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

REPLY BRIEF OF APPELLANT

LOUIS M. JEPEWAY, JR.
Suite 407, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 377-2356
Fla. Bar No. 113699

Counsel for Appellant

MICHAEL A. MELLO
Vermont Law School
Witcomb House
P.O. Box 96
Chelsea St.
South Royalton, Vermont 05068
(802) 763-8303
Fla. Bar No. 376371

Of Counsel

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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.

Contrary to the state's first argument that this issue was not preserved for review because of a failure to assert an objection "which could even be remotely construed as an objection" under *State v. Neil*, 457 So.2d 481 (Fla. 1984), Brief of Appellee at 30, the record establishes that defendant interposed his *Neil* claim at trial. Indeed, counsel first raised the issue very early in the proceedings, when the state exercised its second peremptory strike on a black prospective juror, Ms. Williams: counsel noted the juror's race, the prosecutor responded with his purported reasons for the strike, and counsel disputed those reasons (R. 3082-83).[1/] When the state struck the third black juror, counsel again noted the juror's race and the parties again disagreed on the motivation for the strike (R. 3122). Counsel thereafter expressly noted that all three peremptory challenges exercised by the state on the first group of jurors had been used to strike black prospective jurors (R. 3142-43); the court responded, "Okay," and the prosecutor volunteered that "[t]hey are just improper jurors because of their inability to be fair" on sentencing

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1/ At one point in its brief, the state intimates that counsel failed to dispute the prosecutor's explanations during the several hearings before the court on the propriety of the state's use of its peremptory strikes, except for the reasons given for excusing Ms. Brooks. Brief of Appellee at 33-34 ("when the prosecutor gave his explanations, defense counsel appeared to accept, without further argument, all but [Ms. Brooks]"). As will be set forth *infra*, this is inaccurate; indeed, when the issue first was raised by the state's strike of Ms. Williams, counsel for defendant vigorously disputed as "a very inaccurate representation" the prosecutor's purported reasons for striking her (R. 3082-83).

(R. 3143).

The state thereafter used three more peremptory strikes against black persons in the second group of potential jurors (R. 3629, 3631, 3632), and, before the jury was sworn, defense counsel again raised the issue before the court, noting that six black prospective jurors had been stricken by the state (R. 3694).[2/] When the prosecutor asked whether counsel would "be making some claim about the impropriety of the selection" or was "putting things in the record to clear your voice," counsel stated: *"I'm claiming an impropriety in the record."* (R. 3695)(emphasis supplied). The following then ensued:

> Mr. Laeser: . . . . What is the exact nature of the claim?
>
> Ms. Gottlieb: Exact nature of the claim is that *six blacks were excused peremptorily by the state*. The reasons -- one reason given was such that the state didn't approve of how these individuals were dressed. One individual, I believe, wore a cap in this sometimes cold courtroom. I don't recall the other reasons given. *The defense did not believe they were well founded.*
>
> * * *
>
> 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 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

---

[2/] The state's brief recites that "[f]our of the eight peremptory challenges on the regular panel were for blacks, as was the peremptory challenge to the alternate." Brief of Appellee at 34. This is inaccurate: as the parties stipulated before the trial court (and as the trial record establishes), the state struck a total of *five* black prospective jurors (Brooks, Williams, Johnson, Baldwin and Clark) and used a sixth peremptory challenge to prevent a black person (Ford) from being seated as an alternate juror; of the nine peremptory challenges used by the state, a total of six were thus exercised against blacks (R. 64, 65, 69, 3081, 3082, 3122, 3629, 3631, 3694-97).

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].

Ms. Brill: What I understand, we don't have to respond unless you make a determination first.

The Court: I think the state wishes --

Mr. Laeser: I don't mind to --

The Court: The state wants to respond without me asking. I'm giving them an opportunity.

(R. 3695-97) (emphasis supplied).

Defense counsel then named the six jurors (R. 3697), and Mr. Laeser responded that he would "be glad to discuss" his strikes (R. 3697-98). He then gave his purported explanations, with defense counsel noting their disagreements (R. 3698-702, 3830-31, 3850-56). Upon the completion of the explanations, and after counsel had made additional objections on other jury-selection issues (R. 3856-57), the court stated: "Same Court ruling." (R. 3857).[3/]

Since *State v. Neil* and its progeny "define[] the outer limits of interference with the exercise of peremptory challenges," *Koenig v. State*, 497 So.2d 875, 879 (Fla. 3d DCA 1986), it is difficult to conclude -- as the state apparently would have this Court do -- that

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3/ The state says that, upon the prosecutor completing his explanations, "defense counsel's sole effort to explain the pending objection was that the combination of cause challenges and peremptory challenges served to result in a jury which favored the death penalty." Brief of Appellee at 31. This is inaccurate. What actually happened was that the prosecutor proffered his purported reasons for striking the six named jurors, and then asked defense counsel: "Is that your list?" (R. 3850-56). Counsel responded, "That's my list," after which the prosecutor made a lighthearted comment about the defense having excluded jurors named Gonzalez (R. 3856). The next item to appear on the face of the record is a further objection by defense counsel to matters *other* than the exclusion of black jurors (R. 3856-57); while a portion of that objection appears in the state's brief, Brief of Appellee at 29, the state omits the introductory remarks by counsel, *ibid*, which began: "*Finally*, while the defense acknowledges the U.S. Supreme Court decision in [*Lockhart v. McCree*, 476 U.S. 162 (1986)] . . . ."; counsel then proceeded to lodge an objection to the alleged death-prone nature of the jury. (R. 3856-57) (emphasis supplied). It is plain from the context in which the remarks were made that counsel was making *another* objection and presenting *all* of the defense jury-selection issues to the court for a final ruling.

there were any participants in the trial proceedings who did not understand that they were litigating a *Neil* issue: there is nothing *else* in Florida or federal constitutional law which could have prompted defense objections to the striking of black prospective jurors or impelled a prosecutor to explain his exercise of peremptory challenges. Indeed, the prosecutor twice specifically referred to the *Neil* decision (R. 3698, 3856),[4] plainly indicating that *he* fully understood the claim being raised before the court.[5] The claim is properly preserved for review. *Tillman v. State*, 522 So.2d 14 (Fla. 1988)(defense counsel "met his initial burden" under *Neil* by "ask-[ing] the court note for the record that it appeared that the state was systematically striking blacks" after state used three peremptory challenges to excuse black prospective jurors).[6]

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[4] When defense counsel requested an opportunity to respond to the prosecutor's charge of racial use of defense peremptory challenges (the defense struck one black prospective juror peremptorily (R. 64, 3112, 3143, 3597-98)) the prosecutor stated: "I don't think it's necessary. There is no Neil violation." (R. 3698). The prosecutor again referred to *Neil* by name later in the proceedings (R. 3856).

[5] The prosecutor's eagerness to explain his strikes to the court despite the trial judge's refusal to find a *prima facie* case of discriminatory use of peremptory challenges (R. 3696-97) would defeat the state's preservation-of-error argument on this appeal, even if there were any merit to that argument. *Smith v. State*, 562 So.2d 787, 789 (Fla. 1st DCA 1990)(*Neil* claim reviewed despite defense default at trial where state "agreed voluntarily to proceed with the *Neil* inquiry" in the trial court). In any event, the discussion between the court and counsel showed that all concerned fully understood why the discussion was taking place, and any deficiency in the initial presentation of the issue by defense counsel would thus be of no import. *See, e.g., Williams v. State*, 414 So.2d 409, 411-12 (Fla. 1982)(purpose of the contemporaneous-objection rule served if objection is "specific enough 'to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal,'" and "magic words are not needed").

[6] *Tillman* is the only decision cited by the state in support of its argument that the *Neil* claim is not preserved for review, Brief of Appellee at 31, and, as set forth above, the holding in that case establishes defendant's entitlement to raise his *Neil* claim. Similarly, in *Adams v. State*, 559 So.2d 1293 (Fla. 3d DCA), *dismissed*, 564 So.2d 488 (Fla. 1990), a *Neil* claim was found preserved where counsel had merely pointed out to the court that the state had excused a (Cont'd)

On the merits, the state contends that the trial court's "denial of relief, after having heard a lengthy recitation of reasons for the challenges, is fully consistent with a a finding . . . of a lack of a prima facie case, or of the race-neutral basis for the reasons." Brief of Appellee at 38. The state relies almost exclusively upon this Court's decision in *Reed v. State*, 560 So.2d 203 (Fla. 1990), arguing that this case is "virtually indistinguishable" from *Reed*. Brief of Appellee at 32. *Reed*, however, is utterly inapposite: there, unlike the present case, the record affirmatively showed that the court had *evaluated* the prosecutor's reasons for striking black prospective jurors and found them nonracially based. *Id.* at 205.7/

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black prospective juror, noted that his client was also black, and stated that "'I don't believe the state has any reasonable explanation for it.'" *Id.* at 1295. *Ibid.* The court ruled:

> The objectives of the contemporaneous objection rule are to "apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." These objectives were accomplished in the present case when defense counsel: (1) pointed out that the juror struck by the state is black, (2) pointed out that Adams is black, and (3) asserted that the state could not furnish a reasonable explanation for challenging the black juror. The trial judge's response indicates that he had been apprised of the putative error, but felt that no error had occurred at that point in the proceedings. Accordingly, a timely objection was made and the issue is preserved for appellate review.

Id. at 1296-97 (citation omitted); *accord, e.g., Norwood v. State*, 559 So.2d 1255, 1256 (Fla. 3d DCA 1990)(*Neil* claim preserved by statements that prosecution "had used three of its four strikes against black people" and that "the black people questioned did not 'sit different (sic) than other persons who [were] not excluded by the state'"; held that "[t]hese two statements viewed together were sufficient reasons to require an explanation from the state"); *cf., e.g., Robinson v. State*, 498 So.2d 626, 627 (Fla. 1st DCA 1986)(*Neil* claim not preserved when defense counsel "repeatedly said he was merely making 'a little statement for the record,' and refused the opportunity for an inquiry of the prosecution when it was offered").

7/ The prosecutor in *Reed* "used eight of his ten peremptory strikes to excuse blacks from the jury," and, in response to a defense motion for mistrial, the prosecutor "asked to explain his reasons for strik- (Cont'd)

This is in complete accord with this Court's *Neil* jurisprudence. *State v. Slappy*, 522 So.2d 18, 22 (Fla.)(trial judge must "evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons"), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2873 (1988); *accord, Bryant v. State*, 15 F.L.W. S483, 484 (Fla. Sept. 6, 1990) (purpose of *Neil* inquiry is to have trial court evaluate prosecutor's reasons "to determine whether the reasons are neutral and reasonable and not a pretext").

Here, the state can point to nothing in the record to show an evaluation by the trial judge of the state's proffered reasons -- because there was none. Indeed, the state's argument virtually admits as much: the best that the state can muster from the record is a contention that the trial court's ruling is "fully consistent" with a proper finding of no *prima facie* case. Brief of Appellee at 38. Of course, the state cannot -- and does not -- deny that the record is at least *equally* consistent with the trial court improperly having "accept[ed] the reasons proffered at face value." *State v. Slappy*, 522 So.2d at 22. Indeed, in tacit recognition of the trial court's insufficient inquiry, the state seeks to bolster its position by urging this Court to review the proffered reasons and to conclude that they were "race-neutral." Brief of Appellee at 33-38. However, as this Court expressly has held:

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ing the black jurors." 560 So.2d at 205. The trial court allowed the prosecutor to "volunteer[]" his reasons "without me making a finding," and, after he did so, the court observed that the state "has submitted to a voluntary inquiry . . . without the court making an initial determination that it was necessary," ultimately ruling that "the challenges exercised against the blacks are not based purely upon race or racial discrimination." *Ibid.* This Court, stressing that "the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended," concluded that the court had not abused that discretion in *Reed* by allowing the prosecutor to volunteer explanations and in finding that the defense had not set forth a *prima facie* case. *Id.* at 206.

