IN THE SUPREME COURT

OF FLORIDA

CASE NO. 65,507

CHARLES WILLIAM PROFFITT,

APPELLANT/CROSS-APPELLEE

V.

STATE OF FLORIDA,

APPELLEE/CROSS-APPELLANT

APPEAL FROM THE CIRCUIT COURT IN
AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT AND ANSWER BRIEF TO CROSS APPEAL

Change of address
100 S.E. 2nd St.
One CenTrust Financial Center
Miami 33131

IRWIN J. BLOCK
FINE JACOBSON SCHWARTZ
NASH BLOCK & ENGLAND
~~2401 Douglas Road~~
~~Miami, Florida 33~~134
~~(305) 446-2200~~ 577-4000

DAVID S. GOLUB
SILVER, GOLUB AND SANDAK
184 Atlantic Street
Stamford, Connecticut 06904
(203) 325-4491

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In any appeal, but particularly in a capital case, there is an obligation on the parties to present the facts and law fairly and accurately. The State's brief has utterly departed from this fundamental requirement. In its effort to persuade the Court to uphold Mr. Proffitt's death sentence, the State has misrepresented critical facts and the findings below. More seriously, on numerous occasions the State has improperly attempted to buttress its position with references to "evidence" that is not part of the record before this Court. Such conduct on the part of the State in attempting to uphold a death sentence is unconscionable.

In this brief, we address these inaccuracies, presenting the actual testimony, findings below and relevant legal authority. This brief also responds to the State's cross appeal.

REPLY ARGUMENT

A. THE COLD, CALCULATED AND PREMEDITATED FACTOR WAS NOT SUPPORTED BY THE EVIDENCE.

In order to sustain the cold, calculated factor, the State was required to prove that the homicide resulted from a preconceived plan to kill or a lengthy period of premeditation. Preston v. State, 444 So. 2d 939, 946 (Fla. 1984). The State produced no such evidence. It now attempts to create a factual basis for inferring the requisite heightened homicidal intent, but its creation is not supported by the evidence in the record. Moreover, the "facts" relied upon by the State just as easily support the conclusion that the homicide

was committed by a startled burglar, or for some other unknown reason. The State has not sustained its burden, either factually or legally.

In setting forth its version of the offense, the State claims that "it cannot be disputed" that Joel Medgebow was asleep when attacked. (St. Br. at 7). The State ridicules any other construction of the evidence, accusing appellant of resorting to "invent[ion]," "imagin[ation]," "fancy" or "speculat[ion]" in describing the homicide as the result of a panic reaction of a frightened burglar. (St. Br. at 6-7). Appellant did not "invent" this explanation of the offense. Rather, as set forth below, the prosecutor himself offered that precise explanation at Mr. Proffitt's trial as a reasonable construction of the evidence --before the cold and calculated factor was added to the death penalty statute.

Here is what the prosecutor actually argued:

> [Joel Medgebow] [p]robably left his door unlocked. [Mr. Proffitt] [c]omes right around from the parking lot, goes in, has the knife, looks around the apartment, casing the apartment. Joel restless in his sleep, makes some comment, makes some noise, moves, whatever he does. The defendant thinks he is caught and then he takes his life.

[T.R. 444].

The prosecutor's argument was supported by the testimony at trial: Medgebow was "a very restless sleeper" who would "talk or move about the bed" in his sleep [T.R. 256]; he had been awakened by his wife at 3:00 and 4:00 a.m. [T.R. 249-50], and had been disturbed again, shortly before the homicide, when his wife awoke and sat up

to look at his watch [T.R. 250]; he was up on the bed holding the knife in his hand, when his wife awoke [T.R. 251]. The defendant's own contemporaneous statement, offered by the prosecutor through the testimony of a boarder who overheard it, was that "he killed a man while burglarizing a place." [T.R. 376, 379].

The State provides no record citation for its factual claim that Medgebow was asleep. The State's citations establish only that the Medgebows went to bed at 10:00 p.m., were both up during the night, and that when Mrs. Medgebow awoke at 5:00 a.m., her husband had already been stabbed. (St. Br. at 5-6).

It is accordingly the State's current version of the offense which is "invented." It would require this Court to believe, without any supporting evidence, that a prone person, forcibly stabbed through the heart while he was sleeping, thereafter arose, sat up in bed and removed the knife from his chest.

The State represents that the trial court, in making its cold and calculated finding, accepted the State's contention that Medgebow was stabbed while asleep. (St. Br. at 7). The trial judge made no such finding in his sentencing order, nor does the record contain any statement by the trial judge on the subject.

Here is the trial court's entire finding:

> (B) That prior to, or after entering the living premises of the victim, JOEL RONNIE MEDGEBOW, the Defendant CHARLES WILLIAM PROFFITT, armed himself with a knife and thereafter did murder the said JOEL RONNIE MEDGEBOW by stabbing him in the heart with said knife. The homicide

> was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

[R. 27].

The State further represents, without any record citation, that Mrs. Medgebow witnessed the homicide. (St. Br. at 2). This representation is false. Mrs. Medgebow's actual testimony makes clear that she was not a witness to the actual homicide. She was asleep when her husband was stabbed, was awakened by his moans, "didn't realize something had happened to Joel" and did not know he had been stabbed until after the intruder had fled and she turned on the light. [T.R. 251].

Here is Mrs. Medgebow's actual testimony about what she saw:

> A. Well, I looked at the watch and I lay back down and I either drifted off to sleep for a few minutes or else I slept for a few minutes, or else I, or else I just lay back down. But, then, I heard, I was awakened by some moaning, some loud moaning, so I sat up and turned around to see what happened. And Joel had, was kind of up on one elbow and he had something in his hand. And I thought it was a ruler, at first, because I was half asleep and it was, you know, dark in the room. And I, you know, said, "Well, what's the matter, baby? What have you done?" You know, and --

[Id.]

It is outrageous that the State would so distort the record in a case where a man's life is at stake. It is the State's duty to seek justice, not death sentences. Berger v. United States, 295 U.S. 78, 88 (1935). If the evidence and findings are lacking, the

State ethically and morally cannot distort the record to fill the gap.

The State's argument is not only factually unsupported but legally without merit. The key issue in evaluating the cold, calculated factor is the state of mind of the offender. What matters is not whether the victim was asleep, but whether the assailant acted on the spur of the moment or with a pre-conceived homicidal plan and heightened premeditation. As the original prosecutor argued at trial, the evidence suggests that even if Medgebow were asleep, his behavior in moving and talking in his sleep could have startled and frightened a burglar who could easily have believed him to be awake. The evidence thus does not lead to a conclusion that the homicide was cold and calculated, whether Medgebow was awake or asleep.

The State also relies on the nature of the stab wound and on the lack of any "defensive" wounds to establish the cold, calculated factor. These arguments were not made to the trial court, were not found by the trial court, and consequently cannot serve as bases for affirming the trial court's conclusion. Presnell v. Georgia, 439 U.S. 14 (1979).

Furthermore, there was no testimony to support the State's claim that great force would have been required to inflict the wound. The pathologist did not so testify [T.R. 220-30], nor does the State cite any record citation for this claim. And, on the facts of this case, the location of the wound itself is of questionable significance.

The crime occurred in a darkened room: Mrs. Medgebow, next to her husband on the bed, could not even see he had been stabbed until she turned on the light. [T.R. 251, 254, 256]. It cannot be said with confidence that the assailant could see where he was striking, especially if --as the prosecutor argued at trial -- he struck in panic reaction to noise or movement by Mr. Medgebow.

Moreover, the State's argument is legally specious. Whether the wound was inflicted with the intention to kill is not the issue. By definition, every premeditated homicide entails actions committed with a deliberate intention of taking human life. Rather, the issue is whether there is evidence of lengthy premeditation, i.e., a pre-existing homicidal plan that differentiates the crime from other premeditated stabbings. The State cites no such evidence, and in fact, there is none.

This Court has held homicidal acts of far more deliberate purpose insufficient to establish the cold and calculated factor. See e.g., Preston v. State, supra (victim's throat slashed from one side to the other in an obvious act of execution; factor overruled); Hardwick v. State, ___ So. 2d ___, 9 F.L.W. 484 (Fla. Nov. 21, 1984), (72-year old victim strangled to death by concentrated effort over a period of minutes; factor overruled).

