscrupulous prosecutor's arsenal. *E.g., Adams v. State,* 192 So.2d 762, 764 (Fla. 1966); *Redish v. State,* 525 So.2d 928, 931 (Fla. 1st DCA 1988); *Jackson v. State,* 421 So.2d 15, 16 (Fla. 3d DCA 1982); Here, the remarks were doubly offensive -- not only was counsel unfairly castigated, but her presentation of mitigating arguments -- which the prosecutor had continually sought to have the jury believe were illegitimate -- was predicted to be nothing more than an improper plea for sympathy.

[116] Counsel sought to enforce the court's earlier rulings that appropriate instructions would be given on nonstatutory mitigation, see n.110, *supra,* requesting that the court specifically instruct the jury, in pertinent part, that defendant's "abusive family background" and potential for being a "nonviolent prisoner" if given a life sentence were mitigating circumstances (R. 5790-91; S.R. 883). The court refused to give any instruction except a "catchall," *i.e.,* that the jury could "consider any aspect of the defendant's character, record, emotional and mental history, background, any circumstance of the (Cont'd)

command that "consideration of evidence that mitigates against the death penalty is essential" for a constitutional application of the punishment, *i.e.*, "the jury must be able to *consider and give effect to* any mitigating evidence." *Penry v. Lynaugh,* 109 S.Ct. at 2951. Prosecutorial argument which seeks to prevent consideration of valid mitigating factors as mitigation is egregiously improper. *Drake v. Kemp,* 760 F.2d at 1460; *see Garron v. State,* 526 So.2d at 357.

With the advent of *Hitchcock v. Dugger,* 481 U.S. 393 (1987), this Court recognized that "the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing." *Downs v. Dugger,* 514 So.2d 1069, 1071 (Fla. 1987). The prosecutors in this case deliberately -- and repeatedly -- sought to create just that impression on the part of the jury, the trial court took no steps to disabuse the jury of that impression, and the result is error of constitutional magnitude.

E. Unfair And Unconstitutional Application Of Aggravating Circumstances.

In *Provence v. State,* 337 So.2d 783 (Fla. 1976), *cert. denied,*

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offense or any other circumstance in mitigation, presented to you." (R. 869, 5790-95, 5839-42).

This Court has recognized that the standard nonstatutory-mitigation instruction is sufficient to "alert[] the jury . . . that it could consider" mental-status evidence presented by a capital defendant. *Carter v. State,* No. 71,714 (Fla. Oct. 19, 1989)(slip opinion at 4). However, what is critical here is that the court failed to take *any* action to obviate the impression with which the prosecutor sought to leave the jury -- that defendant's case did not invoke anything that should be considered in mitigation. Moreover, the court granted a prosecution-requested instruction which only made matters worse: at the state's behest, the court agreed to give an "anti-sympathy" instruction (R. 5853-59), and told the jury in its final charge that "[t]his case must not be decided for or against anyone solely because you feel sorry for anyone" (R. 878), playing directly into the motif of the prosecutor's closing and further limiting the jury's consideration of nonstatutory mitigation.

431 U.S. 969 (1977), this Court established the rule that finding two aggravating circumstances which both "refer to the *same aspect* of the defendant's crime" is impermissible. *Id.* at 786 (original emphasis). Prior to defendant's trial, he sought to have the state prohibited from arguing two aggravating circumstances, § 921.141(5)(e), Fla. Stat. (1987)("[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody"), and § 921.141(5)(g), Fla.Stat. (1987)("[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws"), on the ground that both arose from the same aspect of the homicide in this case (R. 131-32, 1242-43). This Court's precedent establishes that a homicide of a police officer cannot give rise to both of these aggravating circumstances, *Jackson v. State*, 498 So.2d 406, 411 (Fla. 1986), *cert. denied*, 483 U.S. 1010 (1987), and the trial court initially rejected the state's request that it be allowed to present both circumstances to the jury, with the court then merging them if a death verdict were to be returned (R. 1244-54, 1420).

During jury selection, the state first announced that it would rely on Section 921.141(5)(j), Florida Statutes (1987)("[t]he victim of the capital felony was a law enforcement officer engaged in the performance of his official duties"), which aggravating circumstance was enacted by the Florida legislature (and became effective) during the pendency of the resentencing proceedings, Ch. 87-360, Laws of Fla. (enacted July 14, 1987 to be effective October 1, 1987), as an additional aggravating circumstance (R. 2736-37, 3574-75). The court overruled defendant's *ex post facto* objections to the application of (5)(j)(R. 3684, 6041-45). And, as trial progressed, the court retreated from its *Provence* ruling, ultimately allowing the state to

argue (5)(e), (g) and (j), over defendant's objection that all three circumstances arose from the same aspect of the homicide (R. 3726-33, 5741-42, 5757-66, 5824-33, 5975-76, 5910-11, 5922-31).