> It is *not* sufficient that the state's explanations for its peremptory challenges are facially race netural. *The state's explanations must be critically evaluated by the trial court to assure they are not pretexts for racial discrimination.*

Roundtree v. State, 546 So.2d 1042, 1045 (Fla. 1989)(emphasis supplied). This Court is not the proper forum to consider, in the first instance, the validity of the proffered reasons. *Stokes v. State*, 548 So.2d 188, 196 (Fla. 1989).[8/] The trial court's failure to make

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[8/] Indeed, the state of the record before this Court is such that no resolution of the issue is possible: the record is replete with contested factual matters, for, contrary to the state's contention that "the reasons proffered by the prosecutor as to four of the [state's] challenges were not contested at trial," Brief of Appellee at 38, the defense disputed the proffered factual bases offered by the prosecutor in support of four of the strikes (R. 3082-83, 3123, 3695-97, 3699-701, 3853-54), and never conceded the propriety of *any* of the peremptory challenges. As set forth in defendant's initial brief, defense counsel vigorously challenged the purported factual bases for the state's excusal of two black women (Brooks and Williams) based upon their mode of dress, Brief of Appellant at 9; when the prosecutor sought to justify his strike of Ms. Baldwin, the defense disputed his statements that she was a regular prison visitor and had a relative who had been represented by the public defender (Tr. 3701, 3853-54); and the parties disagreed as to whether juror Johnson's answers to "death-qualification" questions provided a racially-neutral basis for the state's challenge (R. 3123). Without a determination by the trial court, these conflicts cannot be resolved on appeal. *E.g.*, *Bryant v. State*, 15 F.L.W. at S484. And a fifth black juror, Woodrow Clark, purportedly was stricken in part because an investigation reportedly had shown that the juror had overstated his relationship with a police officer who was not involved in the case (R. 3851-52), although the state never questioned Clark after obtaining this information, an omission which "at the very least renders the state's explanation suspect." *Mayes v. State*, 550 So.2d 496, 498 (Fla. 4th DCA 1989)(citing *Slappy*). Again, the trial court never addressed the state's failure to question Clark, and no resolution of the validity of that strike is possible on appeal without a trial inquiry. Finally, the state seeks on appeal to justify virtually all of the strikes on the additional basis that the jurors were hostile to the death penalty. Brief of Appellee at 33-37. However, of the six stricken black prospective jurors, only *one* (Mr. Johnson) was unsuccessfully challenged for cause on this basis; the state, despite the trial court's considerable liberality in granting such challenges (R. 2654, 2841, 2882, 2883, 2884, 2885-87, 2890-91, 3299, 3625), did not challenge the other jurors based upon their alleged antipathy to capital punishment, a fact which could be relevant to a proper inquiry of the prosecutor's motives. *See, e.g., Casmiro v. State*, 557 So.2d 223, 224 (Fla. 3d DCA)(finding no discriminatory use of challenges in part because "[t]he state did give reasons where in each case it moved to (Cont'd)

a proper inquiry requires a reversal. *E.g.*, *Bryant v. State*, 15 F.L.W. at S484; *Thompson v. State*, 548 So.2d 198, 202 (Fla. 1989); *Stokes v. State*, 548 So.2d at 196.

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.

According to the state's brief, Fla.R.Crim.P. 3.310 creates an heretofore-unknown third category of challenges: "semi-peremptory" challenges, *i.e.*, strikes which, because of the time at which they are made, require "something more than the run-of-the-mill peremptory challenge." Brief of Appellee at 41.[9/] The quick answer to the

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challenge the juror for cause and that motion was denied"), *review denied*, No. 75,780 (Fla. Aug. 8, 1990). Without any explanation by the prosecutor for his failure to challenge these jurors for cause, the validity of this reason cannot be determined on appeal.

[9/] The state cites no authority in support of this intepretation of the rule. Brief of Appellee at 42-43. Its brief criticizes defendant's reliance on decisions from other jurisdictions under statutes or rules similar to Rule 3.310, see Brief of Appellant at 14, on the basis that in those jurisdictions, jurors are sworn individually and not, as in Florida, at the conclusion of *voir dire*, and argues that the decisions cited in defendant's brief "have nothing to do with situations arising after the entire jury has been sworn." Brief of Appellee at 42. This is an incorrect characterization of the precedent on this issue: the critical point in each of the cited decisions is that the challenged *juror* had been sworn prior to the peremptory challenge. *In re Mendes*, 23 Cal.3d 847, 153 Cal.Rptr. 831, 592 P.2d 318, 322 (1979); *State v. Lupino*, 268 Minn. 344, 129 N.W.2d 294, 302-03 (1964), *cert. denied*, 379 U.S. 978 (1965); *State v. Jackson*, 43 N.J. 148, 203 A.2d 1, 8-9 (1964). There is no provision in Florida law for swearing a *jury*, as opposed to a juror, and the *only* reason for the Florida practice upon which the state relies is this Court's interpretation of Rule 3.310 to permit "backstrikes." *Gilliam v. State*, 514 So.2d 1098, 1099 (Fla. 1987). The governing provisions in the jurisdictions noted in defendant's initial brief are indistinguishable from Rule 3.310. *In re Mendes*, 598 P.2d at 322 (statute permitting post-swearing peremptory strike "if there is good cause for the failure of an earlier exercise"); *State v. Lupino*, 129 N.W.2d at 302 (statute which permitted challenge "for good cause" after juror is sworn "and before the jury is completed"); *State v. Jackson*, 203 N.E.2d at 8 (court "for good cause shown" may permit (Cont'd)

state's argument is that there is no warrant for it in the governing law. Rule 3.310 does not *create* the right to cause *or* peremptory challenges in the first instance, much less to some *other* category of challenges. Rather, its title is "*Time* for Challenge." Fla.R. Crim.P. 3.310 (emphasis supplied).[10] Fla.R.Crim.P. 3.330 provides that "[t]he court shall determine the validity of a challenge for cause," but there is no provision in any rule for passing upon the "validity" of a peremptory strike. Rule 3.340 provides:

> If a challenge for cause of an individual juror *be sustained,* such juror shall be discharged from the trial of the cause. If a peremptory challenge to an individual juror *be made,* such juror shall be discharged likewise from the trial of the cause.

Fla.R.Crim.P. 3.340 (emphasis supplied). The only sources of authority in Florida law for juror challenges thus do not admit of a third category lying somewhere between peremptory and cause challenges.[11]

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challenge "after [juror] is sworn but before any evidence is presented"). *People v. Harris,* 57 N.Y.2d 335, 456 N.Y.S.2d 694, 442 N.E.2d 1205 (1982), *cert. denied,* 460 U.S. 1047 (1983), upon which the state relies, Brief of Appellee at 43, interpreted a statute, which allowed only *cause* challenges after swearing of a juror, as excluding peremptory challenges, 442 N.E.2d at 1211-12, and is of no consequence.

[10] The right to challenges for cause is guaranteed by § 913.03, Fla. Stat. (1989), and Fla.R.Crim.P. 3.300(c). The right to peremptory challenges is guaranteed by § 913.08, Fla.Stat. (1989), and Fla. R.Crim.P. 3.350.

[11] The state, however, seizes on the use of the word "may" in the second clause of the rule and argues that "the element of discretion" created by that word permits a trial court to pass upon the merits of the belated peremptory challenge. Brief of Appellee at 40-41. The state ignores the use of the word "may" in the *first* sentence of the rule, Fla.R.Crim.P. 3.310 ("the State or the defendant *may* challenge" a juror . . . before the juror is sworn")(emphasis supplied), and that, the use of "may" notwithstanding, there is an absolute right to challenge prior to the swearing of the jury. *E.g., Jackson v. State,* 464 So.2d 1181, 1183 (Fla. 1985). Moreover, defendant has not suggested that there is no "element of discretion" in a trial court's ruling on a proffered post-swearing challenge: obviously, the court is vested with discretion in determining, for instance, whether the basis for the challenge was known or reasonably knowable *prior* to the juror being sworn; defendant's interpretation of the rule is that there is no discretion *only* insofar as the court cannot pass upon the (Cont'd)

The recent decision in *Mobley v. State*, 559 So.2d 1201 (Fla. 4th DCA 1990), while not decided in reliance upon Rule 3.310, makes this point indisputable. In that case, a prospective juror who had denied having been a crime victim "was selected for the jury and the trial began," after which the juror "remembered that he *had*, after all, been a crime victim and informed the judge." *Id.* at 1202 (original emphasis). On appeal, the trial court's refusal to permit the defense peremptorily to strike the juror was held reversible error:

> Had the juror answered correctly during voir dire, a peremptory challenge might well have been used in view of the juror's personal experience. However, the defendant was denied the inalienable right to use such a challenge because of the incorrect response to voir dire. This was error, notwithstanding the juror's assurances that he could be impartial. Those assurances might well have obviated a challenge for cause, but it did nothing to resurrect the ability to exercise a peremptory challenge.

Ibid (citation omitted).[12/] So too, in the present case, the issue is

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merit of the proposed peremptory challenge.

Unable to find any textual support for its argument in the language of the rule, the state propounds the "admittedly absurd" scenario set forth at page 41 of its brief, in which it asks this Court to assume that a lawyer would seek to use a post-swearing peremptory strike because of information that the juror in question ate an omelet for lunch, and, from this ridiculous example of unprofessional conduct, reasons that "it is clearly necessary to permit inquiries into the merits . . . of the newly discovered 'reason' lest the jury selection process result in a never-ending circus." Brief of Appellee at 41-42. The most significant logical flaw in the state's reasoning is that -- if indeed there are lawyers whose aversion to omelet-eating jurors is sufficiently strong -- its "circus" would take place just as surely when such lawyers used their pre-swearing peremptory challenges; while the law might permit this, it plainly assumes that it will not occur. More to the point, a court always has the inherent power "to protect itself . . . from fraud practiced upon it," *State v. Burton*, 314 So.2d 137, 138 (Fla. 1975), and defendant does not believe that his interpretation of Rule 3.310 is undone by a recognition that a trial court, faced with the state's scenario, might be empowered to find that the attorney's attempt to exercise a peremptory challenge under those circumstances was a fraud.

12/ *People v. Castro*, 146 Ill.App.3d 629, 100 Ill.Dec. 294, 497 N.E.2d 174 (1986), also cited by the state, Brief of Appellee at 43, actually supports defendant's position and is in complete accord with *Mobley*. In *Castro*, the court declined to apply the general rule of (Cont'd)

not whether Zollo properly could have been challenged for cause.[13]/

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.

The arguments raised by the state on this issue, Brief of Appel-

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Illinois law which prohibited peremptory challenges after a juror was sworn, and held that the trial court properly had made further inquiry of a sworn juror where the state learned during a lunch recess, that the juror's stepson had been more extensively involved in criminal activites that the juror had acknowledged on *voir dire*, and correctly had allowed the state peremptorily to challenge the juror. *Id.* at 175-76. Holding that "the new information need not rise to a level which would justify a challenge for cause," the court found that, "had it been known to the State originally," the after-obtained information "might have prompted it to exercise a peremptory challenge," and that the court "therefore did not abuse its discretion by permitting the parties that opportunity." *Id.* at 176.