This Court has also consistently found the lack of struggle by a helpless victim to be insufficient to support the factor. See, e.g., Peavy v. State, 442 So. 2d 200 (Fla. 1983) (victim found

stabbed on the bed with no defensive wounds or any sign of struggle in the room; factor overruled); Drake v. State, 441 So. 2d 1079 (Fla. 1983) (victim stabbed eight times while hands bound with brassiere rendering her helpless; factor overruled); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (victim strangled with phone cord after being rendered helpless with barbituates; factor overruled); Maxwell v. State, 443 So. 2d 967 (Fla. 1983) (victim shot during robbery on golf course after merely stating he did not wish to hand over his wedding ring; factor overruled); Gorham v. State, 454 So. 2d 566 (Fla. 1984) (victim shot in back; factor overruled).

Finally, the State contends that this case is factually identical to Mason v. State, 438 So. 2d 374 (Fla. 1983), where this Court upheld the cold and calculated factor. But there is a clear difference between Mason -- where there was evidence of a pre-existing homicidal plan and Mr. Proffitt's case -- where the evidence establishes, as the prosecutor argued at trial, that the homicide was the unanticipated, spur-of-the-moment action of a startled burglar.

The evidence in Mason revealed that Mason, by the age of twenty, had already been convicted of attempted murder, battery, rape and arson. Only a few days after his capital offense, he committed a similar attack on a woman in her bedroom, raping her and threatening to kill her. See Oats v. State, 446 So. 2d 90 (Fla. 1984) (fact that defendant committed similar assaults relevant to determine cold, calculated intent). Mason was described as a "hostile" person.

There was an eyewitness to the act of murder who testified that the victim was asleep when stabbed. There was no mitigating character evidence. On the basis of those facts, this Court properly concluded that one could infer that Mason was by nature and habit a cold and calculating killer.

By contrast, Charles Proffitt was 28 years old at the time of the offense, and had no prior (or any subsequent) record of violence.[1] There was no eyewitness to the crime. By the State's own evidence, Mr. Proffitt's immediate reaction to the offense was to confess to his wife and tell her to call the police [T.R. 379-80] -- a reaction which, unlike Mason's continuing pattern of homicidal threats and violence, does not reflect the mentality of a cold and calculating killer. After his initial flight, Mr. Proffitt turned himself in to the police, expressing great remorse and anguish over the crime. [R. 262, 271]. Unlike Mason, Mr. Proffitt was not carrying a weapon on the night of the crime and had made no prior statements indicating any intention to commit a murder. [T.R. 313, R. 236]. See Harris v. State, 438 So. 2d 787 (Fla. 1983) (fact that murder weapon came from victim's premises negates finding of cold, calculated murder).

---

1. Despite the array of investigatory facilities at the State's disposal, and despite the fact that Mr. Proffitt has been in the State's custody and under its scrutiny for the past ten years, the State has not come forward with a single other incident of violence on Mr. Proffitt's part.

Unlike Mason, Mr. Proffitt had been drinking for many hours prior to the crime.[2]

Finally, the victim was visibly alive when the assailant fled. No attempt was made to insure Mr. Medgebow died, nor was there any attempt to inflict mortal injuries on Mrs. Medgebow. See Rembert v. State, 445 So. 2d 337 (Fla. 1984) (victim alive when defendant fled; factor overruled).

In Mason, the totality of the evidence of Mason's record and character established with certainty a pre-existing, heightened, homicidal intent. Here, by contrast, the totality of the circumstances precludes any such conclusion.[3]

---

2. Inexplicably, the State disputes our assertion that Mr. Proffitt was out drinking for seven to eight hours before the crime and argues that there is no evidence to support our statement. (St. Br. at 8). Here is the actual testimony of one of the witnesses at the resentencing proceedings:

> Q. Were you out drinking with him [on the night of the crime]?
> A. Yes.
> Q. Do you recall what time it was that you started drinking that evening?
> A. Approximately 7:30 p.m.
> Q. Do you recall what time you left the bar?
> A. Approximately 10:00 p.m.
> Q. When you left the bar was he still there drinking?
> A. Yes.

[R. 236-37]. Another witness at trial testified that Mr. Proffitt remained at the bar from 7:30 p.m. to 3:00 a.m. that morning and was drinking with him during that time. [T.R. 309, 311].

3. The State contends that the burden was on Mr. Proffitt to disprove the factor. The State argues that this Court should hold it against Mr. Proffitt that he did not testify at resentencing to contradict the State's current version of the offense. (St. Br. at 8). This contention is contrary to the fundamental principles of American

In short, on the critical issue of Mr. Proffitt's state of mind at the time of the offense, this case is like Peavy v. State, supra; Blanco v. State, 452 So. 2d 520 (Fla. 1984), and the numerous other cases decided by this Court where the evidence of a murder during a burglary was insufficient to determine the defendant's motive and intent, and where the factor was thus overruled. See, e.g., Hardwick v. State, supra; Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Harris v. State, supra; Rembert v. State, supra. (See also cases cited in App. Br. at 19, n.17). Those cases all firmly establish the principle that proof of the heightened premeditation necessary to support the factor cannot be based on inference or speculation. Where the evidence is susceptible of an interpretation that the offense was the unanticipated result of a felony, the factor will be overruled. Id.

The evidence in this case does not support a finding of a cold, calculated and premeditated murder, and the factor must be overruled.

(fn. 3, cont.) criminal jurisprudence -- that the burden is, at all times, on the State to prove, beyond a reasonable doubt, those facts necessary for imposition of penalty, Williams v. State, 386 So. 2d 538 (Fla. 1980), and that a man may not be penalized for remaining silent. Doyle v. Ohio, 426 U.S. 610 (1976). The State also ignores the fact that Mr. Proffitt's contemporaneous statement regarding the circumstances of the offense is in the record, offered by the State at the original trial. In that statement, Mr. Proffitt stated he had killed a man while burglarizing a place. [T.R. 367, 379-80].

B. THE COLD, CALCULATED FACTOR MAY NOT BE RETROACTIVELY APPLIED.

The State claims that retroactive application of the cold and calculated factor in this case is authorized by this Court's decisions in Combs v. State, 403 So. 2d 418 (Fla. 1981); Smith v. State, 424 So. 2d 726 (Fla. 1982); and Justus v. State, 438 So. 2d 358 (Fla. 1983). The State ignores the critical distinction between those cases and this case.

In Combs, Justus and Smith, all proceedings occurred after July 1, 1979, the effective date of the statutory amendment adding the factor. There was no change in the applicable law during the defendants' capital trials.

In this case, the State seeks to change the law not only retroactively, but in the midst of a defendant's capital proceedings. Mr. Proffitt's trial and jury sentencing occurred in 1974, and the State explicitly relies on evidence from those proceedings to support the new factor. We have found no case in any jurisdiction where the applicable law was changed mid-proceedings.

Would this Court allow, in any other civil or criminal matter, a case to be submitted for final disposition on the basis of a record developed without notice to a party of one of the fundamental disputed elements of the action against him? That is precisely what the State seeks to do here.

In Combs, Justus and Smith, the defendants and their attorneys were aware throughout the entire pre-trial and trial proceedings

that the factor could be considered. See Menendez v. State, 368 So. 2d 1278, 1282 n.21 (Fla. 1979) (listing of aggravating circumstances in statute gives notice of factors which may be considered and thus defended against). By contrast, Mr. Proffitt and his attorney could not have known at the time of trial that the evidence would be used to support an aggravating factor not then in existence. There could be no pre-trial preparation, investigation, confrontation or cross-examination during trial to defend against a finding of the factor. There was, for example, no reason to focus investigation or trial questioning on evidence of the victim's precise location and position when stabbed or whether the apartment showed signs of a struggle. Similarly, there was no reason for any investigation of the victim's injury or questioning of the pathologist concerning the nature of the wound to counter the State's new-found claim that a prone, sleeping victim arose, sat up and removed the knife after being stabbed.

It is impossible to determine ten years later what proper inquiry or trial questioning might have developed. Witnesses are no longer available, whether by absence or loss of memory. The scene of the crime is obviously no longer preserved, and relevant evidence, such as the location, pattern and depth of blood stains, is unavailable.

Had Mr. Proffitt been denied counsel completely at his trial, there is no question that the proceedings would be set aside. Gideon v. Wainwright, 372 U.S. 335 (1963). Similarly, had counsel been

denied time to prepare a defense or an opportunity to confront and cross-examine witnesses, the trial could not stand. Powell v. Alabama, 287 U.S. 45 (1932); Davis v. Alaska, 415 U.S. 308 (1974). Here, there has been the functional equivalent of a denial of counsel, because evidence obtained from proceedings where there was no preparation, cross-examination or defense by counsel on the now-critical issue is being used to sentence a man to death. See Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978).