1. (5)(j) as *Ex Post Facto* Law[117/]

Article I, Section 10, of the Constitution of the United States prohibits *ex post facto* laws, as does Article I, Section 10, of the Florida Constitution. "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham,* 450 U.S. 24, 29 (1981)(citations and footnotes omitted). The first prong is indisputably established: (5)(j), which was enacted almost 10 years after defendant's offense, was applied in the resentencing proceeding. *Miller v. Florida,* 482 U.S. 423, 430-31 (1987). The trial court, however, ruled that defendant's circumstances were not "any worse with this factor than in 1978" (R. 3684), that is, that defendant was not disadvantaged by application of the new circum-

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117/ On defendant's prior appeal, it was asserted that § 921.141(5)(i), Fla.Stat. (1987), which became effective after the date of the offense in this case but prior to the 1981 retrial, could not be applied to defendant without violating the *ex post facto* prohibition, although recognizing this Court's decision in *Combs v. State,* 403 So.2d 418 (Fla. 1981), *cert. denied,* 456 U.S. 984 (1982). Brief of Appellant 83, *Valle v. State,* Case No. 61,176. Defendant relitigated this issue in the resentencing proceeding below, relying upon *Miller v. Florida,* 482 U.S. 423 (1987)(R. 138-40, 1262-65, 1414-34). The trial court ruled that there was no *ex post facto* violation in applying (5)(i) to defendant (R. 1434), and, as is discussed in Point IV, *infra,* the state argued it to the jury (R. 3732, 5926-27) and the court found that aggravating circumstance in imposing sentence (R. 902). Defendant, recognizing that this Court has since rejected the argument that *Miller* is of any impact on its holding in *Combs* that (5)(i) may constitutionally be applied retroactively, *Stano v. Dugger,* 524 So.2d 1018 (Fla. 1988), adopts the arguments set forth in his pretrial motion (R. 138-40) as his claim before this Court that application of (5)(i) to this case violates Article I, Section 10, of the Constitution of the United States and the parallel Florida *ex post facto* prohibition. Art. I, § 10, Fla.Const.

stance.

This is plainly not so. The pre-existing aggravating circumstances, Section 921.141(5)(e) and (g), both require proof of a mental element, *i.e.*, that the homicide was "committed for the purpose of avoiding or prevent a lawful arrest," § 921.141(5)(e), Fla.Stat. (1987), or was "committed to disrupt or hinder the lawful exercise of any governmental function," § 921.141(5)(g), Fla.Stat. (1987). The new aggravating circumstance imposes no such intent requirement, allowing for aggravation simply upon a finding of the status of the deceased. § 921.141(5)(j), Fla.Stat. (1987).[118] Thus, the state's burden of proof to secure an aggravating circumstance against a person convicted of killing a police officer is lessened by the new statute -- and, concomitantly (and inexorably), defendant must be deemed disadvantaged by the new statute. *Miller v. Florida,* 482 U.S. at 431-33.[119] The legislature "added an entirely new factor as an

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[118] The legislative history indicates that no such mental element was intended by the legislature. Senate Staff Analysis, SB 283 (May 6, 1987)("[t]he proposed language does not state that the defendant must have known or had reason to know that the victim was a law enforcement officer engaged in performing his official duties").

[119] As previously discussed, see n.117, *supra,* this Court upheld the retrospective application of (5)(i) in *Combs*. The contrast between (5)(i) and (j) only further serves to make the point: as set forth in *Combs,* (5)(i) "only reiterate[d] in part what is already present in the elements of of premeditated murder," which elements are "inherently part of of the circumstances taken into consideration when imposing a sentence in a capital case," *Combs v. State,* 403 So.2d at 421, and, in this Court's view, actually placed an *increased* burden of proof on the state:

> [(5)(i)] adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds *limitations* to those elements for use in aggravation, limitations which *inure to the benefit of a defendant.*

(Cont'd)

aggravating circumstance" when it enacted (5)(j), and retroactive application is accordingly violative of the federal and state prohibitions of *ex post facto* laws. *Combs v. State*, 403 So.2d 418, 421 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982).[120]

2. "Tripling" of Aggravating Circumstances

The state began its opening statement to the jury using an easel and five large printed cards bearing large-type reproductions of the text of each aggravating circumstance (R. 3735), then reviewed each factor, including (5)(e), (g), and (j), and argued that "there are five aggravating factors that the evidence supports." (R. 3703).[121]

Id. at 421. In direct contrast, it could never rationally be suggested that (5)(j) similarly "inure[s]" to a defendant's benefit.

[120] The prejudice from the application of (5)(j) is plain on the record. It was argued to the jury by the prosecutors (R. 3732, 5931), and, indeed, was the centerpiece of the state's closing arguments:

> It wasn't Luis Pena, it was the invisible blue line out there, that thin line of police officers that protects society from people like that who is being killed that day because it was just the random officer who happened to be the first one to stop him, when he had that gun handy.
>
> * * *
>
> [(5)(j) is] an important one. Why? Because, as you heard before . . ., that men and women [in] blue are the ones that keep our nation one from being lawless. Killing a police officer strikes against the moral fabric that this country has been built on.

(R. 5915, 5931). And, as set forth *infra*, the state's use of this factor bolstered its reliance upon duplicitous aggravating circumstances arising from a single aspect of the homicide.