[13]/ When the state faults trial counsel for not having "asked all prospective jurors if they knew any of the deceased's relatives, including his ex-wife," during jury selection, and argues that "additional inquiry would have been warranted, but was prevented by the defense" so as to disentitle defendant from "claim[ing] good cause for the belated discovery" of juror Zollo's dealings with the deceased's former wife, Brief of Appellee at 43-44, it misses the point. As defense counsel candidly told the trial court, without a guarantee that the court would permit a peremptory strike if Zollo, on further questioning, admitted that he knew the former Mrs. Pena, the risk was too great; as counsel explained, "once we ask him, it's all over." (R. 3761). Contrary to the state's position, defense counsel was not obstructing an inquiry of the juror but were attempting peremptorily to strike a juror for the same reason that they would have used a strike had the state disclosed the information *before* the jury was sworn (R. 3764, 3767). And the state cannot point to anything on the record which would have given counsel any reason to believe that Zollo either had misrepresented the facts or had neglected to mention matters of importance, a critical fact which distinguishes *State v. Owens*, 373 N.W.2d 313, 316 (Minn. 1985)(juror who had denied having been a crime victim when questioned by defense counsel, but then admitted to the contrary when the prosecutor questioned her was sworn without further inquiry, and trial court "did not clearly abuse its discretion" in refusing to permit post-swearing challenge), upon which the state relies. Brief of Appellee at 42-43. Here, by contrast, the information upon which the strike was based was not disclosed by the juror, and it would appear that the state had had no knowledge of it until very shortly before the prosecutor related it (R. 3759).

lee at 44-50, are fully addressed in the Brief of Appellant at 15-23.

B. Prejudicial Reliance Upon Prior Death Sentence.

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

The state would have this Court find that "[t]he fact that the jury became aware that a sentencing proceeding occurred in 1981 in no way leads to a conclusion that that must have been a second sentencing proceeding," and that it could have believed that the 1981 trial "was the first and only prior sentencing." Brief of Appellee at 52. This is utterly disingenuous: the jurors knew, from the opening moments of *voir dire*, that the offense had occurred in 1978 (R. 1759-2322), that there had been a court proceeding in 1978 (R. 3912, 4883-84), that defendant previously had been sentenced to death (R. 710-11, 2343-48, 2357-58, 2780, 3150-52), and that defendant had been on "death row" for almost 10 years at the time of the resentencing hearing in February of 1988 (R. 4668, 4910). Thus, when the *prosecution* went forward with its effort to bring before the jury the fact of a *1981* sentencing proceeding (R. 4286, 4674, 4856, 5312, 5639), and the trial court refused to check that effort, there was only one possible conclusion that a reasonably-attentive juror could have drawn: that defendant had been sentenced to death a *second* time in 1981.[14]

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[14] The state mischaracterizes defendant's claim as being that, "after eliciting from several of his own witnesses, that they saw and evaluated Valle for the first time in 1981," defendant should not be permitted to raise a claim "that it was error for the state, on cross-examination, to make reference to anything that transpired in 1981." Brief of Appellee at 53. The first answer to this is that defendant's claim is not that the state created error in "mak[ing] reference to *anything* that transpired in 1981," but that it was unfair to tell defendant's jury that there had been a *sentencing* proceeding in 1981 -- and the state has no response to that argument. Second, the state conveniently ignores the *direct* examination of *its* rebuttal witness, Ted Key, in which Key plainly told the jury that defendant was "screened" at Florida State Prison "on both his initial arrival" and when he "returned back . . . in 1981." (R. 5639). The state cannot avoid the consequences of the prosecutor's conduct by (Cont'd)

2. Tactical Advantages For Prosecution From Prior Death Sentences.

The same attempt to avoid what actually happened at defendant's trial informs the state's argument on this issue: the state contends that "there was no need for defense counsel to elicit on redirect that 1981 was a 'resentencing' proceeding" in order to rebut the state's challenge to Sheriff Buckley's credibility based upon his fees. Brief of Appellee at 54. What the state would have this Court overlook is that the jury had to have concluded that there had been a death sentence imposed in 1978, and that, in order properly to rehabilitate Buckley, defendant himself would have had to elict the fact of a second proceeding in 1981, which was when Buckley improperly was barred from testifying. See Brief of Appellant at 29.[15/]

Similarly, the state dismisses the cross-examination of Dr. Toomer regarding his alleged "failure" to have evaluated defendant until 1981 -- which undisputedly was not defendant's fault -- with the blithe conclusion that "[w]hatever shortcomings may exist in evaluating defendants several years after offenses, reasons for those delays neither add nor detract from the . . . credibility of an opinion based upon interviews years afterward." Brief of Appellee at 55.

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placing the blame on defendant's trial counsel, who, as the record establishes, consistently attempted to enlist the trial court's assistance in *preventing* the state from bringing out the two prior death sentences before the jury (R. 2521-22, 3146, 3158, 3844, 3912, 4286-90, 4705, 4878-79, 5339-40).

[15/] The state also completely overlooks the full advantage taken of this dilemma by the prosecutor in his closing argument. See Brief of Appellant at 29-30. It rather cavalierly suggests that "even if the defense had to make a difficult choice . . ., such choices do not render the proceedings unfair." Brief of Appellee at 54. To be sure, hard choices abound in a criminal trial and it is not every "trade-off" decision that engenders a constitutional violation. *E.g., Town of Newton v. Rumery*, 480 U.S. 386, 393-94 (1987). However, defendant's claim in the present case is that the prosecution's unlawful conduct -- rather than mere circumstance -- created the trial dilemma, and that is a very different thing from what the state is talking about.

This argument utterly ignores the realities of a jury trial: if the jury believed that defendant was somehow at fault in the delay between the offense and the evaluation, or that his counsel had not sought an evaluation because they did not think it would be productive, it surely would have looked with a jaundiced eye at the testimony; on the other hand, if the jury knew the truth, *i.e.*, that defendant was rushed through an unfair trial in 1978 with no opportunity to seek expert assistance, *Valle v. State,* 394 So.2d 394 So.2d 1004, 1005-08 (Fla. 1981), it might have been more willing to listen to the expert's testimony.[16/] Of course, focusing the jury's attention on the two prior proceedings would have played into the state's hands, and it is unfair of the state to again seek to avoid the consequences of its own strategic choices at trial.

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

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

The state characterizes defendant's position as being "that the state improperly elicited evidence of Valle's escape attempts." Brief of Appellee at 56. Not so: to the extent that the disciplinary report (R. 365) proved an "escape attempt[]," the state was entitled to cross-examine on that report once it had been broached on direct examination of Mr. McClendon (R. 4269-78) and Sheriff Buckley (R. 4650-52).[17/] Defendant's claim is that the state went far *beyond*

[16/] The state remains silent on the advantage taken by the prosecutor of defendant's dilemma in closing argument by disparaging Dr. Toomer's testimony because the doctor had not seen defendant until four years after offense (R. 5906). He would not have been so free to do so had defendant not been hamstrung in his ability to respond on this critical fact issue.

[17/] The state does, however, choose to overlook that defendant sought (Cont'd)

what it proved in the disciplinary report when it cross-examined McClendon and Buckley with the prosecutor's chart detailing the physical evidence allegedly found in defendant's cell, when -- as the state concedes by its apparently-deliberate silence in its brief -- the state could *never* have proved the "facts" on its chart. See Brief of Appellant at 37-40.

Thus, when the state argues that "[p]rosecutorial cross-examination, regarding what these witnesses knew about the escape attempt . . . was proper, as it was based on documents which these experts had admittedly read and considered when formulating their opinions of Valle," Brief of Appellee at 58, it misconceives the issue. Nothing in *Parker v. State*, 476 So.2d 134 (Fla. 1985), or *Muehleman v. State*, 503 So.2d 310 (Fla.), *cert. denied*, 484 U.S. 882 (1987), the two decisions upon which the state primarily relies, entitles the state to introduce *unreliable* evidence on cross-examination of expert witnesses. And the state's attempt to distinguish *Hildwin v. State*, 531 So.2d 124 (Fla.), *aff'd*, ___ U.S. ___, 109 S.Ct. 2055 (1989), on the basis that "[n]o experts were involved" in that case, Brief of Appellee at 58-59, is misguided; as the state notes, *id.* at 59, this Court acknowledged *Parker* in *Hildwin*, but it did so in a way which undoes the state's interpretation of the case:

> Because no conviction was obtained, evidence such as that introduced in the instant case has been deemed inadmissible to prove the aggravating circumstance of committing a previous violent felony. [citation omitted] On the other hand, even where the defendant waived the mitigating circumstance of no prior criminal activity, the state was allowed to bring out the defendant's prior misconduct when the defendant opened the

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to exclude *all* evidence of uncharged criminal acts (S.R. 104-05; R. 1176-84, 1211-25), and that the trial court, upon ruling against him, recognized that defendant could properly preserve the issue for appellate review while, of necessity, touching upon the matters in direct examination of his witnesses (R. 4151-52, 4171).

> door by introducing evidence of his nonviolent character. *Parker v. State*, 476 So.2d 134 (Fla. 1985). We hold that, *during the penalty phase of a capital case*, the 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 . . . .

Hildwin v. State, 531 So.2d at 128 (emphasis supplied). Nothing in *Hildwin* supports the distinction which the state attempts to draw.[18]

And no such distinction can be drawn. The evidentiary principles which control here are that "the conclusion or opinion of an expert witness based on facts and inferences not supported by the evidence in a cause has no evidential value," and that "[t]he opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." *Arkin Construction Company v. Simpkins*, 99 So.2d 557, 561 (Fla. 1957). Stated otherwise, an expert cannot be used to introduce otherwise-inadmissible evidence. *Cirack v. State*, 201 So.2d 706, 709 (Fla. 1967)(citing *Arkin*).[19]

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[18] Indeed, it would not be unfair or unreasonable to read *Hildwin* as severely limiting -- if not overruling -- the *Parker* decision. The state, in an obvious attempt to avoid that reading of *Hildwin*, argues that "this Court, even subsequent to *Hildwin*, has still cited" the decision in *Muehleman v. State* (although notably not *Parker*) in its subsequent decision in *Chandler v. State*, 534 So.2d 701 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 2089 (1989). Brief of Appellee at 59. In *Muehleman*, 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." 503 So.2d 315-16 (citing *Parker*). It is not clear from the face of the decision whether the testimony in *Muehleman* would have satisfied the "direct evidence" test of *Hildwin*, but, assuming it did not, this Court in *Chandler* cited *Muehleman* only for the proposition that, "[t]o be admissible, however, evidence must be relevant, and the admission of evidence is within the trial court's wide discretion." *Chandler v. State*, 534 So.2d at 703. This citation hardly constitutes an endorsement of the specific holding in *Muehleman*, much less a resuscitation of *Parker*.

[19] While § 90.704, Fla.Stat. (1989), provides that, "[i]f the facts or data are of a type reasonably relied upon by experts . . . to support the opinion expressed, the facts or data need not be admissible (Cont'd)

The ultimate holding in *Hildwin* was that the questioned evidence in that case was sufficiently "reliable" to be admitted on cross-examination, *Hildwin v. State*, 531 So.2d at 128; in the present case, the state can muster no defense in support of the reliability of the evidence "introduced" on cross-examination of the defense experts. And the paramount Eighth Amendment requirement of reliability, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983), mandates that "*accurate* sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)(emphasis supplied), and admits of no distinction between non-expert and expert testimony.

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

a. redirect examination of defense witnesses.