Moreover, at resentencing the State presented the testimony of two psychiatrists -- drawn solely from their 1974 examinations of Mr. Proffitt [R. 173-4, 178, 182, 187, 193-4, 196, 198] -- that Mr. Proffitt was not emotionally disturbed at the time of the crime. The State now relies upon that testimony to argue that Mr. Proffitt was acting in a cold and calculated manner. (St. Br. at 7). Defense counsel's decision in 1974 to allow his client to be examined by the two psychiatrists would clearly have been affected had he known of the cold and calculated factor.[4]

---

4. Mr. Proffitt had an absolute Fifth Amendment right to refuse to be examined by the two psychiatrists, as well as a Sixth Amendment right to the knowledgable advice of counsel concerning whether to agree to such examinations. Estelle v. Smith, 451 U.S. 454 (1981). The use of such psychiatric testimony to prove a factor not known to or considered by defense counsel or defendant in 1974 would violate those constitutional rights. We expressly objected to the testimony of the psychiatrists on these grounds. (R. 158-67). The use of that testimony to support the death sentence in and of itself requires reversal.

The State claims that the 1979 amendment did not change the law in effect at the time of Mr. Proffitt's trial. This claim is plainly incorrect: before the amendment, this Court had explicitly ruled that premeditation, even if heightened, could not be considered in aggravation. Brown v. State, 381 So. 2d 690, 695-96 (Fla. 1980) (reliance on premeditation invalidated); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978) (reliance on lengthy premeditation invalidated). Brown's crime occurred on July 7, 1973, three weeks before Mr. Proffitt's. Brown was sentenced on July 3, 1974, three and one half months after Mr. Proffitt's trial. Riley's crime occurred on September 15, 1975; he was sentenced on April 8, 1976. The law was thus definitely changed by the 1979 amendment.[5]

The State's related claim that the amendment to the statute is only "procedural" has previously been rejected by this Court. Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982); Combs v. State, supra.[6] In Vaught, the Court held that because the provisions of

---

5. Significantly, the legislative history of the 1979 amendment indicates that the cold and calculated factor was added specifically in response to the facts in Riley and the Court's holding disallowing reliance on a defendant's heightened premeditation. See SB 523 (1979), Staff Analysis p. 3.

6. The State fails to advise the Court that its identical argument here was advanced and rejected in Combs, where the State cited identical case law and the identical quotation from Dobbert v. Florida, 432 U.S. 282 (1977). See Brief of State in Combs at pp. 4-5).

§921.141 "delineat[e] the circumstances in which the death penalty may be imposed ... [they] are matters of substantive law." Id.[7]

Finally, the State argues that Mr. Proffitt was not disadvantaged by the addition of the factor. This claim is untenable. The trial judge expressly stated that Mr. Proffitt was disadvantaged by application of the amendment. [R. 113]. Because of the amendment, the judge considered in the weighing process an aggravating circumstance --heightened premeditation -- which would not have been permissible at the time of trial. Riley v. State, supra at 21.[8]

---

7. The State's reliance on Dobbert v. Florida, supra, is flawed. Dobbert challenged Florida's post-Furman death penalty statute, which changed the jury's role to make its verdict a non-binding recommendation, and promulgated aggravating circumstances. The Supreme Court held that the change in the jury's role was a matter of procedure and was thus not subject to ex post facto limitations. The Court further held that the addition of aggravating circumstances was a substantive change, but did not violate ex post facto prohibitions since it was "ameliorative" -- whereas any defendant convicted of first degree murder under the old statute could be sentenced to death, the new statute limited capital punishment to those with the aggravating circumstances listed.

The 1979 statutory amendment, which altered the list of aggravating circumstances to be considered, was substantive and not procedural within the meaning of Dobbert. Moreover, Dobbert did not hold that death penalty "procedures" may be changed in mid-case, as the State seeks to do here. Like Combs, Justus and Smith, Dobbert was tried from start to finish under one set of rules.

8. The State claims that the facts of Mr. Proffitt's case are comparable to those of Justus v. State, supra, where the Court found the defendant had not been disadvantaged by retroactive application of the factor. The State's claim is quite disingenuous: there were no mitigating factors in Justus' case, and, therefore, the inclusion of the cold, calculated factor could have had no affect on any weighing process. The circumstances of Mr. Proffitt's case, with an underlying non-violent felony, no history of other violent

C. MR. PROFFITT'S DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE.

In responding to our argument that Mr. Proffitt's death sentence is excessive and disproportionate, the State claims that the substantial non-statutory mitigating evidence presented below should be ignored, and that the death sentence should be upheld because two aggravating circumstances --felony-murder and cold, calculated --were found, as opposed to only one statutory mitigating circumstance -- no significant criminal history.

As discussed above, the State's reliance on the cold, calculated factor is misplaced because that factor was not properly found. Moreover, as discussed below, the State's attempt to discredit the evidence of Mr. Proffitt's character and background is based almost exclusively on references to non-record, disputed testimony and misrepresentations of the record below. However, even accepting the State's misguided formulation of the aggravating and mitigating

---

(fn. 8, cont.) behavior and statutory and non-statutory mitigating evidence are markedly different.

Moreover, Justus' crime was infinitely more aggravated, and he had a history of repeated homicidal behavior. Justus was convicted of kidnapping, raping and robbing his victim prior to murdering her by shooting her twice in the head. He has been convicted of two other first degree murders and is presently under sentence of death in three states. See Justus v. State, 276 S.E.2d 242 (Ga. 1981) (murder, rape, kidnap with bodily injury and armed robbery of twenty-eight year old woman Justus stabbed three times then shot execution style); Commonwealth v. Justus, 266 S.E.2d 87 (Va. 1980) (murder and rape of an eight-month pregnant young woman whom Justus shot twice in the face and once in the back of the head). Evidence of the Georgia and Virginia offenses was admitted at the Florida trial. Justus v. State, supra, 438 So. 2d at 364, 368.

circumstances, the death sentence in this case is excessive and disproportionate when compared with the punishment imposed in other capital cases.

Even when reviewed on the State's own terms:

1. There is no case in this State in which the Court has affirmed a death sentence for a defendant with no significant criminal history where the only aggravating circumstances were felony-murder and cold, calculated.

2. There is no case in which this Court has upheld a death sentence for a burglary-homicide, with or without a finding of cold-calculated, where the victim was not abused, even absent any mitigating circumstances.[9]

It must be emphasized that the State cites no cases in its brief upholding a death sentence on the combination of statutory aggravating and mitigating circumstances found by the trial court.

---

9. The distinctions the State seeks to draw between Mr. Proffitt's case and that of Rembert v. State, supra and Menendez v. State, 419 So. 2d 312 (Fla. 1982) are either inaccurate or irrelevant. One cannot distinguish Rembert by the fact that there was no evidence as to how the murder actually occurred, because as was shown supra at 4, the same holds true for Mr. Proffitt's case. The fact that Rembert killed someone he knew or committed an armed robbery of a business during business hours arguably makes his offense more, rather than less, serious: to commit an armed robbery at a time when one must know people will be endangered, and to kill an acquaintance with whom one had no quarrel requires more indifference than an unarmed burglary commited by stealth to avoid confrontation.

The State describes Menendez as a day-time robbery without any evidence of premeditation, heightened or otherwise, wholly ignoring the fact that Menendez was armed with a silencer and the victim in that case was found with arms raised in a submissive gesture.

Neither Rembert nor Menendez, moreover, involved the extensive mitigating evidence present in Mr. Proffitt's case.

The State misunderstands the citations in our initial brief to analogous first degree murder cases decided in the District Courts of Appeal. Those cases were heard by the District Courts rather than this Court precisely because it has been the consistent judgment of trial judges that cases such as Mr. Proffitt's do not warrant the extreme sanction of death.

Moreover, we respectfully submit that the State has overstepped the bounds of proper appellate advocacy in its attempt to discredit the substantial non-statutory character evidence presented at resentencing. It attempts to impugn the credibility of Mr. Proffitt's witnesses below with non-record "evidence," arguing that prior counsel made a "tactical" decision not to call the witnesses. This argument is not based on any evidence in the record, nor on any judicial finding. It is based on testimony from the federal habeas corpus proceedings setting forth one of several disputed justifications offered by Mr. Proffitt's prior counsel for his failure to introduce any character evidence.