[121] At that point in the proceedings, the court's initial ruling that the state could not ask the jury to find (5)(e), (g) and (j) separately was still extant, and counsel objected to the state's presentation (R. 3726-27). The court, agreeing with the state's argument that it should be permitted to "lay[] them out as if they can find all of them," leaving the question of merger "to the Court's instructions," ruled that the state could "list[] them separately" and that it would "make it clear later." (R. 3727-28). The prosecutor, after reviewing each of the aggravating circumstances in his (Cont'd)

While recognizing that it could not ultimately have the court rely upon each of the three circumstances separately,[122] the state thereafter opposed defendant's request to have the jury instructed in accordance with *Provence* and *Jackson*, and succeeded in having the court allow argument to the jury on each factor and give no limiting instructions on their application (R. 5741-68, 5824-33, 5975-76).[123]

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opening statement, stated that the court "may tell you that even though you find the existence of five aggravating factors that three of them may have to be combined into one." (R. 3732-33).

[122] Prior to announcing its intention to rely upon (5)(j), the state made an argument, which the prosecutor himself conceded would "seem[] somewhat semantic," in support of separate findings on (5)(e) and (g) (R. 1246-47, 1251-52). However, when urging the court to allow the jury to find all three circumstances, the state candidly recognized that, "no matter what happens in this case, the state will not be able to get more than one aggravating circumstance out of three." (R. 5758). And, at sentencing, the state made no effort to persuade the court otherwise: as the lead prosecutor stated, "I don't think I can split fine hairs to really argue that there are some semantic or technical differences between the three." (R. 6106).

[123] The court, prior to trial, had ruled against the state, finding that "the case is governed" by *Jackson* (R. 1252-53). However, when defendant requested, during the charge conference, that the jury be instructed to weigh (5)(e), (g), and (j) "as one aggravating circumstance" if each were found to exist (R. 814), the state renewed its argument that, while the court could not find each separately, see p.82, *supra*, the prosecutors could argue each to the jury (R. 5741-42, 5757-68). The court suggested that the jury could be instructed to "consider it as one" upon finding that "any of the three arise from the same particular conduct" (R. 5824, 5829, 5833), and defendant thereafter submitted a revised request for such an instruction, which request stated that the jury "may find" that the three circumstances "involve the same aspect of the offense," and that, upon such a finding, should weigh the factors as a single circumstance (R. 857). The revised instruction was denied by the court (R. 5975-76).

The court relied upon this Court's decision in *Suarez v. State*, 481 So.2d 1201 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986), in denying defendant's instructional requests and permitting the prosecutor's closing arguments (R. 5741-42, 5760, 5829). In that case, the defendant asserted "that the trial court erred in instructing the jury at the penalty phase of aggravating circumstances which have been held to constitute 'doubling,'" *i.e.*, pecuniary gain and felony murder, § 921.141(5)(d), (f), Fla.Stat. (1987), as well as (e) and (g). 481 So.2d at 1209. This Court recognized its prior rulings that "[t]hese two pairs of aggravating circumstances have been held to constitute improper doubling," but, noting that the decisions so holding had involved "improper doubling in the trial judge's sentencing order, and did not relate to the instructions to the penalty phase jury," *ibid*, rejected the defendant's argument:
(Cont'd)

The prosecutor's closing arguments featured reliance on each circumstance, telling the jurors that "there exist[] *five different aggravating circumstances*" and that "the Court is going to tell you to consider all" of those factors (R. 5910-11, 5922, 5924-27, 5931).

In *Mendyk v. State*, 545 So.2d 846 (Fla. 1989), the defendant requested that the jury be given a blanket instruction that, "if you find two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance." 545 So.2d at 849 & n.2. This Court found that this instruction was "not . . . an entirely correct statement of the law" and had been properly refused by the trial court in that case. *Id.* at 849. By contrast, defendant's requested instructions indisputably *were* correct. *Jackson v. State*, 498 So.2d at 411. The question that remains is whether the court should have provided the jury with those correct statements.

The importance of adequately guiding a capital jury in sentencing was underscored by the Supreme Court in its seminal capital-punishment decisions. *E.g., Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (the "provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentenc-

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> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

Ibid. Thus, nothing in *Suarez* prohibits the instruction requested in this case: the request there had been to not instruct on the duplicitous aggravating circumstances *at all*, which was *not* the requested instruction in this case (R. 814, 857).

ing is performed by a jury"). "[J]ury discretion must be guided appropriately by objective standards," *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860, 1865 (1988), and the Eighth Amendment is satisfied only when the jury's discretion "is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). Giving a jury inaccurate or misleading information regarding the factors that may be considered in determining whether death should be imposed violates the Eighth Amendment. *E.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 335-36 (1985); *California v. Ramos*, 463 U.S. at 1001-06; *Banda v. State*, 536 So.2d 221, 224 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 U.S. 1548 (1989).