The state concedes that the prosecutor elicited from McClendon that, "in [his] offense, he did not plan to go in and kill the store clerk during the robbery." Brief of Appellee at 60. By this admission, the state necessarily also concedes that its questioning of McClendon should be deemed to have "opened the door" to questioning by the defense on the matter. *E.g.*, *Rogers v. State*, 511 So.2d 526, 532 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Huff v. State*, 495 So.2d 145, 150 (Fla. 1983). But the state nonetheless claims that "[t]he facts of McClendon's offense were not pertinent, as the question really dealt with accidental murders in general, as opposed to McClendon personally," and "there was no need to rehabilitate McClendon on this point." *Id.* at 60-61. The state is applying an

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in evidence," that statute did not vitiate the *Cirack* rule, *e.g.*, *Johnson v. State*, 478 So.2d 885, 887 (Fla. 3d DCA 1985), *dismissed*, 488 So.2d 830 (Fla. 1986), and, even under that provision, an expert witness "may not serve merely as a conduit for the presentation of inadmissible evidence." *Smithson v. V.M.S. Realty, Inc.*, 536 So.2d 260, 261-62 (Fla. 3d DCA 1988)(citations omitted).

erroneous standard of review: the question is not whether there was a "need" for rehabilitation of a defense witness on redirect, but rather, whether the proposed redirect examination was "within the scope of questions asked on cross-examination," *Johnston v. State*, 497 So.2d 863, 869 (Fla. 1986); the issue does not turn upon a subjective determination of what the state "really" intended to ask the witness. The state does not even make the least effort to show that the matters defendant sought to elicit from McClendon regarding his offense and rehabilitation on redirect examination were not "within the scope" of the prosecutor's cross-examination.

Moreover, regardless of how the prosecutor sought to justify his cross-examination to the trial court,[20] the trial court's refusal to permit redirect examination allowed the state to create a one-sided view of McClendon's testimony. The prosecutor began his cross-examination of McClendon by eliciting testimony regarding McClendon's behavior in prison, and specifically brought out from the witness that he had become a "model prisoner." (R. 4292-93). Then, by linking successful rehabilitation to a conviction for a non-premeditated homicide -- as the state concedes on appeal the prosecutor was trying to do, Brief of Appellee at 60-61 -- the state was able to create the impression for the jury that persons who commit premeditated homicides do not successfully adapt to prison life. The trial court's discretion in this area notwithstanding, defendant was entitled to rebut that inference by eliciting testimony on redirect to explain

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[20] If the prosecutor's true goal had been what the state claims it was, he could have asked the question in general terms, McClendon having previously been found to be an expert in correctional matters (R. 4181-200), without making McClendon's own background an issue. The fact that he chose to address the issue in terms of McClendon's criminal behavior speaks far more loudly than his after-the-fact justification for the cross-examination.

McClendon's rehabilitation. *Tompkins v. State,* 502 So.2d 415, 419 (Fla. 1986)(party should be permitted to rebut through redirect "delusive innuendos" raised on cross-examination)(citation omitted).

The state's argument that the issue was not preserved because "[t]he defense never proffered what it was about the facts of McClendon's killing that would have any significance" and that "there is no possibility of meaningful appellate review," is spurious. The record reflects that everyone connected with the trial was fully aware of McClendon's background (S.R. 110-11),[21] and that counsel specifically proffered to the court that he wished to have McClendon explain his answer to the prosecutor's question that there was no link between the nature of a conviction and a defendant's amenability to prison (R. 4416-18), asserting that McClendon's rehabilitation was "relevant to his understanding of how people who commit murder are treated in prison by prison authorities" and their "[b]ehavior in prison." (R. 4418).[22] To this argument the court four times responded that "[h]is rehabilitation is irrelevant." (R. 4418-19). The excluded evidence was thus clearly "made known to the court" and

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[21] The state had filed a motion *in limine* seeking exclusion of testimony that it (erroneously) believed the defense intended to present regarding the deterrent value of capital punishment (S.R. 109-11). In that motion, the state noted that McClendon was a former death row prisoner "who at one time was sentenced to death for murder in New Mexico, but later achieved a substantial education, was pardoned for his prior offenses," and became a corrections official (S.R. 110). The court heard the motion prior to trial (R. 1494-95).

[22] As the state notes, McClendon denied that there was a "connection" between the nature of the crime of which a prisoner has been convicted and the prisoner's amenability to life under incarceration (Tr. 4411-12). See Brief of Appellee at 61. However, the state's conclusion that there accordingly "was no need to rehabilitate McClendon," *ibid,* is based upon the apparent view that McClendon, having answered the prosecutor's question, could never be questioned further on the matter, a view which is directly counter to the governing rule that redirect is properly used "to *explain and clarify* the testimony elicited . . . during cross-examination." *Huff v. State,* 495 So.2d at 150 (emphasis supplied).

"was apparent from the context within which the questions were asked," so as to permit appellate review. § 90.104(1)(b), Fla.Stat. (1989). A formal proffer "is unnecessary where the offer would be a useless ceremony, where the evidence is rejected as a class, or where the court indicates the proffer would be unavailing." *Reaves v. State*, 531 So.2d 410, 403 (Fla. 5th DCA 1988)(citations omitted).

With regard to the limitation on Buckley's testimony, the state says that Buckley, on cross-examination, had "volunteered the unsolicited response that 'Mr. Jose Martinez is a professional informant,'" and that, despite then being specifically asked by the prosecutor for the source of this opinion (R. 4849), Buckley was properly "prohibited from speaking about matters of which he had no personal knowledge." Brief of Appellee at 62. The most fundamental flaw in the state's analysis is that Buckley had been qualified by the trial court as an expert in correctional matters (R. 4586, 4588), and, having run two detention facilities during his 10-year term as a sheriff (R. 4552, 4556-57), he was quite familiar with "snitches" and "inmates . . . looking for deals" in exchange for information (R. 4655, 4661).[23/] Based in part upon his evaluation of Martinez's activities,

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[23/] As the state concedes, Brief of Appellee at 62, § 90.604, Fla. Stat. (1989), was therefore -- by its own terms -- inapplicable. The governing statute, § 90.704, Fla.Stat. (1989), provides that "[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before trial." The state attempts to denigrate the basis for Buckley's opinion that Martinez was an informant by suggesting that "he knew Martinez was a snitch based on conversations with a Mr. Sobel at the jail," while, as the complete exchange between the prosecutor and Buckley on this question (quoted in defendant's brief at p.45), plainly shows, his opinion was based upon depositions of Martinez and Sobel, the latter of whom was the investigator for the county jail (R. 4848-49). Indeed, when the state objected to Buckley's testimony on direct examination, counsel expressly proffered that it was based on Sobel's deposition (R. 4656-58), and Buckley subsequently testified that he had also considered Martinez's deposition (R. 4662). Moreover, as set forth in defendant's brief, there was no question before the trial court as to the veracity of the information upon (Cont'd)

he reached the opinion expressed on direct examination, *i.e.*, that defendant's conversations with Martinez in jail should not be taken "seriously" in evaluating defendant (R. 4661-62, 4665).

Thus, Buckley was doing no more than explaining why certain facts had not played an important part in his analysis of defendant's potential for adjusting to prison, an indisputably-proper aspect of expert testimony. *See, e.g., Huff v. State,* 495 So.2d at 145, 148 (Fla. 1986)("expert, once qualified by the trial court as such, normally decides for himself whether he has sufficient facts on which to base an opinion"). Then, when the prosecutor sought to impeach that opinion by suggesting that Martinez's depiction of the conversations should have been given more weight (R. 4848), Buckley answered the question by labelling Martinez a "professional informant" (R. 4849), and -- most notably -- the prosecutor did not truncate his examination at that point but continued by asking Buckley to relate the information upon which this opinion was based (R. 4849).[24/] The answer, which necessarily had to mention Martinez's undisputed arrangements with the state, was virtually required by Section 90.705 (1), Florida Statutes (1989)(expert may render opinion "without prior disclosure of the underlying facts or data" but, "[o]n cross-examination he shall be required to specify the facts or data"). The essen-

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which Buckley based his opinion of Martinez, Brief of Appellant at 45, and the state does not contend otherwise.

[24/] The question was: "Where did you get the idea that Mr. Martinez is a professional snitch?" *Ibid.* Thus, the state's argument on appeal that Buckley properly was prohibited from "expressing opinions about the credibility of Martinez," Brief of Appellee at 62, conveniently ignores the fact that it was the *prosecution* which attempted to elicit Martinez's actual statements. The court -- at the request of defense counsel -- specifically instructed the jury that "the statements of Mr. Martinez as they're being related by Mr. Buckley are not coming in for their truth but are coming in to evaluate the basis of Mr. Buckley's opinions." (R. 4847-48).

tial point is that the state asked the question and Buckley's answer would have been well within the scope of proper expert testimony.

Finally, the state concedes that the trial court refused to allow redirect examination of Buckley on the criminal and prison record of Marvin Francois, the inmate who had been disciplined for fighting with defendant, which record had been proffered as relevant to dispute the inference that the state had attempted to create on cross-examination that defendant nonetheless had been responsible for the altercation. Brief of Appellee at 63-64. The state's only justification for the exclusion of these records was that "[t]he Francois incident was fully explained by the reports disciplining Francois and the absence of a disciplinary report for Valle." *Id.* at 64. Again, the state seems to believe that its cross-examination of an expert witness is somehow conclusive and bars *any* further testimony on redirect examination, while the governing legal principle is that "testimony is admissible on redirect which tends to qualify, explain or limit cross-examination testimony." *Tompkins v. State*, 502 So.2d at 419 (citation omitted). The state does not even attempt to argue that Francois' record does not satisfy this standard.

b. denial of surrebuttal

The arguments raised by the state on this issue, Brief of Appellee at 64-66, are fully addressed in the Brief of Appellant at 47-51.

3. Prejudicial Misuse of Defendant's Prior Record

On this point, the state adopts the arguments it presented in III(C)(1), relying on the *Parker* and *Muehleman* decisions. Brief of Appellee at 67. Defendant's argument in this regard is set forth at pp.15-17 *supra*. But the state goes further on this issue, arguing that the fact of the probation revocation, as acknowledged by defendant's expert witnesses, would be sufficient to satisfy the *Hildwin*

requirement of "direct evidence," *Hildwin v. State*, 531 So.2d at 128. Brief of Appellee at 68-69.[25] This argument, of course, ignores the critical fact that the state *never sought to prove* the Toledo incident by such "direct evidence." Rather, believing that Toledo "would not look good on cross examination" (R. 4119-20), the prosecution apparently *never* intended to call Toledo as a witness (R. 5509) and, for that matter, the transcript of the probation-revocation proceeding upon which the state now places such importance, was, as the state is forced to concede, never placed before the jury as evidence in the case. Brief of Appellee at 69.[26]

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[25] At one point in its brief, the state seeks to gain advantage from the fact that "it was the *defense* which elicited this testimony" on direct examination of the witnesses Buckley and Fisher, and that, on direct of the other expert witnesses, "the defense established . . . that they had reviewed and considered all of Valle's criminal records." Brief of Appellee at 68. The state chooses to ignore counsel's early and consistent efforts to exclude the Toledo incident, which led to the trial court several times ruling that the testimony would be admissible (R. 1174-84, 1349-50, 3689-92, 4107-19, 4133-34, 4461). As counsel explained to the court -- after the state had cross-examined the first defense expert, McClendon, with regard to the Toledo incident (R. 4296-97, 4306-08, 4488-49) -- the incident would be touched upon in the direct of other experts without a waiver of the objection (R. 5199-200) because the testimony was going to be brought before the jury by the state on cross-examination, and the defense would have been further disadvantaged had it appeared to the jury that it was unwilling to address it. Notably, the trial court never found that the defense questioning of the witnesses allowed the state to present the testimony; rather, its ultimate ruling was that the state had "the right . . . to use it to see whether it factored into the expert's opinions." (R. 4461).

[26] The state defends its use of this purported "documented, violent incident" to cross-examine defense experts who considered but "minimized" its significance "for appalling reasons," and excoriates defendant for raising an "outrageous[]" argument which urges "the law to utterly take leave of its senses." Brief of Appellee at 68-69. As the state's actions at trial show, however, the prosecution never intended such a limited use of the Toledo incident, but planned from the outset to use it to prejudice defendant before the jury, and the clinching evidence in this regard is the prosecutor's elicitation of the incident on *direct* examination of its *own* rebuttal witness, see Brief of Appellant at 56, whom, presumably, the state did not plan to impeach. On appeal, the state blithely overlooks this use of the Toledo incident, for which it apparently has no excuse.