The Court of Appeals did not hold, as the State asserts, that prior counsel made a "tactical" decision not to present evidence in mitigation at the first trial. It held that counsel failed to present mitigating evidence because he mistakenly believed such evidence was limited to the mitigating circumstances listed in the Florida sentencing statute. See Proffitt v. Wainwright, 685 F.2d 1227,

1248 (11th Cir. 1982).[10]

The egregiousness of the State's reliance on non-record evidence is matched by its misrepresentation of the record evidence to "corroborate" prior counsel's habeas testimony:

1. The State claims there was a "separation" of Mr. Proffitt and his half brother, suggesting some estrangement of the two. (St. Br. at 22) But the State's citation is to the first page of the brother's cross-examination, which contains no discussion at all of the brothers' relationship. Nowhere in the testimony is the term "separation" used. In fact, Sgt. Glander and Mr. Proffitt lived together almost continuously until Mr. Proffitt was nineteen, when Sgt. Glander got married and set up his own household.[11]

---

10. The Court of Appeals held:

> The defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Florida Statute §921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

Id. at 1248. It should be further noted that the federal court expressly rejected defense counsel's testimony that Mr. Proffitt had instructed him not to present mitigating evidence. See Proffitt v. Wainwright, supra at 1239, n. 22. The State's citation to this discredited extra-record "evidence" (St. Br. at 2) is not only highly improper, but dishonest.

11. There was one six-month period during their childhood when all the siblings were separated because their parents could not afford to keep them together, [R. 266, 274], and a short period when Sgt. Glander was in the army, then moved back home [R. 274], during which the brothers did not live together.

2. Despite prior counsel's disparagement of their marriage, Mr. Proffitt and his wife are still married; his marriage was described by the State's key witness against Mr. Proffitt at trial in 1974 as "very loving, happy, tender, caring" [R. 245].

3. There was no evidence that either of Mr. Proffitt's sisters at the resentencing proceeding has a criminal record, nor did the State contend below that they do.

The State presented not a shred of evidence below, when it had the opportunity to do so, to contradict any of the mitigating evidence presented by Mr. Proffitt --despite the fact that it has been on notice since the clemency and post-conviction proceedings of the evidence Mr. Proffitt considered mitigating and would seek to present. The State cannot compensate for lack of evidence in the record by reference to extra-record material. Its attempt to do so should be rejected by this Court in clear and strong terms.

Finally, the State's brief does not contradict (by either proper or improper evidence) the bulk of non-statutory mitigating evidence presented below, including the fact that Mr. Proffitt has no history of violent behavior before or subsequent to the offense, nor any prior criminal record [R. 28, 235, 245, 252, 279-80]; his marriage has survived his decade-long incarceration [R. 253, 277, 281] and his family, including his mother, brother and three sisters, has been unusually close and supportive [R. 271, 288, 293, 307]; despite being raised in a difficult environment, Mr. Proffitt led a stable,

non-criminal working life from his teen-age years until his arrest [R. 263-8 279, 297]; he was a good worker, a responsible employee, and had good relations with his fellow employees. [R. 234, 235, 236, 252]; he was remorseful after the offense and surrendered himself to the authorities [R. 262, 270, 271]. The offense itself involved no abuse of the victim, nor any attempt to inflict mortal injuries on the only other person at the scene. [T.R. 229, 251].

This is not "squeez[ing] the towel dry" (St. Br. at 24); this is the uncontested evidence. It is impossible to cite a single case -- and the State does not even try -- where a person of this character, with these aggravating circumstances (even if both are valid) has had a death sentence affirmed by this Court.[12]

This Court's ultimate responsibility in a capital appeal is to compare the death sentence imposed with the punishments imposed in

---

12. The State argues that Mr. Proffitt's death sentence should be upheld because it was found "appropriate" by a prior judge and jury and "approved by the United States Supreme Court." This Court has on multiple occasions reversed a sentence of death and imposed life or remanded despite the fact that two different judges had previously sentenced the defendant to death. See, e.g. Morgan v. State, 392 So. 2d 1315 (Fla. 1981), 453 So. 2d 394 (Fla. 1984); Foster v. State, 387 So. 2d 344 (Fla. 1980), 436 So. 2d 56 (Fla. 1983); Miller v.State, 332 So. 2d 65 (Fla. 1976), 373 So. 2d 882 (Fla. 1979); Lee v. State, 294 So. 2d 305 (Fla. 1974), 340 So. 2d 474 (Fla. 1976).

The United States Supreme Court did not "approve" the death sentence imposed in 1974. It upheld nothing more than the facial constitutionality of the statute. See Proffitt v. Wainwright, supra at 1263.

Moreover, the trial court in 1974 relied on three improper aggravating circumstances and did not have the mitigating evidence now in the record.

Florida's other capital cases. That comparison here reveals no similar case in which the death sentence has been upheld and compels reversal of Mr. Proffitt's death sentence.

D. THE TRIAL COURT IMPROPERLY EXCLUDED AND FAILED TO CONSIDER MITIGATING EVIDENCE.

1. The Excluded Documentary Evidence

The State concedes that hearsay evidence is admissible in capital sentencing proceedings. (St. Br. at 26). Thus, the State's objections at trial to the Johns' letter, to the affidavits from Mr. Proffitt's nephews and to the letter from Mr. Proffitt's school principal on hearsay grounds, [R. 303, 304, 305], were ill-founded and the trial court's exclusion of these documents as inadmissible hearsay was erroneous.* Perri v. State, 441 So. 2d 606, 608 (Fla. 1983).

The State asserts, without citation to any authority, that Sgt. Johns' letter was inadmissible because not under oath. Presentence reports and similar hearsay documents are not under oath, either, yet are regularly admitted in capital sentencing proceedings. See e.g., Swan v. State, 322 So. 2d 485, 488 (Fla. 1975). The State further claims that it could not rebut Sgt. Johns' letter. The letter concerns Mr. Proffitt's record and behavior while in State

*These documents have now been submitted to the Court in a Supplemental Record. The Johns' letter is at R. 356-7, the nephews' affidavits at R.352 and R. 354, and the principal's letter at R. 359.

custody; the State has direct access to Mr. Proffitt's prison records and to prison personnel who have had contact with Mr. Proffitt.

Finally, the State claims that the letter was irrelevant. Sgt. Johns describes Mr. Proffitt's behavior in prison, his cooperation and respect for authority, and his intentional efforts to avoid trouble. [R. 356]. The letter further describes Mr. Proffitt's "fine adjustment" to incarceration and "his capacity to be a productive individual." [R. 357]. This Court has expressly recognized that an individual's conduct and character in prison on death row can provide relevant mitigating evidence at resentencing. Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982); Delap v. State, 440 So. 2d 1242, 1257 (Fla. 1983). Indeed, "[evidence of a] person's potential for rehabilitation is an element of his character and therefore may not be excluded from consideration as a possible mitigating factor." Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982). Sgt. Johns' letter plainly was not irrelevant.

The State similarly claims that the affidavits from Mr. Proffitt's nephews and the letter from his school principal were also "irrelevant." The evidence undeniably concerned Mr. Proffitt's character and background and cannot, as a matter of law, be deemed irrelevant at a capital sentencing. Simmons v. State, supra at 320; see Lockett v. Ohio, 438 U.S. 586 (1978).

2. Evidence of Mr. Proffitt's Impoverished Upbringing.

The State does not even attempt to defend in this Court the "relevancy" objection it argued as grounds for excluding the evidence of Mr. Proffitt's impoverished upbringing. [R. 264-65]. Rather, the State attempts to mislead this Court into believing that the evidence was not excluded, citing purported testimony of such poverty by Mr. Proffitt's brother. However, the testimony cited by the State is precisely the testimony to which its "relevancy" objection was sustained.[13]

The trial court's ruling indicates its mistaken belief that evidence of Mr. Proffitt's impoverished background was irrelevant. Thus, even were there other evidence of Mr. Proffitt's impoverished background in the record, it was clearly not considered relevant by the trial court. The trial court's failure to permit and/or consider this evidence was error. Lockett v. Ohio, supra.

3. Exclusion of Testimony of Remorse.

The State argues that Father Baker was not qualified to render an opinion about Mr. Proffitt's feelings of remorse. Father Baker is a Catholic priest who met with Mr. Proffitt on a regular basis for over three years, coming to know him well during that time. [R. 284-86].