To be sure, jury sentencing in Florida "is not a mere counting process" but "a reasoned judgment . . . in light of the totality of the circumstances," *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), and the jury in this case was so instructed (R. 881). However, "[w]hile juries indeed may be capable of understanding the issues posed in capital-sentencing proceedings, they must first be properly instructed." *Mills v. Maryland*, 108 S.Ct. at 1867 n.10. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations," *Gregg v. Georgia*, 428 U.S. 153, 193 (1976), and the jury in this case was given *no* guidance in construing the duplicitous aggravating circumstances. The prosecutors, on the other hand made every effort to ensure that the jurors would weigh *each* circumstance separately -- that they would consider "five *different* aggravating circumstances" (R. 5911) when, properly, there were but two to be weighed, if established by the evidence. Since there is no way to know the precise influence that the arguments and instructions had on

the jury's deliberations,[124] and the possibility exists that the recommendation -- which is "an integral part of the death sentencing process," *Riley v. Wainwright*, 517 So.2d 656, 657 (Fla. 1987)(citation omitted), -- was grounded, at least in part, upon a finding of "five different aggravating circumstances," as urged by the state, reversal is required. *Mills v. Maryland*, 108 S.Ct. at 1866-67 (where reviewing court cannot be certain "which of two grounds was relied upon" in jury's death verdict, and verdict "could be supported on one ground but not on another," death sentence must be reversed).

F. "Mandatory Death" Arguments

Section 921.141(2), Florida Statutes (1987), governs the jury's sentencing function, as follows:

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute, as originally interpreted by this Court, was to provide for the exercise of "reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment." *State v. Dixon*, 283 So.2d at 10. Under its express requirements, there are "three separate determinations which must be made prior to the imposition of a death sentence," *Wainwright v. Goode*, 464 U.S. 78, 80 n.2 (1983), with the jury, upon reaching the third step, completely free to recommend life imprisonment:

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[124] Neither the Florida statute, § 921.141(2), Fla.Stat. (1987), nor the Constitution requires specific jury findings. *Hildwin v. Florida*, ___ U.S. ___, 109 S.Ct. 2055 (1989).

> The statute contemplates that the trial jury . . . will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment . . . . Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).[125] The trial judge in the present case, however, ruled that *Alvord* "is not Florida law" (R. 2718, 2761, 2774, 3130), and, over defense objections, permitted the prosecutors repeatedly to tell the jury throughout the proceedings, that a death sentence was *required* if the jury found the aggravating circumstances to outweigh the mitigating circumstances.[126]

The state's efforts began in jury selection, when the prosecutor, purportedly was explaining the governing law to the prospective jurors, told the panel that, upon a finding of aggravating circumstances and no mitigation, "*the law commands that you must recommend*

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[125] *Accord, Barclay v. Florida*, 463 U.S. 939, 962-64 (1983) (Stevens, J., concurring)(finding sufficient aggravating circumstances which outweigh mitigation brings case across death-penalty "threshold," leaving the "third-stage determination" of "whether, even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty," and "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not *required* to impose the death penalty").

[126] The choice by the Florida legislature and this Court to allow for "reasoned judgment" and the discretionary exercise of mercy by a capital sentencer, *State v. Dixon*, 283 So.2d at 10, was an important one. *See Blystone v. Pennsylvania*, ___ U.S. ___ (Feb. 28, 1990) (statute providing that jury "must" impose death upon finding aggravating factor and no mitigation or that aggravation outweighs mitigation; held that Eighth Amendment does not "require" that aggravating factors "be further refined or weighed" and "that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice"). The prosecutors and the trial court were not free to depart from established Florida procedure in seeking a death sentence for defendant.

death." (R. 2708).[127] And the prosecutor made the state's position clear in closing argument:

> If you find that there are four aggravating, three aggravating or five aggravating, two aggravating or one aggravating and they outweigh any mitigating you may find -- but it's our position there is no mitigating in this case -- *the law requires that you recommend the death penalty.*

(R. 5922). Objections to this comment were overruled (R. 6043, 6048).[128]

"[T]he jury is granted full discretion to impose life imprisonment or death . . . . [and] may opt for mercy and impose life imprisonment at will," and prosecutorial argument suggesting otherwise "strikes at the core of the jury's role in capital sentencing." *Drake v. Kemp*, 762 F.2d at 1460; *see Jackson v. Dugger*, 837 F.2d 1469, 1474 (11th Cir.)(jury instructed that, "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence" unless overridden by mitigation; instruction held unconsti-

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[127] When defendant objected, the court ruled that *Alvord* "could not be Florida law for the last ten years because nobody follows what you are saying," but directed the prosecutor to refer to "sufficient" aggravating circumstances in discussing the law (R. 2709-11, 2717-18, 2721). The court subsequently ruled that if the jury found sufficient aggravating circumstances, not outweighed by mitigation, "they are to give somebody the death penalty" and that the requested instruction would tell the jury "to disregard Florida law." (R. 2764, 2769), and labelled "incorrect" counsel's position that the jury was not *required* to recommend death in that situation (R. 2770-74).