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

a. parole

In arguing that their cross-examination of the expert witness regarding defendant's purported parole eligibility 15 years after the imposition of a life sentence was based upon a "reasonable theory of the evidence," Brief of Appellee at 72-73, the state has misrepresented the structure of the sentences imposed upon defendant. First, he was sentenced on April 25, 1978 to a total of 10 years (and 60 days) on the probation-revocation in Case No. 71-9555 (R. 32). Then, when the death sentence was first imposed in May of 1978, the sentencing order provided that the 30-year term imposed on Count II was "to begin immediately upon the expiration of the sentence imposed by this Court in Case No. 71-955," that the 15-year sentence on Count III would be consecutive to the sentence on Count II (R1 334), and defendant was also sentenced to five years on Count IV, which had been severed and to which he had pled guilty (R. 337). Upon resentencing in 1981, the court imposed consecutive terms of 30 and five years on Counts II and III (R2 1057). The court's order is silent as to whether those sentences are consecutive to the probation-revocation sentences, and, under § 921.16(1), Fla.Stat. (1981), the sentences are therefore consecutive. Thus, at the time of sentencing hearing below, defendant had been serving (1) the 10 year sentence in Case No. 71-9555, followed by (2) the 35 years imposed in 1981.[27/]

[27/] Contrary to the state's argument, Brief of Appellee at 73 ("individuals don't serve time on death row for non-death offenses"), defendant had not been "serving" his death sentence during the preceding 10 years. Rather, the location of his imprisonment was commanded by § 922.111, Fla.Stat. (1989):

> The sheriff shall deliver a person sentenced to death to the state prison to await the death warrant. A circuit judge of the circuit in which

(Cont'd)

The controlling statutory provision remains § 921.161(1), Fla.Stat. (1989)("[a] sentence of imprisonment shall not begin to run before the date it is imposed").[28/]

On appeal, the state seeks to sanitize its actions in the trial court by maintaining that it was only because Sheriff Buckley referred in his testimony to "lifers" who are in prison "forever" (without, incidentally, stating that defendant would be) that it even broached the subject of parole. Brief of Appellee at 71. Assuming that Buckley's answer would properly have permitted the prosecutor to mention the 25-year minimum-mandatory term, § 782.02(1), Fla.Stat. (1989), in equally general terms, Buckley's answer does not explain (1) the erroneous computation of defendant's eligibility date, (2) the subject of possible parole being brought up on cross-examination of Dr. Fisher, who never mentioned parole or "lifers" in his direct examination (R. 4888-912, 4945-51), or (3) the prosecutor's closing argument that defendant would be dangerous if released on parole (R.

> a death sentence was imposed may order the convicted person transferred to the state prison before the issuance of a warrant of execution if he determines that the transfer is necessary for the safekeeping of the prisoner.

Ibid. That the trial court in 1981 gave defendant "credit" on his death sentence does not lead, as the state apparently believes, Brief of Appellee at 73, to a different conclusion: § 921.161, Fla.Stat. (1989), only allows for credits on sentences of *imprisonment*, and, consistent with the authority cited in the state's brief at p.72, the credits granted by the trial court in 1981 on the death sentence, rather than the simultaneously-imposed sentences of imprisonment, could only have been applied to the prison sentences.

[28/] *Cf.*, *Downs v. State*, No. 73,988 (Fla. Sept. 20, 1990)(jury instructed, in response to question during deliberations regarding whether defendant's 11 year of incarceration prior to resentencing hearing would be "'subtracted'" from the 25-year mandatory term, that the time would be credited where "Downs created the issue by arguing to the jury that a life sentence would 'protect[] society from him for the next 25 years"; held, "[u]nder the facts presented, . . . the trial court did not abuse its discretion").

5900).[29] These acts of plain misconduct have gone altogether unanswered by the state.

b. lack of remorse

The state's argument that this issue was not preserved by proper objections is utterly frivolous. Defendant's pretrial motion *in limine*, did not, as the state contends, argue only that "lack of remorse is an inadmissible aggravating circumstance." Brief of Appellee at 75. Defendant certainly made that argument (R. 130), citing *Pope v. State*, 441 So.2d 1073 (Fla. 1983), but, quoting *Trawick v. State*, 473 So.2d 1235, 1240 (Fla. 1985), *cert. denied*, 476 U.S. 1143 (1986), further argued that "'it is error to consider lack of remorse for *any purpose in capital sentencing*.'" (R. 131)(emphasis supplied). The state, in its written response to the motion, argued that if defendant presented "any evidence of remorse, the State can and will present evidence of 'lack of remorse'" as rebuttal (R. 156), citing *Pope* and *Agan v. State*, 445 So.2d 326 (Fla. 1983), *cert. denied*, 469 U.S. 873 (1984), the two decisions upon which the state relies on appeal.

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[29] In tacit recognition of the weakness of its position on this claim, the state alternatively argues that "[t]he ten year differential, even if erroneous, should not be deemed reversible, as Valle still would be subject to release in either case." Brief of Appellee at 73. This argument, of course, presupposes that comment on defendant being "subject to release" was appropriate in the first instance, and the only argument that the state can muster in this regard is that, "where evidence which would not support a statutory aggravating factor is adduced not as an aggravating factor, but to negate mitigating evidence, that otherwise inadmissible evidence becomes admissible." Brief of Appellee at 71. That is sometimes -- but certainly not always -- the case: the admissibility of such evidence turns upon its reliability, *Hildwin v. State*, 531 So.2d at 127-28, and upon its potential for causing unfair prejudice, *Robinson v. State*, 487 So.2d 1040, 1042 (Fla. 1986). Under the state's theory, the mere possibility of parole release -- without, as in the present case, *any* evidence introduced to support the state's position -- would be admissible whenever the defendant properly invoked *Skipper v. South Carolina*, 476 U.S. 1 (1986), despite this Court's recognition that parole eligibility is simply "an improper consideration." *Norris v. State*, 429 So.2d 688, 690 (Fla. 1983). See Brief of Appellant at 61.

Brief of Appellee at 74.[30] During a break in Detective Wolfe's testimony, the court announced its ruling on the issue:

> The Court: . . . . I think the state can ask him, while he was testifying, they were asking the questions and he was answering, during that period of time did he ever show any remorse? *I think that's legal.*
>
> * * *
>
> Mr. Scherker [counsel for defendant]: Our objection to whatever testimony the state may have elicited in that regard during the course of the interrogation is based upon the argument in our pretrial motion in limine.
> The Court: Right.
> Mr. Scherker: Is the Court going to require us to preserve it at that time?
> The Court: No. The Court feels it is preserved now, and, for the record, you don't have to say it in front of the jury.

(R. 3966-67)(emphasis supplied). Detective Wolfe's testimony resumed moments later (R. 3980), and shortly thereafter he gave the testimony at issue (R. 4068-69).

As the record plainly shows, the court did not limit either its ruling or the state's right to introduce the testimony to "rebuttal" of nonstatutory mitigation: to the direct contrary, it issued its ruling long before defendant had presented *any* mitigatory evidence, and right before the state planned to elicit the offending testimony.[31] Defendant's position before the trial court was that the tes-

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[30] In the first arguments on this aspect of the motion before the trial court, the prosecution sought to make their position "very clear," stating that "[t]he *only reason* the State will introduce any evidence of lack of remorse is in rebuttal of any mitigating evidence in which the defendant has expressed remorse." (R. 1231-32)(emphasis supplied). When defendant's counsel voiced a "very big problem with that," in that Detective Wolfe previously had testified in the state's case that defendant "never came forward" with a statement of regret or remorse, and that the state's case on that issue would be defendant's silence, the prosecutor responded that "there is other evidence that we have to show lack of remorse." (R. 1233). The court deferred a ruling at that time (R. 1234-40).

[31] The state does not fault defendant for accepting the trial (Cont'd)

timony was inadmissible for *any* purpose and the trial court ruled that the state could elicit it during its case-in-chief; nothing more could possibly be required to preserve the issue for review. *E.g., Spivey v. State*, 529 So.2d 1088, 1093 (Fla. 1988).

On the merits, the state offers no argument in support of the trial court's ruling,[32] but asserts only that "any error is clearly harmless" in that "the lack of remorse testimony was inevitably going to come in to negate" the mitigating evidence presented through defendant's expert witnesses. Brief of Appellee at 63-64. The first problem with the state's argument is that it has no record support: there is nothing on the record from which it can be argued that the defense would have gone forward with the testimony from McClendon and Buckley had Wolfe's testimony been excluded, and, "[h]aving 'released the spring'" by eliciting defendant's purported lack of remorse in the first instance, the burden should be on the state to show that its "illegal action" did not induce the defense to go forward with the testimony at issue in order to gain any benefit therefrom. *Harrison v. United States*, 392 U.S. 219, 224 (1968).[33]

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court's ruling that it would not be necessary to renew the objection during the actual testimony. Brief of Appellee at 75.

[32] In addition to the authority set forth in defendant's brief at pp.63-64, this Court recently has found error in the introduction of almost-identical testimony. *Jones v. State*, No. 72,461 (Fla. Sept. 13, 1990)(state improperly called police officer "for the express purpose of testifying that Jones showed no remorse").

[33] It is worth noting that the prosecution utterly failed to conduct *any* cross-examination of Buckley and McClendon, the two expert witnesses upon whose testimony the state now relies, Brief of Appellee at 74-76, on this issue: McClendon was not cross-examined at all on the question, and Buckley was only asked about defendant's alleged silence since the time of the 1981 trial (R. 4856). The state seems to think that the *prosecution* might have brought out evidence of defendant's remorse on cross-examination, even if defendant had not gone forward with the testimony, and that, having done so, would then have been permitted to present Wolfe "at the end rather than the beginning," urging this as another basis to find the error harmless. However, this Court has held only that a lack of remorse can be pre-
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And the state unaccountably ignores the most prejudicial aspect of its misconduct in the trial court -- the closing argument in which the prosecutor relied on the purported "lack of remorse" to support an application of § 921.141(5)(i), Fla.Stat. (1989) -- and this Court's holding in *Hill v. State*, 549 So.2d 179, 184 (Fla. 1989), that such constitutes reversible error, as set forth in defendant's brief at 64-65.[34/] The closing argument, of course, belies everything the prosecutors told the trial court about their intent, and, all other possible excuses for the state's reliance upon defendant's purported lack of remorse notwithstanding, this error compels a reversal for resentencing.

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.

a. unfounded character attack

The state says that it "had no obligation to accept the defense claim of typographical error" with regard to whether Dr. Toomer previously had held himself out as a psychiatrist, and that the onus was

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sented "to *rebut* nonstatutory mitigating evidence of remorse *presented by a defendant*." *Walton v. State*, 547 So.2d 622, 625 (Fla. 1989)(citation omitted)(emphasis supplied), *cert. denied*, ___ U.S. ___, 110 S.Ct. 759 (1990) As with any mitigation, when a defendant does not raise an issue, the state cannot "rebut" it. *Maggard v. State*, 399 So.2d 973, 978 (Fla.), *cert. denied*, 454 U.S. 1059 (1981).