---

13. Thus, on page 25 of its brief, the State quotes lines 8 - 17 of the record at page 264. Lines 19 - 26 of page 264 and lines 1 - 21 on the following page set forth the State's successful objection to this testimony.

It is difficult to imagine a more qualified witness on the subject of remorse than an experienced clergyman testifying from personal knowledge.

The State, citing Magill v. State, 386 So. 2d 1188 (Fla. 1980), further claims that Father Baker's testimony was "remote" and "irrelevant."[14] Subsequent to Magill, the Court has re-examined the relevancy of evidence of remorse and held that "[a]ny convincing evidence of remorse may properly be considered in mitigation of the sentence...." Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983).

Father Baker's excluded testimony established Mr. Proffitt's continuing feelngs of remorse years after his appeal had been denied by this Court, at a time when he might well have become hardened and cynical. In a case where the State alleges a cold, calculated murder, such evidence of continuing sincere remorse years after the offense was clearly relevant to the issue of Mr. Proffitt's character.

Finally, perhaps tacitly acknowledging that the trial court erred in excluding mitigating evidence, the State argues that, at most, the sentencing judge should be directed to indicate whether the proffered exhibits and testimony would have made any difference in his sentencing decision.[15] That is not the appropriate remedy

---

14. In Magill, at issue were a defendant's own self-serving statements at the time of trial of alleged remorse. The Court held that such evidence "may or may not be relevant." Id. at 1190.

15. The cases cited by the State in support of this proposition (St. Br. at 28) do not involve a Lockett violation, nor are they even capital cases.

for a violation of Lockett v. Ohio, supra, as established by precedents of this Court and the United States Supreme Court.[16] The appropriate remedy for the exclusion of evidence in a capital case is to vacate the death sentence and remand for resentencing. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Simmons v. State, supra at 320.

E. MR. PROFFITT WAS ENTITLED TO A NEW JURY PROCEEDING.

Mr. Proffitt's claim for a new jury proceeding presents one simple question: may a death sentence be imposed in reliance on a jury verdict infected with numerous constitutional and state law errors? The issue is not, as the State contends, whether there was a prior determination of error in the jury proceeding, but rather whether there was error. If the resentencing court considered the 1974 jury verdict in imposing sentence, that verdict is a part of

---

16. The State's suggestion that the trial court be directed to disclose its mental processes in imposing sentence is highly impermissible. As the Eleventh Circuit Court of Appeals has recently stated in rejecting the State's similar efforts to rely on the mental processses of a sentencing judge in a capital case:

> "It is fully established in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision."

Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982) (Unit B) (en banc), rev'd. on other grounds, ___ U.S. ___, 80 L.Ed.2d 674 (1984); accord, Fayerweather v. Ritch, 195 U.S. 276, 206-07 (1904).

the sentence to be reviewed by this Court now.[17] The State itself seeks to exploit the jury verdict, asking this Court to affirm the death sentence because of the jury's verdict. (St. Br. at 21). Before this Court can pass on the propriety of Mr. Proffitt's current sentence, it must determine whether all the proceedings resulting in that sentence --including the jury verdict -- were proper, or whether, as is clearly the case here, any of those proceedings were infected with error.

The State contends that Mr. Proffitt is bound by the "tactical" decision of his prior counsel to present no character evidence to the jury. As we have shown, the Court of Appeals held that prior counsel's failure to present character evidence was not tactical, but resulted from a misunderstanding of Florida law.[18] That misunderstanding unconstitutionally deprived the jury (and court) of any humanizing information about Mr. Proffitt's background and character. See Lockett v. Ohio, supra; Woodson v. North Carolina, 428 U.S. 280 (1976) (Eighth Amendment requires consideration of

---

17. As stated in our initial brief, if the trial court sentenced Mr. Proffitt without consideration of the jury verdict (his order omits any reference to the jury's recommendation [R. 27]), Mr. Proffitt has been denied his right under state law to a jury recommendation of sentence. See App. Br. at 46. The fact that Mr. Proffitt may have no federal constitutional right to a binding jury verdict is irrelevant. See Richardson v. State, supra at 1095.

18. The State also contends that Mr. Proffitt is bound by prior counsel's "tactical" decision to allow Dr. Crumbley to testify. The consideration of Dr. Crumbley's testimony is discussed in our response to the State's cross-appeal, infra.

defendant's character and background).

The State does not even attempt to address on their merits the numerous other errors in the jury proceedings cited in our initial brief (App. Br. at 42-45). Instead, the State asserts that all other errors should be ignored because of a lack of objection at the time of the jury proceedings, or for failure to raise the issue in the first appeal. (St. Br. at 31). First, there were objections to at least two of the errors, e.g., the admission of the 1967 conviction without explanation as to its meaning [T.R. 495];[19] and the lack of instruction on the twenty-five year mandatory minimum sentence [T.R. 535]. Second, as previously stated, the prior appeal is irrelevant, since the errors in the prior jury proceeding infect the sentence currently before the Court. Finally, prior counsel's failure to object in 1974 to the remaining errors does not bar review of those errors. As this Court stated in Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977), failure to object in the sentencing proceeding of a capital trial "should not be conclusive of the special scope of review by this Court in death cases." Because of the Court's special obligations in capital cases, the Court has repeatedly reviewed the record of sentencing proceedings even where no issue regarding the

---

19. See United States v. Tucker, 404 U.S. 443 (1978); Townsend v. Burke, 334 U.S. 736 (1948) (consideration of inaccurate information in sentencing requires reversal of sentence).

sentence was raised by counsel, Jacobs v. State, 396 So. 2d 713, 717 (Fla. 1981); LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978); where counsel expressly, for "tactical" reasons, waived any argument on sentencing issues, Davis v. State, ___ So. 2d ___, 9 F.L.W. 430 (Fla. Oct. 4, 1984); and where the appellant sought to dismiss the appeal and go forward with his execution, Goode v. State, 365 So. 2d 381, 384 (Fla. 1979) ("Even though defendant admits his guilt and ... expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the Legislature and the courts.")

Moreover, even if this were not a capital case, counsel's failure to object would not constitute a "procedural default" barring review since counsel could not, in 1974, have anticipated the changes in the law that underlie the errors cited. Reed v. Ross, ___ U.S. ___, 82 L.Ed.2d 1 (1984).

The trial court erred in overruling Mr. Proffitt's motion for a new jury.

II. ARGUMENT IN RESPONSE TO STATE'S CROSS APPEAL

THE TRIAL COURT DID NOT ERR IN SUPPRESSING DR. CRUMBLEY'S TESTIMONY.

In its cross appeal, the State seeks reversal of the trial court's order suppressing testimony obtained in violation of Mr. Proffitt's

privilege against disclosure of confidential psychiatrist-patient communications and his constitutional rights.[20] The trial court's ruling comes to this Court with a presumption of correctness. McNamara v. State, 357 So. 2d 410 (Fla. 1978).

A statement of the relevant facts is necessary, because the State excluded from its statement of the facts any description of what occurred before Dr. Crumbley took the stand to testify.

While incarcerated in the Hillsborough County jail prior to trial [T.R. 394, 411], Mr. Proffitt requested to see a psychiatrist [T.R. 415, 419]. He was taken to see Dr. James Crumbley, a physician with psychiatric training [T.R. 392], who served as a consultant at the jail [T.R. 394, 410]. Dr. Crumbley was a special deputy employed and paid by the Hillsborough County sheriff's office. [T.R. 398, 410-11]. Dr. Crumbley told Mr. Proffitt he was a psychiatrist. [T.R. 400, 410, 415]. Mr. Proffitt asked Dr. Crumbley if the two could speak in private [T.R. 394], and if their conversation would be kept confidential [T.R. 400]. He was repeatedly assured that

---

20. The Supreme Court has now clearly held that double jeopardy protections are applicable to capital sentencing proceedings. Arizona v. Rumsey, ___ U.S. ___, 52 U.S.L.W. 4665 (1984); Bullington v. Missouri, 451 U.S. 430 (1981). Thus, should this Court hold, on Appellant's appeal, that based on the evidence below, he was entitled to be sentencted to life imprisonment, then the State's cross appeal would be barred by the federal and state double jeopardy clauses. Burks v. United States, 437 U.S. 1 (1978).

it would be:

> A. [By Dr. Crumbley] We walked into the office. We sat down. Mr. Proffitt sat down facing me and he asked me if I was a psychiatrist. And I told him I was. He said that he would like to talk to me about a problem that he had and that he would like to know whether or not he could talk to me in confidence without the nature of his problem being divulged. I told him he could.
>
> Q. Okay.
>
> A. Gave him my word.