[128] Prior to closing arguments, defendant's counsel had again requested that the jury be instructed that, "even if you were to find that the circumstances of this case warrant the imposition of a death sentence, you are free to exercise your reasoned judgment and find that a death sentence is not required." (S.R. 250; R. 5798). The court struck the first clause in the preceding quotation (R. 5801-03), and read the second to the jury (R. 881). In *Mendyk v. State*, this Court held that the trial court had not erred in refusing to give similar requested instructions, ruling that "there is no requirement that a jury be instructed on its pardon power." 545 So.2d at 849-50 & n.3. Defendant does not request that this Court hold otherwise; however, where, as here, the prosecutor affirmatively misstates the jury's role, it is proper, as defendant's counsel requested, for the trial court to take curative action.

tutional because it "'misled the jury with respect to its absolute discretion to grant mercy regardless of the existence of "aggravating" evidence'"), *cert. denied,* ___ U.S. ___, 108 S.Ct. 2005 (1988). The prosecutor's affirmative misrepresentations of Florida law thus were constitutional error.

IV

THE UNFAIR AND PREJUDICIAL USE OF "VICTIM IMPACT" TESTIMONY AND ARGUMENT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

"[T]he Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence" because such evidence "is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Booth v. Maryland,* 482 U.S. 496, 501-03 (1987); *accord, e.g., South Carolina v. Gathers,* ___ U.S. ___, 109 S.Ct. 2207, 2210-11 (1989); *Jackson v. Dugger,* 547 So.2d 1197, 1198-99 (Fla. 1989). This precept was ignored at every turn of the proceedings in the trial court.

The state's efforts began in its case-in-chief, when it elicited from Officer Spell, the eyewitness, that he had driven to the location of Officer Pena's stop of defendant because the officer "was a friend of mine . . . and I worked with him and his dog," and "I loved his dog." (R. 3797).[129/] Then, the prosecution deliberately finished the testimony of the lead investigator, Detective Wolfe, by eliciting from the officer that he had been working without interruption for three days after the homicide, that he had finished his investigation after defendant's arrest and transfer to the local jail

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129/ On defendant's objection, the court stated that it "would appreciate it" if the state limited its case to aggravating circumstances (R. 3797-98).

(R. 4070), and:

> Q. After you followed up some leads in the morning of April 5th, what did you do next?
> A. I left the homicide office and went by the chapel in Coral Gables where the funeral services were taking place.

Ibid.[130]

But the state saved its most devastating efforts for closing argument, when the atmosphere in the courtroom was charged by the presence of the family of the deceased and brother officers (R. 5861-68).[131] The prosecutors made repeated and blatant remarks urging the jury to consider the character of the victim, the effects of the homicide on his family, and the contrast between the sentencing hearing given to defendant and the officer's murder:

> There are lots of people in this courtroom. You don't need to look very far to know there are

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[130] Defendant objected and moved for a mistrial. *Ibid.* The court denied the motion and instructed the prosecutor "not to say anything else about this." *Ibid.* The prosecutor then stated that he had "no further questions," and the jury was excused (R. 4071), after which the prosecutor, under inquiry by the court, candidly admitted that he had purposefully asked the question, knowing the answer would be what it had been (R. 4072-74). Counsel renewed his objections and motion for mistrial; the court, while noting that "[t]he question should not have been asked," denied the motion (R. 4072, 4076).

[131] Prior to trial, defendant requested the court to exclude uniformed officers from the courtroom (S.R. 76-83), and the court instead called the chief of the Coral Gables Police Department to ask that officers not attend in uniform, if possible (R. 1148-56). A small number of officers attended throughout the trial (R. 3704, 4413, 4707). Counsel renewed their motion at the end of the testimony and the court stated that it would "deal" with any "problem" when it arose at the beginning of closing arguments, scheduled to start on the following morning (R. 5687-90). Of the 64 seats in the courtroom, 19 were occupied by uniformed officers when closing arguments began, with extra folding chairs having been placed in the aisles to accommodate the overflow crowd (R. 5861-67); indeed, the closing argument was broadcast to another room on television (R. 5689-90), resulting in a videotape recording (R. 6059-60) which has been transmitted to this Court pursuant to stipulation, and which shows the composition of the courtroom. The deceased's family, including his widow, his divorced first wife, and two daughters, occupied the front row of the courtroom from the beginning of the trial (R. 3770, 3820, 5823-24).

> people on both sides who have shed a lot of tears, maybe some on the witness stand, some just in the audience, some just at home over the last ten years.
> . . . You have to put that type of sympathy out of your mind and consider why it is that one person is crying on the witness stand and one person is crying in the audience. The reason for that, the fault lies strictly because of the actions of Manuel Valle on April 2nd of 1978.
> . . . If you want to place the fault somewhere, the fault lies there; that his sister cries, *that widows cry,* that children cry or that parents cry.

(R. 5875-76).

> *There is something inherently unfair about this proceeding.* Nobody got up here and argued to you about whether or not Officer Pena was salvageable; whether or not there [were] aggravating and mitigating circumstances in his life that caused him to be executed. The system has its own special ways of working, but *nobody was here to beg for mercy for the officer* or do anything else. . . . .

(R. 5903).