[34/] The state disagrees with defendant's characterization of Wolfe's testimony as being based upon defendant's silence, Brief of Appellant at 63-64, arguing that it was "based on what Valle chose not to say." Brief of Appellee at 76. Even if this was correct, it would not change the result dictated by *Hill*. Moreover, it is an inaccurate portrayal of what happened when Wolfe testified. Unlike *Ragland v. State*, 358 So.2d 100 (Fla. 3d DCA), *cert. denied*, 365 So.2d 714 (Fla. 1978), in which it was held that "comment upon the failure to answer a single question" did not violate the Fifth Amendment, Wolfe did not testify that he had *asked* defendant if he was remorseful and received no response; rather, he testified that defendant had *failed to express* any remorse (R. 4068-69).

on the defense to prove "that it was a court reporter's error." Brief of Appellee at 77. The state ignores the trial court's *specific factual finding* that Dr. Toomer had *not* stated in the 1981 trial that he was a psychiatrist (R. 5303, 5305), rendering extrinsic proof unnecessary. The state apparently can muster no defense for the prosecutor's misuse of the error in the 1981 transcript.

b. use of insanity standard

The invalidity of the state's proffered justification for raising the question of legal insanity on cross-examination of Dr. Toomer and for the challenged closing argument are fully addressed in the Brief of Appellant at pp.68-71. The state asserts, however, that the prosecutor's closing-argument use of legal insanity, *id.* at 69-70, is not preserved for appeal. While, as the state recognizes, Brief of Appellee at 79, the parties in the trial court agreed that objections to each closing argument would be addressed at the conclusion of the closings (R. 5864-66),[35/] the state now finds fault with the timeliness of defense objections, citing the rule requiring that objections be made prior to the return of the jury verdict. Brief of Appellee at 79-80. The state's position is utterly without any basis in the record: defense counsel strictly followed the directives of the trial court in presenting their objections to the prosecutor's remarks, and the court ruled on the merits of the objections.

The record shows that, at the end of closing argument, the court directed that the objections be addressed after a luncheon recess (R.

[35/] It was the *prosecution* which first suggested this approach: the defense presented a pre-argument motion *in limine*, as to which the lead prosecutor vociferously objected, choosing for the state to "proceed[] at its peril as it does in every case," and the state raised the possibility of holding objections until the end of closing arguments, to allow the lawyers to make their remarks without numerous interruptions; the court and the defense accepted this as an appropriate procedural device (R. 5862-66).

5957-58).[36] After this recess, the court first suggested that "we wait until they're out" to take up the objections; defense counsel represented that there were "a number of things that were said" by the prosecutor which "were objectionable that I believe warrant[] a mistrial, that . . . we would like to bring to the [c]ourt's attention." (R. 5962-65). The trial court responded that "[e]very last thing that was said in [closing] arguments by both sides, at the present time, the [c]ourt does not intend to grant a mistrial," although it would "gladly hear this piece by piece if you would like, *as the record is preserved*." (R. 5965)(emphasis supplied).[37] Contrary to the state's assertion in its brief, Brief of Appellee at 80, counsel then commenced the presentation of their objections to the prosecutor's closing arguments (R. 5966-71).[38]

After counsel began (R. 5867-71), the court interrupted and directed them to "[t]ell me whatever it is you want and I will either grant it or deny it," and that "[a]ll other complaints that I do not think . . . are serious error, I will take up immediately after I

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[36] The court had first suggested that a "few minutes break" be taken, after which objections would be addressed and the jury instructions reviewed, but, when counsel reminded the court that it had directed the defense to have the final version of the instructions typed during the lunch recess, the court noted that "[w]e haven't left the courtroom for five minutes," and told counsel to "get back at two [o'clock] and go over the instructions, over everybody's objections in closing arguments." (R. 5957-58).

[37] The court previously had noted that it had taken "careful notes [of] who said what," and that, while "[b]oth sides may have taken a couple of cheap shots," there was no "serious error." (R. 5962-63).

[38] The state has read these pages erroneously: it represents that the court did not hear objections at this point in time because the trial judge had "suggested waiting for Valle to return before proceeding further with the objections," and that, when defendant was brought back into the courtroom during the charge conference, counsel failed to "request[] that the court revisit objections to closing arguments," failing to do so again until the jury returned its verdict." Brief of Appellee at 79-80. As is set forth in the text, this is simply not what happened.

instruct the jury." (R. 5971). The court denied a requested instruction on other comments, *ibid,* at which point the proposed jury instructions arrived in the courtroom, and the judge and the parties reviewed the charges (R. 5972-93). The court then proceeded as it had indicated it would and instructed the jury (R. 5994-6006); however, at the conclusion of the instructions, when counsel asked if the court "want[ed] to address the remaining issue[s] at closing argument now," the court responded "[n]ot particularly." (R. 6013). The following exchange then occurred:

> Mr. Scherker: [The] Court knows we need to address the objections at some point.
> The Court: Obviously.
> Mr. Scherker: What's the Court's pleasure?
> The Court: I need to do other things first.

(R. 6015).

The court thereafter directed counsel to present their remaining objections while the jury deliberated (R. 6018) and numerous other objections were argued to the court (R. 6019-26) until the proceedings were interrupted by the jury advising the court that a verdict had been reached (R. 6026). The court then told counsel: "Have a seat. We will do this later." *Ibid.* The jury's verdict was then returned (R. 6027, 6030), and the court then directed counsel to proceed with the remainder of their objections (R. 6029), after which the following transpired:

> Mr. Scherker: The next thing I have in my notes was Mr. Laeser using the dictionary --
> The Court: Let me ask you one other thing. I have no problem taking the rest of this up tomorrow.
> Mr. Scherker: Whatever is convenient for the Court.
> The Court: Let's take it up tomorrow. We will be in recess.

(R. 6029-30). The proceedings resumed on the following day, and, when the specific issue raised in this claim was argued by defense

counsel (R. 6037-39), the court observed that "I didn't think it was appropriate" comment, but that "[i]f it's error, it's certainly not reversible error." (R. 6038-39).[39/]

It is irresponsible of the state -- which never voiced *any* problems with the admittedly somewhat-unusual procedure followed by the trial judge -- to now seek to have this Court ignore what occurred below.[40/] While *State v. Cumbie*, 380 So.2d 1031, 1033-34 (Fla. 1980), upon which the state relies, Brief of Appellee at 80, imposes the general requirement that mistrial motions be made before the commencement of jury deliberations,[41/] it is beyond dispute that a trial court may choose to consider and rule upon such motions after the jury has retired, *Ed Ricke & Sons v. Green*, 468 So.2d 908, 910-11 (Fla.

[39/] This last ruling by the trial court, following as it did on the heels of the court's several statements that *none* of the prosecutor's remarks warranted *any* corrective action, would serve to render irrelevant any technical flaws in counsel's presentation of the issue: this Court can be confident that the trial court believed the claim to be without merit and that it would not have acted differently regardless of the context in which counsel raised it, and no legitimate purpose of the contemporaneous-objection rule would be served by declining now to pass upon the merits.

[40/] Indeed, the state, by actively participating in the final hearing on the objections before the trial court, on this claim (R. 6038) as well as on other objections (R. 6046-47), and -- when the trial court offered the prosecution the opportunity for "[a]nything you want to say before I make a ruling" on *any* of the objections -- responded, "I don't believe it's necessary" (R. 6048), should properly be deemed to have waived any right to make this argument in the first instance. *See McGee v. State*, 438 So.2d 127, 133 (Fla. 1st DCA 1983).

[41/] In *Cumbie*, the defense objected to a remark in the prosecutor's closing argument and the court sustained the objection, directing the jury to disregard the comment; but counsel did not proceed further on the matter until after the jury retired, at which time he sought a mistrial. *Id.* at 1033-34. This Court held that, "[i]f Cumbie felt the judge's admonition was inadequate, he should have informed the judge of this fact at the time of his objection, or, at the latest, at the end of the prosecutor's closing argument," and, having failed to do so, had waived the issue. *Id.* at 1034. Obviously, the situation in this case is very different: it is undeniable from the record that nothing different would have transpired in this case regardless of when the trial judge ruled, since he believed the comment, while improper, did not warrant any corrective action.

1985), which is what the trial court plainly chose to do in this case.[42] Defendant cannot be penalized when his counsel repeatedly sought to have the court consider their objections, properly acceded to the court's directives at every turn of the proceedings and secured a ruling on the merits of the claim now raised on appeal.[43]

2. Limitation on Mitigation to Defenses to Crime.

The state first relies upon *Saffle v. Parks*, ___ U.S. ___, 110 S.Ct. 1257 (1990), to argue the propriety of the prosecutor's repeated efforts to label defendant's mitigating evidence as an attempt to play on the jury's sympathy. Brief of Appellee at 81. That decision, involving as it does a federal procedural issue, *i.e.*, whether striking down an "anti-sympathy" instruction would constitute a new rule of law which could not be pronounced on federal habeas corpus,

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[42] In *Ricke*, this Court noted *Cumbie* and other decisions, both civil and criminal, holding that a motion for mistrial must be timely, *id.* at 910, but also recognized that the practicalities of trial proceedings require that a judge be permitted some flexibility:

> [T]he trial court has the power to wait until the jury returns its verdict before ruling on a motion for mistrial. . . . .
> . . . When, as here, the prejudicial comments occur during closing argument, it is quite reasonable for a trial judge to reserve ruling until after the jury deliberates in the hope that the jurors can rise above the alleged prejudice and cure the error. If the verdict cures the error, the court will save the expenditure of additional time, money, and delay associated with a new trial. . . . .

Id. at 910. In the present case, the parties themselves waived the requirement of objections being made during closing arguments, and the trial court thereafter plainly elected to invoke the discretionary power conferred by this Court upon trial judges.

[43] The state raises preservation-of-error arguments in response to several other claims of prosecutorial misconduct. Brief of Appellee at 82, 85, 86, 90. The discussion in the text is equally applicable to those arguments. See nn.44 & 50, *infra*.

110 S.Ct. at 1260 ("our task is to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution"), is in every respect of no consequence in this case. The issue in this case is *not* whether a measured "anti-sympathy" instruction, intended "to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a 'reasoned *moral* response,' rather than an emotional one," *Parks*, 110 S.Ct. at 1263 (citation omitted; original emphasis), is proper. Rather, it is whether a prosecutor properly may denigrate undisputedly-mitigatory evidence as presented "only to pull on your heart strings" and may direct the jury "to put *that type* of sympathy out of your mind" (R. 5875, 5886)(emphasis supplied).[44/]

And, contrary to the state's portrayal of the claim, this was not a mere isolated comment but was part of a deliberate effort unconstitutionally to minimize the mitigation evidence. See Brief of Appellant at 73-76. To be sure, the prosecutor was entitled to argue, as the state suggests, that "the jury should not accept such mitigating factors as being *established*," Brief of Appellee at 85 (emphasis supplied), but he was *not* entitled to argue that they were *not mitigating factors* -- which is what he *did* argue to the jury (R.

[44/] The state argues that these comments are not preserved for review, Brief of Appellee at 82, ignoring that the trial judge, at least twice prior to closings, expressly had ruled, over objection, that "anti-sympathy" arguments were proper (R. 3190-99, 3416, 5853-59), that the objections were renewed at the end of closing arguments (R. 5973) and that the objections were again raised before the court's final ruling on the propriety of the prosecutor's closing argument (R. 6021, 6048). See pp.30-34, *supra*.

5878-79, 5881-82, 5884, 5885-86, 5910-11).[45] Whether a factor is "mitigating in nature" is "a question of law," *Campbell v. State*, 15 F.L.W. S342, 344 & n.6 (Fla. June 15, 1990), and therefore not an appropriate subject for prosecutorial comment. *See Garron v. State*, 528 So.2d 353, 357 (Fla. 1988).

Ultimately, the state is forced to turn to the court's "catch-all" mitigation instruction that the jury could consider "any aspect of the defendant's character, record, emotional and mental history, background, any circumstance of the offense or any other circumstance in mitigation" (R. 870, 5997), and to argue that this cured the error engendered by the prosecutor's remarks. Brief of Appellee at 82-

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[45] The state says that defendant "has taken isolated comments out of context." Brief of Appellee at 84. The record belies this:

> [A]t some point we have to understand that if this has any value at all in mitigation, it[] somehow maybe *has to have a cause and effect relationship to why he committed the crime.*
>
> I grant you this was evidence presented, that he had a strict father. Now, the question is, *should that even come into your consideration* as something that should be balanced, something that should in any way be balanced against a cold, calculated, premeditated murder.
>
> As I said before, *one didn't cause the other.* . . . .
>
> *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?
>
> [F]or what purpose are [defendant's witnesses] being brought to you? Are they being brought to you because they have some effect on the crime? Because they give you some explanation or some insight into why he killed a police officer?
>
> They don't tell you anything about that.