[T.R. 400].

> ....
>
> Q. And you encouraged him to tell you everything, is that right?
>
> A. I told him he might tell me his story.
>
> Q. And that whatever he told you would be privileged because you were a psychiatrist?
>
> A. That, I did.

[T.R. 411]. (See also T.R. 416 ["in strictest confidence"]). Mr. Proffitt then made incriminating statements to the doctor, in the context of seeking psychiatric help for what he perceived to be psychiatric problems. [T.R. 400]. He made no incriminating statements before receiving the assurances of confidentiality [T.R. 415-16], and testified that he would not have spoken with Dr. Crumbley had he not been told that Dr. Crumbley was a psychiatrist with whom he could speak confidentially [T.R. 419].

A week before trial -- two weeks after the initial interview -- Dr. Crumbley, on his own initiative, had Mr. Proffitt brought to

him again. [T.R. 402]. Dr. Crumbley repeated his assurance of confidentiality. [Id.]. During the course of that interview, again in the context of discussing psychiatric help, Mr. Proffitt again made incriminating statements. [T.R. 404].

Dr. Crumbley admitted that he was seeing Mr. Proffitt not only as a psychiatrist, but as a representative of the Hillsborough County Sheriff's Department. [T.R. 410-11]. Dr. Crumbley acknowledged that Mr. Proffitt was interviewed in a custodial setting [T.R. 411], and made no admissions until after he had been assured that whatever was said would not be revealed to anyone [T.R. 415-16]. Dr. Crumbley testified that he did not advise Mr. Proffitt of his right to counsel, of his privilege against self-incrimination or that any statements made could be used against him at trial. [Id.]

The day before trial, the doctor called the State's attorney (as well as the sheriff's attorney and defense counsel[21] [T.R. 405]), and revealed the substance of Mr. Proffitt's incriminating statements. [T.R. 406]. The prosecutor immediately amended the State's witness list to add Dr. Crumbley's name [T.R. 37], and proffered Crumbley as a witness at the guilt stage of the trial [T.R. 391]. Defense counsel moved to suppress the testimony, and a hearing on the motion was held during the trial. [T.R. 391]. At the hearing, the State first elicited from Dr. Crumbley the circumstances of his interviews with Mr. Proffitt. [T.R. 391-99]. Over defense counsel's objection,

---

21. Dr. Crumbley assured defense counsel that the "discussion with [Mr. Proffitt] was privileged and would not be revealed to anybody ...." [T.R. 406].

the State was then also allowed to elicit the substance of Mr. Proffitt's incriminating statements to Dr. Crumbley. [T.R. 399-404]. Thus, notwithstanding Dr. Crumbley's express assurances to Mr. Proffitt that any statements would be confidential, Mr. Proffitt's statements were disclosed, without his permission and over his objection, to the prosecution and to the ultimate sentencing authority in his capital case.

After hearing the testimony, the trial court ordered argument on the motion to be held in chambers. [T.R. 420]. When trial resumed the next morning, the State rested without calling Dr. Crumbley. [T.R. 421]. The record contains no ruling on the motion or other indication whether the court suppressed the testimony or the prosecutor decided for some other reason not to have Dr. Crumbley testify.

At the penalty stage, the State again proffered Dr. Crumbley as a witness. [T.R. 495]. Trial counsel was then faced with a situation where the sentencing court had heard the damaging incriminating statements made to Dr. Crumbley, but had not heard any cross-examination as to the mitigating aspects of the statements. At that point, trial counsel announced he was waiving the privilege but specifically <u>for purposes of that hearing alone</u>. Defense counsel explicitly stated: "[T]his waiver is only for purposes of this particular proceeding and is not to be construed in any manner as a waiver for any other purpose." The Court responded, without objection from the State: "Let the record so reflect. You may proceed."

[T.R. 497]. Dr. Crumbley thereupon testified to the substance of Mr. Proffitt's statements and offered opinions concerning Mr. Proffitt's mental state. [T.R. 497-505].

At the resentencing in 1984, Mr. Proffitt moved to suppress and exclude Dr. Crumbley's trial testimony on the grounds that 1) it was obtained in violation of his Fifth Amendment privilege against self-incrimination; 2) it was obtained in violation of his Sixth Amendment right to counsel; 3) it was obtained without required warnings as to his constitutional rights; 4) it was privileged from disclosure by the psychiatrist-patient privilege; 5) the testimony was admitted without notice to the defendant that it could be used to support an aggravating circumstance -- cold and calculated murder -- added to the statute in 1979; and 6) it was inherently unreliable. [R. 8-11, 119-135, 213-229].

A hearing was held on Mr. Proffitt's motion in the trial court. Mr. Proffitt was called as a witness and testified that he did not know in 1974 that he had a Fifth or Sixth Amendment right to challenge the use of Dr. Crumbley's testimony [R. 218], and that he would have instructed his attorney to use any appropriate legal basis to block the admission of Dr. Crumbley's testimony had he known the testimony could be used to support the cold and calculated aggravating factor [R. 219-20].

The State presented no testimony at the hearing. In particular, it presented no evidence -- either from Mr. Proffitt's prior counsel

or through cross-examination of Mr. Proffitt -- to establish Mr. Proffitt's or his counsel's understanding of Mr. Proffitt's constitutional, statutory and common law rights in 1974. It presented no evidence in regard to Mr. Proffitt's or his counsel's understanding of the limited waiver placed on the record by counsel in 1974. It presented no evidence that Mr. Proffitt had made a knowing, intelligent and voluntary waiver of any right to exclude the testimony.

The trial court granted Mr. Proffitt's motion to suppress and exclude Dr. Crumbley's testimony. [R. 231]. The trial court found, from the evidence presented, that Mr. Proffitt's statements had been made under privileged circumstances with an express promise of confidentiality [R. 230], and that the State had not proven a knowing and voluntary waiver of the privilege [R. 230-31]. The trial court found that the use of Dr. Crumbley's testimony would, therefore, violate Mr. Proffitt's rights. [R. 230]. The trial court's oral ruling was subsequently confirmed in a brief written order. [R. 22].

We respectfully submit that the trial court's ruling was correct and should not be overturned on appeal.[22]

---

22. It should be noted that although the State objected to defendant's Motion to Suppress Dr. Crumbley's testimony, it never actually proffered the testimony for admission at the resentencing. A party may not complain on appeal about the exclusion of evidence never actually preferred to the court below. Francois v. State, 407 So. 2d 885, 860 (Fla. 1982).

A. MR. PROFFITT HAD THE RIGHT TO INVOKE THE PSYCHIATRIST-PATIENT PRIVILEGE TO EXCLUDE DR. CRUMBLEY'S TESTIMONY.

There is no question that the psychiatrist-patient privilege applied to Mr. Proffitt's communications to Dr. Crumbley. See Fla. Stat. §90.503(1)(a)1 and (2); Fla. Stat. §90.242(a) and (2). The State does not challenge that ruling.

Any testimony by Dr. Crumbley concerning his conversations with Mr. Proffitt was therefore barred unless the State could establish a knowing, intelligent and voluntary waiver of the privilege by Mr. Proffitt. Johnson v. Zerbst, 304 U.S. 458 (1938). The burden was on the State, as the party seeking to invade the protections of the privilege, to present evidence to the trial court to prove the existence of such a waiver. Eastern Airlines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983); City of Tampa v. Harold, 352 So. 2d 944 (Fla. 2d DCA 1977); Yoho v. Lindsley, 248 So. 2d 187 (Fla. 4th DCA 1971); Leithauser v. Harrison, 168 So. 2d 95 (Fla. 2d DCA 1964).

Whether the privilege existed and whether it was waived were factual determinations to be made by the trial court that cannot be overturned unless clearly erroneous. Wray v. Department of Professional Regulation, 410 So. 2d 960 (Fla. 1st DCA 1982). In this case, as the trial court held, the State wholly failed to meet its burden.

It is the State's position that defense counsel's statement at the 1974 proceedings, agreeing to a limited waiver of the privilege for the purpose of those proceedings only, constituted a legally binding absolute waiver of Mr. Proffitt's privilege for all purposes. The trial court properly rejected this contention, both as a matter of law and fact.