> Lou Pena was a Coral Gables cop. He was doing his normal job, a lazy afternoon patrolling the streets, protecting the people of Coral Gables, earning a living, supporting his family."
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> * * *
>
> *Remember that, on April 2nd, 1978 the defendant was the judge, jury, and assassin of a 100 percent innocent man, Lou Pena. There were no lawyers representing Lou Pena. There were no sidebars, no experts on whether Lou Pena would be a good father.*

(R. 5919, 5932-33). Defendant's objections were overruled and his motions for mistrial based upon these remarks were denied (R. 5932, 5966-71, 6019, 6037, 6041-42, 6048).

"Victim impact evidence is irrelevant to a capital sentencing decision, and its introduction to the jury creates the risk that the decision to impose the death penalty was made in an arbitrary and capricious manner." *Jackson v. Dugger,* 547 So.2d at 1199 (citing

Booth).[132] Prosecutorial argument which relies upon such considerations carries with it the same impermissible risk. *South Carolina v. Gathers*, 109 S.Ct. at 2210-11. The state's reliance upon the good character of the deceased and the loss to his family "serve[d] no other purpose than to inflame the jury and divert[ed] it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth v. Maryland*, 482 U.S. at 508. Reversal of the death sentence in this case is accordingly mandated. *Jackson v. Dugger*, 547 So.2d at 1199.

V

THE TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court found three aggravating circumstances: (1) the contemporaneous attempted murder conviction, § 921.141(5)(b), Fla. Stat. (1987), (2) the merged "law enforcement" circumstance, §§ 921.141(5)(e), (g), (j), Fla.Stat. (1987),[133] and (3) that the homicide

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[132] The prosecutor's misconduct in this case was double-barreled: not only did he improperly invoke the jury's natural sympathy for the death of "a sterling member of the community," *Booth v. Maryland, 482 U.S.* at 506, he simultaneously brought into the jurors' minds the rights conferred upon defendant in the trial and the assistance of lawyers, witnesses, and the court, which were not afforded to the deceased. This Court has condemned such argument. *Bertolotti v. State*, 476 So.2d 130, 133 & n.2 (Fla. 1985); *see Jackson v. State*, 522 So.2d 802, 809 (Fla.)(prosecutor improperly remarked "that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 183 (1988). "[I]t is wrong to imply that the system coddles criminals by providing them with more procedural protections than their victims. A capital sentencing jury's important deliberation should not be colored by such considerations." *Brooks v. Kemp*, 762 F.2d at 1411.

[133] As noted in Point IIIE, *supra*, the state prevailed upon the court to permit argument and instructions to the jury on all three aggravating circumstances (R. 861-67, 5741-42, 575-68, 5824-33, 5975-76, 5910-11, 5922, 5924-27, 5931), although recognizing that, "[n]o matter what happens in this case, the state will not be able to get more than one aggravating circumstance out of three." (R. 5758). And, after the jury returned its recommendation, the state expressly did not urge the court to find each circumstance separately (R. 6106). (Cont'd)

"was committed in a cold, calculated, and premeditated matter without any pretense of moral or legal justification," § 921.141(5)(i), Fla. Stat. (1987) (R. 900-03). No mitigation was found (R. 904-07).

A. Overbroad Application Of Section 921.141 (5)(i), Florida Statutes (1987).[134]

To find (5)(i) applicable, there must be proof beyond a reasonable doubt not only of "heightened premeditation," *White v. State*, 446 So.2d 1031, 1037 (Fla. 1984), that is, "something in the perpetrator's mind beyond the specific intent required to prove premeditated murder," *Brown v. State*, 473 So.2d 1260, 1267 (Fla.)(citation omitted), *cert. denied*, 474 U.S. 1038 (1985), but the "evidence to support the heightened premeditation described in the statute . . . must bear the indicia of 'calculation,'" *i.e.*, "of a careful plan or prearranged design." *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 102 (1988); *accord, e.g., Rutherford v. State*, 545 So.2d 853, 856 (Fla. 1989). Although the trial court found that the homicide in this case had been "an execution-type murder," and that defendant had constructed a "careful plan to kill Officer Pena to avoid arrest" (R. 902), the evidence simply does not support these findings or application of the aggravating circumstance.

The pertinent facts of this case have been summarized by this Court as follows:

> On April 2, 1978, Officer Louis Pena of the Coral Gables Police Department was on patrol when he stopped [defendant] and a companion for a traffic violation. The events that followed were

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The court found that the three circumstances "merge[d]," and did not consider (5)(g) and (j) as separate reasons to impose death (R. 900-03), as the jury had been urged to do by the state.

[134] As set forth in Point IIIE(1), *supra*, defendant maintains his previously-asserted claim that (5)(i) was applied in violation of the federal and Florida *ex post facto* prohibitions. See n.117, *supra*.

> witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, [defendant] was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a license check on the car [defendant] was driving. According to Spell, [defendant] then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. [Defendant] also fired two shots at Spell and then fled. . . . .