(R. 5878-89, 5881-82, 5884, 5885-86)(emphasis supplied).

86.[46/] This is a harmless-error argument in disguise, and the state cannot avoid the requirements of *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986)(burden on state to show the error was harmless beyond a reasonable doubt), which requirements are fully applicable to capital sentencing proceedings. *E.g., Castro v. State*, 547 So.2d 111, 115-16 (Fla. 1989); *Dudley v. State*, 545 So.2d 857, 860 (Fla. 1989). The state makes no effort to argue that this stringent standard could be satisfied on this record.

E. Unfair And Unconstitutional Application Of Aggravating Circumstances.

The matters raised in the state's brief are fully addressed in the Brief of Appellant at pp.77-85.

F. "Mandatory Death" Arguments

The state says that "when sufficient aggravating circumstances exist and outweigh the mitigating circumstances, a jury in Florida's death penalty scheme is *required* to recommend a sentence of death," and that the prosecutors' comments were therefore "accurate statement[s] of Florida law." Brief of Appellee at 90-91 (footnote omitted; emphasis supplied). The state does not dispute this Court's exegesis of Florida law in *Alvord v. State*, 322 So.2d 533, 540 (Fla.

[46/] While this instruction indisputably was a correct statement of the law, it came much too late and was far too general to cure the error. The court's statement during jury selection that mitigation "does not have to go just to an excuse for the crime but also goes to the character of the defendant or anything that you as a juror believe[] is a relevant mitigating factor" (R. 2675-76) did not tell the jury that the prosecutor had said anything wrong. Thereafter, the court dealt with defense objections by telling the jury that it would give appropriate instructions at a later time (R. 3735, 4529-30). The instruction as quoted in the text did nothing to disabuse the jury of the notion propounded by the prosecutor, and was therefore insufficient to cure any error. *E.g., Robinson v. State*, 520 So.2d 1, 7 (Fla. 1988)(in event of "improper conduct" by prosecutor in sentencing phase court "should reprimand the offending prosecuting officer in order to impress upon the jury the gross impropriety of being influenced by improper argument)(citations omitted).

1975), as quoted in defendant's brief at p.86, but insists that when this Court in *Alvord* spoke of "reasoned judgment" it meant a judgment based "upon the weighing of the aggravating and mitigating circumstances," with *no* discretion once it was determined that the aggravating factors outweighed those in mitigation. Brief of Appellee at 90. Defendant submits that *Alvord* speaks for itself: while "[n]o defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors," the exercise of "reasoned judgment" and imposition of life imprisonment is permitted even in cases which "may warrant infliction of capital punishment." *Alvord*, 322 So.2d at 540.[47/] Indeed, as this Court more recently has recognized, a jury in a Florida capital-sentencing proceeding is free to determine that aggravating factors, even if established, are "entitled to little weight" in the ultimate sentencing determination.

[47/] The state's attempt to rewrite *Alvord* must fail: if this Court had intended to have the jury's inquiry stop upon a finding that the aggravating circumstances outweighed the mitigating circumstances, with death the inexorable result, it would have written a very different decision; plainly, the "reasoned judgment" authorized by *Alvord* comes into play *after* a finding that the aggravation outweighs the mitigating circumstances.

The state's reliance upon *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), in which this Court stated, without further explication, that "[w]hen one or more of the aggravating circumstance is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided" in the statute, *id.* at 9, is completely misplaced. While this Court, in *Jackson v. Wainwright*, 421 So.2d 1385, 1388-89 (Fla. 1982), held that reading this language to a sentencing jury was not error, it reached that conclusion upon a finding that it did not *compel* a death verdict; indeed, this Court specifically noted that, under Florida law, death is merely "appropriate" -- not *mandatory* -- when aggravation is found. *Id.* at 1388. And, with the exception of the *Jackson* decision, the proposition set forth in *Dixon* has been used only as an appellate harmless-error rule, *Barclay v. Florida*, 463 U.S. 939, 955, 958 (1983); *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir.)("the Florida Supreme Court's 'presumption' . . . 'seems very like the application of harmless error rule'")(citation omitted) *cert. denied*, ___ U.S. ___, 108 S.Ct. 2005 (1988), and one which was not applied "in an automatic or mechanical fashion," but only when this Court "actually finds that the error is harmless." *Barclay v. Florida*, 463 U.S. at 958.

Hallman v. State, 560 So.2d 223, 227 (Fla. 1990).

What this precedent means is that Florida is "a weighing State," that is, a jurisdiction in which the sentencer must not only find that aggravating factors exist, but must weigh "the mix of mitigating factors and aggravating circumstances." *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 1450 (1990)(citing *Barclay v. Florida*, 463 U.S. 939 (1983)).[48/] That denomination has important constitutional consequences: an "automatic rule" for imposition of death as punishment in a "weighing" jurisdiction violates the command of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "for it would not give defendants the individualized treatment that would result" from a weighing of aggravation and mitigation. *Clemons v. Mississippi*, 110 S.Ct. at 1450 (citation omitted).[49/]

[48/] The Supreme Court in *Clemons* directed further proceedings because it could not be determined whether the Mississippi court had reweighed the aggravating and mitigating factors upon finding one invalid aggravating circumstance or had merely upheld the death sentence based on the remaining aggravating factor, noting that "[a]n automatic rule of affirmance in a weighing State would be invalid." *Id.* at 1450. The Supreme Court further noted that, if the state court had been applying a harmless-error test instead of an "automatic rule," the "'beyond a reasonable doubt' standard" of *Chapman v. California*, 386 U.S. 18, 24 (1967), should be used, with a "detailed explanation based on the record" to be set forth on remand. *Id.* at 1451. With the advent of *Clemons*, this Court plainly has signalled the demise of the *Dixon* presumption discussed in n.47, *supra*, even as a tool of appellate review. *White v. Dugger*, 15 F.L.W. S392 (Fla. July 17, 1990)(application of *Dixon* on direct appeal challenged in habeas corpus under *Clemons*; held that "[r]egardless of this langauge, we are convinced that this Court properly applied a harmless error analysis on direct appeal," and, "[t]o remove any doubt," new harmless-error inquiry showed that "the trial court's ruling would have been the same beyond a reasonable doubt even in the absence of the invalid aggravating factors"); *see Preston v. State*, 564 So.2d 120, 121-23 (Fla. 1990).

[49/] This feature of the Florida capital-sentencing structure serves to render utterly inappropriate the state's reliance upon *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1194-96 (1990), in which the Supreme Court upheld a jury instruction providing that the jury "shall impose" death upon finding that aggravating circumstances outweigh mitigation was upheld. *Id.* at 1194-96. Prior to *Boyde*, the Supreme Court had held in *Blystone v. Pennsylvania*, ___ U.S. ___, (Cont'd)

With its central premise thus removed, the state's argument must fail.[50/] And the state, apparently all but conceding as much, turns ultimately to the court's instructions to the jury, which instructions notably *omitted* any "mandatory" directives, arguing that, "[e]ven if the prosecutor's comment was in any way inaccurate, the court's instructions were clearly proper." Brief of Appellee at 92. Of course, the state cannot point to anything in the record where the court took *corrective* action to guard against the jury being influenced by the prosecutor's argument -- because there is none -- and the state makes no effort to satisfy the standard established by this Court in *Teffeteller v. State*, 439 So.2d 840, 845 (Fla. 1983), *cert. denied*, 465 U.S. 1074 (1984).

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110 S.Ct. 1078 (1990), that a statute which provided for a mandatory sentence of death upon a finding that aggravating circumstances outweighed mitigation was constitutional because "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Id.* at 1083 (citation omitted). Thus, in *Boyde*, the Court rejected the argument that "the jury *must* have the freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances 'outweigh' the mitigating circumstances." *Boyde v. California*, 110 S.Ct. at 1196. (emphasis supplied).

However, the Court was careful to note in *Blystone* that, while the Pennsylvania statute there considered passed constitutional muster, other states "have enacted different forms of death penalty statutes which also satisfy constitutional requirements," and states "enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 110 S.Ct. at 1084. From its earliest discussion of the jury's role in the Florida sentencing structure, this Court has recognized the existence of a third level of inquiry which is not tied *only* to the specific aggravating-versus-mitigating finding, and that other sentencing structures have been held constitutional does not lead to a rewrite of Florida law.

[50/] The state's additional argument that "this issue is not properly preserved for appellate review, as the only objection to it was after the jury's verdict," Brief of Appellee at 90, is without merit, for the same reasons set forth in response to the identical argument raised with regard to Point III(D). See pp.30-34, *supra*.

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.

The state offers an unacceptable view of *Booth v. Maryland*, 482 U.S. 496 (1987), *i.e.*, that it *only* prohibits "evidence of of personal characteristics of the victims and the emotional impact of the crimes on the family" in capital cases, and argues that defendant's claims of prosecutorial conduct do not "implicate *Booth*." Brief of Appellee at 93-95. But *Booth* is not so limited: the Supreme Court did not merely hold in that case that "victim impact statements" are *per se* inadmissible as a a matter of evidentiary law, but rather, that such statements should not be used in capital sentencing because presenting such matters to the sentencing jury "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." *Booth v. Maryland*, 482 U.S. at 504-05. The state offers no *legitimate* reasons for the introduction of the challenged evidence or the prosecutor's closing remarks.[51] Indeed, this Court's condemnation of similar remarks in *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985), see Brief of Appellant at 91,

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[51] The state essays weak excuses for two of the prosecutor's several improper efforts: it suggests that Officer Spell's friendship with Pena and feelings for Pena's dog were "a relevant circumstance in this case, as it explained why Spell had approached Pena and Valle" and "is therefore further corroboration of Spell's ability to see what occurred and hear what was said," Brief of Appellee at 93, an argument which sinks of its own weight, and second, it intimates that the prosecutor's remarks about crying family members were an effort to avoid having the jury "base its decision on sympathies for Valle's family members -- for the sister and father who cried in court", *id.* at 94, a characterization which has no basis in the record and which, as the state is forced to recognize, does not explain the plain reference to the deceased's widow. *Ibid.*

goes without response.[52]

In *South Carolina v. Gathers*, ___ U.S. ___, 109 S.Ct. 2207 (1989), the import of which the state altogether ignores, the Supreme Court noted that extensive "victim-impact" evidence had been introduced in *Booth*, whereas in *Gathers* there was only the prosecutor's closing argument, in which he commented on the victim's character. *South Carolina v. Gathers*, 109 S.Ct. at 2210-11. It is surely at least as prejudicial for a prosecutor to summon up for the jury the character of a police officer who is also a family man, as was done in this case, see Brief of Appellant at 89-90, as it was in *Gathers* to refer to the deceased as "'a religious man and a registered voter.'" *South Carolina v. Gathers*, 109 S.Ct. at 2210. The Court's holding in *Gathers* completely undoes the state's attempt to restrict *Booth* to its facts.

V

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

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[52] The state discusses *Bertolotti* only insofar as the result in that decision was an affirmance upon a determination that the challenged comments were not "so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented," *id.* at 133, and urges this Court to reach the same conclusion in the present case, albeit without endeavoring to muster record support for its completely-conclusory statement that "[s]o too, in the instant case, any improprieties . . . would not be serious enough to warrant a resentencing hearing, and must be deemed harmless." Brief of Appellee at 96 (citing *Bertolotti*). The state ignores the caution in *Bertolotti* that closing argument in a capital case "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant," 476 So.2d at 134 -- which, indisputably, is what the prosecutor was trying to do here -- and recognition that trial judges should take corrective action in the case of prosecutorial misconduct, *ibid.* Moreover, the review standard applied in *Bertolotti* has been refined since the time of that decision by the adoption of the harmless-error standard in *State v. DiGuilio*, 493 So.2d at 1139, and *Robinson v. State*, 520 So.2d at 7, which standard is applicable to *Booth* errors, *Jackson v. Dugger*, 547 So.2d 1197, 1199 (Fla. 1989), and which the state makes absolutely no effort to satisfy.