Contrary to the State's position, the limited waiver is a much-used device in criminal law. Wigmore states that a waiver is limited to the particular proceedings in which the otherwise privileged testimony is taken, and that waiver at an initial trial is invalid for a subsequent trial. VII Wigmore §2276(4). Limited waivers are possible even within the same trial. For instance, a defendant may testify at a suppression hearing without waiving his privilege against self-incrimination at the actual trial. Simmons v. United States, 390 U.S. 377 (1968). Limited waivers of confidential privileges are also common. See e.g. Diversified Industries Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc) (surrender of confidential attorney-client report to SEC does not waive privilege for subsequent civil trial.)[23]

---

23. The cases cited by the State do not hold to the contrary. In Hamilton v. Hamilton Steel Corp., 409 So. 2d 111 (Fla. 4th DCA 1982), the court found that there was no privilege under the circumstances of the case. It also found that even if the privilege existed, counsel's absolute waiver of the privilege on behalf of his clients was valid. In In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979), the Court held that the corporation's attorney, acting as agent for the corporation and thus as the holder

Moreover, we submit that the trial court's action in accepting counsel's limitation on the waiver, without objection by the State, gave rise to a judicially sanctioned and valid limited waiver. Mr. Proffitt was entitled to rely on the trial court's and State's acceptance of the limitation. State v. Fuller, 387 So. 2d 1040 (Fla. 3rd DCA 1980); Cochran v. State, 117 So. 2d 544 (Fla. 3d DCA 1960).

Even if the State is correct that, as a matter of law, a waiver may not be limited then Mr. Proffitt was misled in 1974 as to his rights, and there could have been no "knowing" waiver by Mr. Proffitt as required under the law.

It is fundamental that any waiver, to be valid, must be knowing and intelligent. Johnson v. Zerbst, supra. A defendant must know what he is giving up when he waives his rights. The 1974 record reveals only that Mr. Proffitt heard his counsel agree to allow Dr. Crumbley to testify in that proceeding, before a trial judge who had already heard the confidential testimony at issue.[24] It was

---

(fn. 23, cont.) of the privilege, had made an absolute waiver of the privilege. New counsel for the corporation could not revoke that waiver. Here, by contrast, there was no absolute waiver of the privilege, but an explicitly limited waiver. Similarly, neither in In re Weiss, 596 F.2d 1185 (4th Cir. 1979), or Permian Corp. v. United States, 665 F.2d 1214 (D.C.Cir. 1981), was an explicit limited waiver at issue; rather, in both cases the courts held that voluntary disclosure of privileged information, without limitation, constituted a waiver of the privilege.

24. In fact, the 1974 trial record contains no inquiry by the trial court of Mr. Proffitt to establish that he agreed with his counsel's action and was so agreeing voluntarily and with knowledge of the consequences.

clearly not unreasonable for Mr. Proffitt to believe that such a limitation was possible, when his lawyer, the trial judge and the prosecutor all accepted it. Mr. Proffitt's earlier utilization of precisely such a limited waiver -- when he testified at the suppression hearing [T.R. 417] --had been agreed to by the Court. The only right Mr. Proffitt arguably knowingly and intelligently waived was the right to suppress Dr. Crumbley's testimony in the 1974 penalty proceeding.

If there is no such thing as a limited waiver, as the State now contends, Mr. Proffitt was deceived by the trial court, prosecutor and court-appointed counsel into believing that his rights were protected when, in fact, they were not. Any "waiver" that resulted is legally invalid. See State v. LeCroy, 435 So. 2d 354, 357, opin. on reh., 441 So. 2d 1182 (Fla. 4th DCA 1983) (no waiver where waiver qualified in way to mislead defendant regarding subsequent use of statements); United States ex rel. Healey v. Cannon, 553 F.2d 1052 (7th Cir. 1977) (guilty plea waiving rights invalid where predicated on defense counsel's erroneous assurance defendant could challenge evidentiary ruling on appeal); cf., State v. Burwick, 442 So. 2d 944, 948 (Fla. 1983) (no waiver where defendant misled by state officials regarding subsequent use of post-Miranda silence); Harrison v. State, 12 So. 2d 307 (Fla. 1943) (no waiver where defendant misled as to his position and consequences of confession by state officials eliciting statements); State v. Slifer, 447 So.

2d 433, 436 (Fla. 1st DCA 1984) (same); Williams v. State, 441 So. 2d 653 (Fla. 3rd DCA 1983) (same); Foreman v. State, 400 So. 2d 1047 (Fla. 1st DCA 1981) (same). There is no evidence, from either the 1974 or 1984 proceedings, to establish that Mr. Proffitt had any notion that there is no such thing as a limited waiver, and/or that his limited waiver might be held at a later date to be an absolute waiver.

This is exactly the opposite of the situation in Murch v. Mottram, 409 U.S. 41 (1972), relied upon by the State in its brief. In Murch, the defendant was specifically admonished by the trial court that although he sought to withdraw a claim "without prejudice," his action would be considered a waiver which would forever foreclose relief on the claim. Id. at 42-43. Under that circumstance, the United States Supreme Court found that, having been warned of the consequences of his action, the defendant could not claim that he had not intended to waive his claim. Id. at 44.

Finally, at the time the waiver was announced, the death penalty statute did not contain the aggravating circumstance for which the State now seeks to use Dr. Crumbley's testimony.[25] Mr. Proffitt took the stand at the motion hearing on resentencing and testified

---

25. The State's pseudo-denial of reliance on Dr. Crumbley's testimony (St. Br. at 5), in which it selectively cites to a portion of that testimony, makes clear the purpose for which the State seeks to use the testimony. In fact, however, Dr. Crumbley's opinion was that Mr. Proffitt had acted under "uncontrollable emotional stress" and "extreme mental disturbance." [T.R. 503].

that he would never have waived the privilege if the circumstance had existed at the time the State proffered Dr. Crumbley as a witness. [R. 219-20]. The State made no attempt on cross-examination to challenge this statement. Plainly, the trial court was justified in relying on this testimony to conclude that Mr. Proffitt was unaware of the consequences of his waiver and that the waiver was therefore not knowing and intelligent.

Equally important, the State offered no proof to the trial court to establish that the 1974 waiver was voluntary. Mr. Proffitt was faced in 1974 with a situation where the trial judge, the ultimate sentencer, had already heard Dr. Crumbley's testimony in violation of the privilege. With "the cat out of the bag," any subsequent decision to allow the testimony more fully cannot be deemed as "voluntary." Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982); Harrison v. United States, 392 U.S. 219 (1968). Even if it might have been proven voluntary by competent evidence as to the reasons for the decision to waive the privilege, the State offered no such evidence here.

It must be emphasized that the State's lengthy argument that the decision to allow Dr. Crumbley to testify was a "tactical" decision by prior counsel now binding on Mr. Proffitt is completely without support in the record. The State offered no evidence of prior counsel's "tactical" motives, nor does it cite any record citation to support its allegation. The State relies, again, on the federal habeas

corpus hearing testimony of prior counsel. (St. Br. at 35). The State did not offer such testimony to the trial court, nor even direct the trial court to the transcript of the federal proceedings on this issue. The State's attempt in this Court to support its cross-appeal with "facts" never presented to the trial court is improper.

In sum, the trial court held that (1) Dr. Crumbley's testimony was based on conversations occurring under circumstances giving rise to a psychiatrist-patient privilege; and (2) that the State did not meet its burden, through proof in the record, that Mr. Proffitt had knowingly, intelligently and voluntarily waived the privilege for purposes of the 1984 resentencing.

The State has set forth no record evidence to establish that the trial court's findings were clearly erroneous. The trial court's decision suppressing Dr. Crumbley's testimony should be affirmed.

B. DR. CRUMBLEY'S TESTIMONY WAS INADMISSIBLE BECAUSE IT WAS OBTAINED IN VIOLATION OF MR. PROFFITT'S FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND ARTICLE I, § 9 OF THE FLORIDA CONSTITUTION.