Valle II, 474 So.2d at 798. At the hearing below, it was established through the state's case that the first license check requested by the officer was at 6:39 p.m. -- but that check was on the name that defendant provided to the officer -- and that the second, in which the license tag of the car was checked, was answered by the dispatcher at 6:43 p.m. (R. 374-76, 3789-95).[135/] Officer Pena was shot no more than one minute after this response by the dispatcher. *Ibid.*

It is a basic command of the Eighth Amendment that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. at 877. Overbroad and standardless application of an aggravating circumstance runs afoul of this "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in the infliction of death as punishment. *Maynard v. Cartwright*, ___ U.S. ___, 108 S.Ct. 1853, 1858 (1988); *accord*,

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135/ The evidence which the state used to prove the defendant's mental state prior to the shooting is derived from his post-arrest statements, which statements -- taken in a light most favorable to the state -- indicate that the intent to kill was formed after the dispatcher informed the police officer of the name of the owner of the vehicle defendant had been driving, that is, less than one minute before the shooting (R. 387-90). Absent any evidence to the contrary, it is sheer -- and impermissible -- speculation to conclude that there had been a lengthy period of reflection prior to the shooting. *Hamilton v. State*, 547 So.2d 630, 633-34 (Fla. 1989).

Godfrey v. Georgia, 446 U.S. 420, 428-31 (1980). In the instance of subsection (5)(i), this Court's limiting construction has been that the facts of the case must "show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." *Preston v. State*, 444 So.2d 939, 946 (Fla. 1984)(citations omitted). A killing which is committed "most likely upon reflection of a short duration" is not within the proper scope of subsection (5)(i). *Wilson v. State*, 493 So.2d 1019, 1023 (Fla. 1986); *accord, Preston v. State*, 444 So.2d at 946-47; *Herzog v. State*, 439 So.2d 1372, 1380 (Fla. 1983). And a homicide which is "extemporaneously committed for the purpose of avoiding a lawful arrest" does not demonstrate the "heightened degree of premeditation, calculation or planning" necessary for application of this aggravating circumstance. *Richardson v. State*, 437 So.2d 1091, 1094 (Fla. 1983)(citations omitted); *accord, Washington v. State*, 432 So.2d 44, 46-48 (Fla. 1983).[136] The application of (5)(i) to this case, where the facts do not satisfy this Court's limited construction of the aggravating circumstance, violates the Eighth Amendment. *Maynard v. Cartwright*, 108 S.Ct. at 1858-59; *Godfrey v. Georgia*, 428 U.S. at 431-32.

B. Restricted Consideration of Mitigating Factors.

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[136] *Cf., e.g, Jackson v. State*, 498 So.2d 406, 408-09, 413 (Fla. 1986)(defendant vandalized her own car and reported to police that others had done it; at officer's request, she went to her home to secure the bill of sale for the car; upon defendant's return, she learned that officer had spoken to other witnesses and learned that defendant had damaged car; defendant resisted violently when officer attempted to arrest her for filing a false report and then diverted officer by claiming to have dropped her keys, after which she produced a pistol as the officer looked for the keys and shot him six times; held that defendant's deliberate actions in damaging her car, arming herself, distracting the officer and shooting him six times proved applicability of (5)(i)), *cert. denied*, 483 U.S. 1010 (1987); *Jones v. State*, 440 So.2d 570, 577-78 (Fla. 1983)("sniper attack" on officer involved in unrelated investigation within scope of (5)(i)).

The record in this case bears out that the trial court was aware of the requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny that nonstatutory mitigation be considered in the capital sentencing process (R. 899). However, the record also bears out that the trial court did not deem nonstatutory mitigation to be of the same significance as the statutory factors, and that this parsimonious view of mitigation tainted its consideration of the bulk of defendant's case.

First, during jury selection, when counsel objected to statements by the prosecutor which restricted mitigation to excuses for the offense, see Point IIID(2), *supra*, the court responded that it would tell the jury that there is a "list of aggravating and mitigating [circumstances], but then mitigating factors are *also* anything else that they believe would be mitigating in this case." (R. 2673). That this facially-neutral comment actually evinced a view that nonstatutory mitigation was somehow of an inferior status became quite clear during the testimony of Evalyn Milledge, a social worker who testified as a defense witness to defendant's abusive family background (R. 4996-5089). See n.108, *supra*. Ms. Milledge had been relating defendant's life history, as learned from interviews with him and family members (R. 5017-45) when the prosecutor interjected an objection to her testimony (R. 5046), and the following occurred at sidebar:

> The Court: *Do you think you can like get to more relevant things pretty soon?*
> Ms. Georgi: Your Honor, I object to the Court's and the prosecutor's indication that this is somehow not important testimony.
> The Court: Did I say it wasn't important? I said more relevant. . . . . I have a right to limit what the Court believes is repetitive or redundant or potentially relevant [sic]. So, I'm just giving you forewarning to try to get on to *more relevant* areas.