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

The state does not dispute defendant's position that the officer was shot by defendant no more than *one minute* after the dispatcher reported that the tag on the car defendant had been driving belonged to another person (R. 374-76, 387-90, 3789-95).[53/] Its only argument is that (5)(i) was properly found because defendant, "after hearing information over the dispatch radio, which led him to believe he would be arrested for probation violation, walked back to Ruiz" said that "he would have to 'waste' or 'kill' Officer Pena," arguing that "[s]uch verbal announcements of an intent to kill, prior to the killing, have routinely been found to support the heightened premeditation required for this factor." Brief of Appellee at 97-98. The state is seeking to overlook *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 102 (1988), establishing the rule that the "heightened premeditation" required for finding (5)(i) "must bear the indicia of 'calculation," *i.e.*, "of a careful plan or prearranged design." *Id.* at 533.

53/ The state quotes a portion of the court's sentencing order, which states that "[a]pproximately 2 to 5 minutes elapsed from the time the defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill" the officer (R. 902), and asserts very generally that "[t]he court's findings are supported by Valle's statements, the dispatch tape recording, the dispatcher's testimony, the autopsy, and Officer Spell's observations." Brief of Appellee at 97. Although the state never goes beyond this broad statement, it should be noted that the tape, together with the dispatcher's testimony, establishes beyond question that the dispatcher called the officer with the license tag information at 6:43 p.m., that the officer was shot within one minute thereafter (R. 374-75, 3789-95), and that, while Officer Spell described the series of events between the dispatcher's response and the shooting, he did not -- and, obviously, could not -- dispute the timing established by the tape recording (Tr. 3805-06). Indeed, Officer Spell's testimony, standing alone, would indicate that defendant could not have had the conversation with Ruiz: Spell testified that Ruiz had been allowed to leave the area *prior* to the dispatcher's report on the license tag (Tr. 3802-05). The state would thus be hard-pressed to rely on Spell's testimony to support the trial court's finding of this aggravating circumstance.

Harvey v. State, 529 So.2d 1083 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1175 (1989), upon which the state places its primary reliance, Brief of Appellee at 98, is of no impact.[54/] In *Harvey*, the defendant and a codefendant robbed William and Ruby Boyd after planning the crime, driving to the Boyd's home and cutting the telephone lines. They then "discussed what they were going to do with the victims and decided they would have to kill them." *Id.* at 1084. The Boyds attempted to flee and Harvey shot them both, killing Mr. Boyd and mortally wounding his wife, who was then shot in the head. *Ibid.* Contrary to the state's characterization of the case as holding that "[s]ufficient reflection can exist, even in a short period of time, when there is a clear communication of the plan," Brief of Appellee at 99, this Court, citing *Rogers*, held as follows:

> [T]he facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. That Harvey and Stiteler planned the robbery in advance and even cut the phone lines . . . would not, standing alone, demonstrate a prearranged plan to kill. However, once the Boyds were under control, they openly discussed whether the kill the Boyds. These murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance.

Id. at 1087 (citing *Rogers*).

In the present case, by contrast, the *entire incident* -- from the stop to the homicide -- lasted *eight minutes*, only the last one of which allowed for defendant to walk back to his car, have the conversation at issue, and return to the police car where the homicide

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[54/] *Johnson v. State*, 438 So.2d 774, 779 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984), and *Dufour v. State*, 495 So.2d 154, 164 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987), also cited by the state, Brief of Appellee at 98, both predate the revamping of the (5)(i) standard in *Rogers*, 511 So.2d at 533 (receding from prior precedent).

was committed.[55/] As this Court has stated, (5)(i) applies only to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," and "the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began." *Porter v. State*, 15 F.L.W. S353, 354 (Fla. June 14, 1990)(citations and footnote omitted). The declaration of intent one minute before the homicide, while enough to prove premeditated murder, utterly fails to show the calculation and planning required for (5)(i).

B. Restricted Consideration of Mitigating Factors.

The state says that the trial court "*implicity and inherently* rejected any nonstatutory mitigating argument" that defendant suffered mental or emotional impairment, Brief of Appellee at 101 (emphasis supplied), and, albeit "somewhat inartful[ly]," found that other nonstatutory mitigation arising from defendant's family background had not been "reasonably establish[ed]." Brief of Appellee at 103. This attempt to rewrite the court's order to comply with the requirements of *Campbell v. State*, 15 F.L.W. S342 (Fla. June 14, 1990), is unavailing.

While the state characterizes the court's rejection of the statutory circumstances (R. 905-06) as also constituting a rejection of "any . . . lesser degree of impairment" as mitigation, Brief of Appellee at 101, the order plainly states, in the section in which the

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[55/] The state cites *Thompson v. State*, 15 F.L.W. S347 (Fla. June 14, 1990), for the proposition that "'[h]eightened premeditation can be demonstrated by the manner of killing . . .' when the evidence also shows the prior plan to commit the murder," and argues that "the shooting from point-blank range is indicative of an execution style killing." Brief of Appellee at 99. The entire quote from *Thompson* is: "Heightened premeditation can be demonstrated by the manner of killing, *but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began.*" 15 F.L.W. at 349-50 (citations omitted; emphasis supplied).

court's findings under § 921.141(6)(f), Fla.Stat. (1989), were set forth, that defendant had not been "*substantially* impaired" (R. 906)(emphasis by the court), and concludes: "*This* mitigating circumstance does not apply." (R. 906)(emphasis supplied).[56/] The *next* section of the court's order is entitled "[a]ny other aspect of the defendant's character or record and other circumstances of the offense to warrant mitigation." *Ibid.* There is no support for the state's attempt to read into the court's treatment of the statutory factor *any* finding regarding impairment as *nonstatutory* mitigation.

The same holds true for the court's dismissal of defendant's background and history; the state says that "the only fair reading" of that portion of the order is that the court was "concluding that the defense did not reasonably establish such nonstatutory mitigating factors." Brief of Appellee at 103. The state necessarily would have this Court overlook the dramatic distinction between the words used by the court, *i.e.*, that defendant's background was not a "relevant mitigating circumstance[]" (R. 907), and the language used when the court *truly* was finding that *other* mitigating factors had not been established. When rejecting a *statutory* circumstance, the trial judge stated that "this Court does not believe that this mitigating circumstance reasonably exists" (R. 905), and, rejecting defendant's potential for prison adjustment as a nonstatutory mitigating factor, the court stated that it "does not find that this mitigating circumstance reasonably exists." (R. 906). Thus, when the court, in dis-

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56/ As this Court recently has recognized in *Cheshire v. State*, No. 74,477 (Fla. Sept. 27, 1990), the statutory modifiers cannot be used to restrict consideration of mitigating evidence and "*any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say," since "[a]ny other rule would render Florida's death penalty statute unconstitutional." Slip opinion at 8 (citing *Lockett*)(original emphasis).

cussing the nonstatutory mitigation concerning defendant's abusive upbringing, found that it was not "relevant," this Court must presume that it meant just that.57/

This Court in *Campbell* declared that, "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." 15 F.L.W. at S344 (citation and footnote omitted); *accord,*

57/ While the state, on appeal, criticizes the expert evaluations of defendant's background as being without a basis in independent evidence, Brief of Appellee at 104, it conveniently -- and completely -- ignores the powerful, unchallenged testimony of defendant's twin sister, Georgina, who testified at great length to their father's physical and mental abuse of the children and to its effect on them (R. 5447-68); and, while attempting somehow to justify that abuse in its brief, see n.58, *infra,* also ignores the father's admission of harsh treatment (R. 5471-74). See Brief of Appellant at 71. As Dr. Toomer and Ms. Milledge opined (R. 5316, 5081-89), and this Court recently has recognized, childhood abuse has long-lasting effects and must be considered as mitigation in capital sentencing, even when the offense was committed during the defendant's adulthood. *Nibert v. State,* 15 F.L.W. S415, 416 (Fla July 26, 1990).

The state acknowledges *Nibert,* but claims that there "the earlier child abuse had a clear connection to the homicide" and relies upon *Rogers v. State* for the proposition that "a nonstatutory factor has mitigating weight only 'if relevant to the defendant's character, record or the circumstances of the offense.'" Brief of Appellee at 106 (quoting *Rogers,* 511 So.2d at 535). This is inaccurate: the evidence in *Nibert,* as in the present case, was that the defendant had been suffered abuse during his "formative childhood and adolescent years," and this Court expresssly ruled that to discount that abuse because Nibert had committed the crime at 27 years of age "would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary." 15 F.L.W. at S416. There was no requirement of a nexus between the abuse and the capital crime imposed in *Nibert,* and certainly none in *Rogers;* rather, in the latter case, the defendant asserted that that the trial court should have found "in mitigation that he was intelligent and articulate," a factor which this Court determined was not mitigatory as a matter of law, and also raised, for the first time on appeal, that the court should have assessed his "childhood trauma" as mitigatory, despite having presented "[n]o testimony on this question . . . during the penalty phase." *Rogers v. State,* 511 So.2d at 534-35. *Rogers* provides no support for the trial court's refusal to weigh established mitigation.

Cheshire v. State, No. 74,477 (Fla. Sept. 27, 1990)("the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record")(slip opinion at 8). This the trial court utterly failed to do, and in the face of substantial and compelling evidence to support the proposed mitigation. See Brief of Appellant at 65-66, 71.[58/] The precedent set forth in defendant's initial brief at pp.96-99, which this Court resoundingly has reaffirmed in *Campbell*, controls: at the very least, there is a "reasonable doubt whether the trial court gave the proper consideration to the nonstatutory mitigating evidence arguably available in the record," *Copeland v. Dugger*, 15 F.L.W. 412 (Fla. July 26, 1990), and reversal is therefore mandated.

[58/] In implicit recognition of this omission by the court, the Attorney General ultimately must defend the trial court's order on the basis that the evidence of defendant's background was not mitigating: the state argues that the abuse inflicted by defendant's father was was no more severe than the "corporal punishment" which is permissible in the public schools, Brief of Appellee at 104, that the "alleged 'child abuse'" was "nonexistent, *id.* at 105, that, since "[f]ew among us have not suffered deaths of close relatives," defendant's loss of a beloved aunt was properly disregarded as irrelevant, *ibid*, that defendant's "childhood was one which was more fortunate than most" and "[w]ould that all of the children in this state were so unfortunate as to have such a father," *ibid.* The state is seeking to have this Court sit as the initial sentencer and make the factual determinations which the trial court deemed unnecessary because the proposed mitigation was found irrelevant; but as was held in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981), this Court's "role after a death sentence has been imposed is 'review,'" and does not "involve[] weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." *Id.* at 1331. Rather, when the trial court fails properly to weigh nonstatutory mitigation, the remedy is further proceedings for consideration of all mitigation. *Campbell v. State*, 15 F.L.W. at S344.

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,

LOUIS M. JEPEWAY, JR.
Suite 407, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 377-2356
Fla. Bar No. 113699

Counsel for Appellant

MICHAEL A. MELLO
Vermont Law School
Witcomb House
P.O. Box 96
Chelsea St.
South Royalton, Vermont 05068
(802) 763-8303
Fla. Bar No. 376371

Of Counsel

BY: Louis M. Jepeway, Jr.
LOUIS M. JEPEWAY, JR.

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 23 day of ~~September~~ October, 1990.

Louis M. Jepeway, Jr.
LOUIS M. JEPEWAY, JR.