At the time Mr. Proffitt spoke with Dr. Crumbley, Mr. Proffitt was in state custody. [T.R. 394, 411]. Dr. Crumbley was a special deputy in the sheriff's department and admitted that in speaking with Mr. Proffitt he was acting as a representative of the sheriff's department. [T.R. 398, 411]. Dr. Crumbley did not warn Mr. Proffitt

that his statements could be used against him, that he had a right to remain silent, or that he had a right to consult with his lawyer and have his lawyer present during questioning. [T.R. 415]. To the contrary, Dr. Crumbley repeatedly promised Mr. Proffitt that the statements would be privileged and held in strictest confidence. [T.R. 416]. He questioned Mr. Proffitt, eliciting incriminating statements in the context of "privileged" psychiatric consultations. [T.R. 411]. The statements obtained during the interviews were then disclosed to the State and were proffered by the State for use at resentencing.

Under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 §9 of the Florida Constitution, Mr. Proffitt could not be compelled to incriminate himself at his capital sentencing. Estelle v. Smith, 451 U.S. 454 (1981). Smith makes clear that Dr. Crumbley's testimony could not be admitted against Mr. Proffitt absent a knowing and intelligent waiver by Mr. Proffitt, after proper warnings, of his privilege against self-incrimination.

It is indisputable that there was no waiver of Mr. Proffitt's Fifth Amendment privilege against self-incrimination at the original sentencing hearing. The privilege against self-incrimination is a personal right that can only be waived by a defendant, personally, under circumstances establishing that the waiver is knowing and voluntary. Miranda v. Arizona, 384 U.S. 436 (1966); Daniels v. State, 48 So. 747 (Fla. 1909). The statement made by counsel at

the 1974 hearing referred exclusively to the psychiatrist-patient privilege. There is no indication in the 1974 record that Mr. Proffitt was aware that a Fifth Amendment right existed, and at the suppression hearing below, Mr. Proffitt expressly testified, without contradiction, that he was not aware that he had such a right in regard to Crumbley's testimony at the time of the original sentencing. [R. 218]. Awareness of a right is the threshold requirement for an intelligent decision regarding its exercise. Miranda v. Arizona, supra at 469 (1966); Cochran v. State, supra. The burden was on the State to prove a valid waiver of Mr. Proffitt's Fifth Amendment privilege against self-incrimination, and this burden was not met.

Thus it is clear that (1) Mr. Proffitt had a right to be given his Miranda warnings before any statements made to Dr. Crumbley could be used against him at capital sentencing proceedings; Estelle v. Smith, supra; (2) not only were no such warnings given, but Mr. Proffitt was instead deceived into believing the statements elicited would be kept confidential; (3) there was no waiver of Mr. Proffitt's privilege against self-incrimination. Under the circumstances, Dr. Crumbley's testimony was inadmissible. Estelle v. Smith, supra at 462. See also, e.g., Leyra v. Denno, 347 U.S. 556 (1954) (in-custody defendant sought treatment for sinuses; statement elicited by psychiatrist during examination without warnings and subsequent confessions which were the fruit thereof violated defendant's Fifth Amendment rights); Grant v. Wainwright, 496 F.2d 1043 (5th Cir.

1974) (statement elicited by psychiatrist using format of psychiatric examination from in-custody defendant seeking medical attention for headache violated defendant's Fifth Amendment rights); Navia-Duran v. Immigration and Naturalization Service, 568 F.2d 803 (1st Cir. 1977) (though confession ordinarily admissible in INS proceedings, fact that statement was elicited through agents' deception regarding alien's right to a hearing made suppression proper); DeConingh v. State, 433 So. 2d 501 (Fla. 1983) (confession suppressed as involuntary where elicited through deception and thus without valid waiver); Harrison v. State, supra (same); State v. Slifer, supra (same); Williams v. State, supra (same); Foreman v. State, supra (same); In re Bryan, 645 F.2d 331 (5th Cir. 1981) (Unit B) (waiver of Fifth Amendment privilege must be explicit as to waiver of that right, plea agreement containing general agreement to testify was insufficient waiver).[25]

C. THE TESTIMONY WAS INADMISSIBLE BECAUSE IT WAS OBTAINED IN VIOLATION OF MR. PROFFITT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL AND ARTICLE 1, SECTION 16 OF THE FLORIDA CONSTITUTION.

Mr. Proffitt had been indicted and was represented by counsel at the time of Dr. Crumbley's interview of him. [T.R. 1]. Mr. Proffitt did not knowingly initiate an interrogation by a government

---

25. Defendant has the right on re-trial to raise these suppression issues. United States v. Akers, 702 F.2d 1148, 1148 (D.C. Cir. 1983); United States v. Fortin, 685 F.2d 1297 (11th Cir. 1982); King v. State, 353 So. 2d 180 (Fla. 3rd DCA 1977); Meehan v. State, 397 So. 2d 1214 (Fla. 2nd DCA 1981).

officer, but sought the confidential assistance of a psychiatrist. [T.R. 415, 419]. He was assured by Crumbley that he was talking to a psychiatrist in confidence. [T.R. 400, 410, 411, 415, 416]. Dr. Crumbley elicited incriminating statements from Mr. Proffitt in the context of a privileged psychiatric interview. [T.R. 411]. On his own initiative, Dr. Crumbley interviewed Mr. Proffitt a second time, again eliciting statements from him in a psychiatric counselling setting. [T.R. 402].

The law is clear that Mr. Proffitt had a constitutional right to the assistance of counsel at these post-indictment interviews. Estelle v. Smith, supra; Massiah v. United States, 337 U.S. 201 (1964). No waiver of the right to counsel was obtained, nor was Mr. Proffitt informed that he even had such a right. [T.R. 415]. Mr. Proffitt testified at the resentencing that he was unaware that he had such a right. [R. 218]. Under the circumstances, the evidence obtained by Crumbley during the interview was obtained in violation of Mr. Proffitt's right to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 16 of the Florida Constitution. Estelle v. Smith, supra; United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, supra; State v. Douse, 448 So. 2d 1184 (Fla. 4th DCA 1984); Fasenmyer v. State, 233 So. 2d 642 (Fla. 2d DCA 1970).

D. ADMISSION OF THE TESTIMONY TO PROVE THE COLD, CALCULATED AGGRAVATING FACTOR WOULD VIOLATE MR. PROFFITT'S RIGHTS TO DUE PROCESS, CONFRONTATION, THE ASSISTANCE OF COUNSEL, THE PROHIBITION ON EX POST FACTO LAWS AND CRUEL AND UNUSUAL PUNISHMENT, AND THE RIGHT TO JURY CONSIDERATION OF AGGRAVATING CIRCUMSTANCES.

Mr. Proffitt had no notice at the time of trial that Dr. Crumbley's testimony would be utilized to support the "cold and calculated" aggravating factor. For the reasons previously discussed in this brief and our initial brief in reference to other evidence from the 1974 proceedings (App. Br. at 28-31; supra at 11-13), use of Dr. Crumbley's testimony now to establish the 1979 factor would violate Mr. Proffitt's rights to due process of law, the assistance of counsel, confrontation and cross-examination of witnesses, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Florida Constitution. In addition, consideration of Dr. Crumbley's testimony on that new factor would violate Mr. Proffitt's statutory right to jury consideration of the aggravating circumstances, as well as the ex post facto prohibitions of the state and federal constitutions and law. (See App. Br. at 21-22; supra at 11-13).

These issues are discussed fully in Mr. Proffitt's Initial Brief and this brief and will not be repeated here.

E. DR. CRUMBLEY'S TESTIMONY WAS INADMISSIBLE BECAUSE IT VIOLATES FLORIDA LAW REGARDING THE USE OF STATEMENTS MADE TO PSYCHIATRISTS DURING PSYCHIATRIC EXAMINATIONS.

Under Florida law, even in those circumstances where a psychiatrist is permitted to testify about a patient's mental state in a criminal proceeding, incriminating statements made by the defendant/patient during the course of the examination are not admissible in evidence. Parkin v. State, 238 So. 2d 817 (Fla. 1970). Such statements are admissible only on cross-examination to test the basis for a psychiatrist's opinion, and then are not to be admitted for the truth of the matter. Id.

The holding in Parkin reflects a reasonable compromise whereby the State is not deprived of an opportunity to elicit psychiatric testimony, but neither is the defendant's right against self-incrimination infringed. That principle was violated in this case. The testimony by Dr. Crumbley suppressed below contained not only the doctor's opinions regarding Mr. Proffitt's mental state but incriminating statements made by Mr. Proffitt to Dr. Crumbley, elicited by the State on direct examination. Those statements were inadmissible, and properly suppressed by the trial court on resentencing. Id.

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Petitioner-Appellant have been mailed, postage prepaid, to Charles Corces, Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, this 15th day of January, 1985.

DAVID S. GOLUB