Ibid.[137]/

This view finds its full expression in the trial court's order. First, the trial court, while noting the testimony of Dr. Toomer, see n.97, *supra*, and Ms. Milledge, found Section 921.141(6)(f), Florida Statutes (1987)("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired") inapplicable (R. 905). However, while that testimony had been specifically relied upon as also pertinent to nonstatutory mitigation (R. 5773), the court gave it no weight, ruling that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not *substantially* impaired." (R. 906; emphasis by the court). The insistence upon satisfaction of the statutory standard for consideration of mental-status mitigation violates the *Lockett* requirement of full consideration of all relevant mitigation. *Hargrave v. Dugger*, 832 F.2d 1528, 1535 (11th Cir. 1987)(en banc)(identical trial court finding that defendant's impaired capacity would not be weighed because "'such capacity was not *substantially* impaired'" showed that court unconstitutionally failed to weigh nonstatutory mitigation)(emphasis by the Court), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1353 (1989).

Second, the court found -- as presaged by its comments during trial -- that the evidence of defendant's family background, which the court noted in its order (R. 906), was irrelevant to the sentencing decision:

137/ This view was repeated later in Ms. Milledge's testimony, when the prosecutor objected to the witness' opinion of "what factors were present in terms of [defendant's] motivation" at the time of the crime (R. 5084). The court, while overruling the objection, noted its opinion that the testimony was "[g]oing more for mercy than what is taking place." (R. 5085-86).

> *Considering all the evidence which the defense has presented concerning these circumstances, the Court does not find that these circumstances to be relevant mitigating circumstances.* [sic] Even if they were established, the Court finds that they are outweighed by the aggravating factors.

(R. 907). This record establishes the unconstitutional limitation placed on mitigation by the trial court in imposing a death sentence.

The Supreme Court of the United States held in *Eddings v. Oklahoma*, that:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

455 U.S. at 114-15 (footnote omitted). "A defendant in a capital case has a constitutional right to present to and have considered by the sentencing authority any competent evidence that is relevant to the sentencing determination, *including information about the character and background of the defendant*, and the circumstances of the offense." *McCrae v. State*, 510 So.2d 875, 880 (Fla. 1987)(citations omitted).

The evidence rejected below as irrelevant was not: relevant mitigation "can be anything in the life of a defendant which might militate against the appropriateness of the death penalty." *Brown v. State*, 526 So.2d 903, 908 (Fla.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 371 (1988). Thus, "[c]hildhood trauma has been recognized as a mitigating factor," *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988)(citations omitted); *accord, e.g., Freeman v. State*, 547 So.2d 125, 129 (Fla. 1989); *Brown v. State*, 526 So.2d at 908, as has psychological stress not found to rise to the level of the statutory mitigating circumstances, *e.g., Cochran v. State*, 547 So.2d 928, 932

(Fla. 1989); *Perry v. State*, 522 So.2d 817, 821 (Fla. 1988).[138] "A trial judge is permitted to determine the weight to be give the mitigating evidence, but a judge *may not refuse to consider any relevant mitigating evidence presented.*" *Stevens v. State*, 552 So.2d at 1086 (citing *Eddings*).[139]

As this Court has held, "the mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge believes . . . that some of that evidence may not be weighed" in imposing sentence. *Downs v. Dugger*, 514 So.2d at 1069. And the Supreme Court of the United States, in reaffirming *Eddings*, has made full consideration of mitigating evidence an absolute prerequisite to a constitutionally-valid death sentence:

> it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence.

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[138] *See Delap v. Dugger*, 890 F.2d 285, 305-06 (11th Cir. 1989)(defendant who presents psychological evidence is prejudiced by restricting jury's consideration to statutory circumstances because jury may "consider[] psychological evidence in mitigation even if it did not find that the evidence met the required threshhold level for a statutory mitigating factor").

[139] Any doubt whether the trial court in this case refused to consider the personal-history testimony or considered -- but rejected -- it, is resolved when the court's treatment of defendant's prison-adjustment mitigation is reviewed. The court, in rejecting that component of defendant's mitigation case, ruled:

> The Court has considered their opinions, weighed the evidence concerning these witnesses' opinions, as well as the State's evidence in rebuttal. *The Court does not find that this mitigating circumstance reasonably exists.*

(R. 906). Contrast this plain evidentiary-weight ruling with the court's statement that "the [c]ourt does not find that these circumstances [are] . . . *relevant* mitigating circumstances" (R. 907), and it is beyond question that the court's ruling on defendant's personal history was that the evidence was indeed *irrelevant*.

Penry v. Lynaugh, 109 S.Ct. 2947. The failure of the trial court in the present case to weigh and consider relevant nonstatutory mitigation requires reversal of defendant's sentence. *Thomas v. State*, 546 So.2d 716, 717 (Fla. 1989); *Lamb v. State*, 532 So.2d 1051, 1054 (Fla. 1988); *Cooper v. Dugger*, 526 So.2d 900, 902-03 (Fla. 1988); *Zeigler v. Dugger*, 524 So.2d 419, 420-21 (Fla. 1988); *Foster v. State*, 518 So.2d 901, 902 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2814 (1988).

CONCLUSION

Based upon the foregoing, defendant requests this Court to vacate the sentence of death in this cause and to remand for imposition of a life sentence or, in the alternative, for a new jury sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was delivered by mail to RICHARD L. POLIN, Assistant Attorney General, 401 Northwest Second Avenue, Suite N921, Miami, Florida 33128, this 21 day of March, 1990.

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