IN THE SUPREME COURT OF FLORIDA

CARLOS BELLO,

Appellant,

vs.

Case No. **70,552**

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "S". Other references will be as denoted in appellant's initial brief.

This reply brief is directed to Issues 11, 111, IV, VI, and VII. As to the remaining issues, appellant will rely on his initial brief.

ARGUMENT

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON TRANSFERRED INTENT, AS THAT DOCTRINE WAS INAPPLICABLE TO THE EVIDENCE IN THIS CASE

Appellant will reply to the state's contention that he failed to preserve this error for appellate review. As to the merits, appellant will rely on his initial brief.

The Florida Standard Jury Instructions contain the following one on transferred intent, with the direction "[G]ive if applicable":

> If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

During the charge conference, defense counse objected to the state's request that the jury be instructed on transferred intent (R752-53, 757) (see s. 6):

> MR. LOPEZ [defense counsel]: Judge, the last paragraph of that says, "If

> a person has a premeditated design to kill one person and attempting to kill that person and actually kills another person, that killing is premeditated." The note to the Court indicates, Give if applicable," and case.
>
> THE COURT: Over that objection, that will be given. ...

(R752)

Appellant's Issue II of his brief is divided into three sections. In Part A ("The Doctrine of Transferred Intent"), he briefly describes the development of the common law doctrine of transferred intent [see Gladden v. State, 330 A.2d 176, 180-85 (Md. 1974)], and its application in Florida. In Part B ("The Inapplicability of the Doctrine of Transferred Intent to the Facts of this Case"), he explains why the evidence did not warrant such an instruction, and that the trial court therefore erred in giving it. [Compare Provenzano v. State, 497 So.2d 1177, 1181 (Fla. 1986) with Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986)]. In Part C ("The Inappropriate Jury Instruction on Transferred Intent Cannot be Dismissed as 'Harmless Error'")[1], appellant argued that the instruction, unsupported by the evidence, may well have had the unconstitutional effect of relieving the state of its burden of proof on the essential (and contested) element of premeditation as to the death of Detective Rauft, and therefore the reviewing Court

[1] Appellant made this argument anticipating that the state would argue "harmless error" in its brief; an assumption which proved correct (see S. 9-10).

cannot determine beyond a reasonable doubt that the error did not contribute to the jury's verdict. [See Sandstrom v. Montana, 442 U.S. 510 (1979); State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)].

In its answer brief, the state characterizes defense counsel's objection below as "only .... a general objection" (S. 8), and contends that it was insufficient to preserve the issue for appeal (S. 6-8). Ignoring Parts A and B of appellant's argument, in which appellant contends that the giving of the transferred intent instruction was error because the evidence did not support it, the state instead focuses on appellant's "anti-harmless-error" argument and complains that that argument was not preserved below. However, "harmless error" is an appellate, not a trial, concept. See State v. DiGuilio, supra. When the defense makes an objection at trial, the state can argue against the merits of the objection, but the state cannot at that point argue "prospective harmless error."[2] Nor is defense counsel required to show at that point that if his objection is overruled, the error will not be harmless. Rather, defense counsel is simply required to state the legal and/or factual ground for his objection explicitly enough to "direct the attention of the trial judge to the purported error in a way which will allow him to respond in a timely fashion." Castor v. State, 365 So.2d 701, 703 (Fla. 1978). See also Jackson v.

[2] In other words, it would not be appropriate for the state to argue at the trial level that even if the defense objection is meritorious, the judge should go ahead and commit the error anyway, on the theory that it will be "harmless".

State, 451 So.2d 458, 461 (Fla. 1984) (objection made on ground of relevancy was sufficient to preserve "Williams-rule" collateral crime issue).

In the instant case, the objection made by defense counsel may have been concise, but it was the specific objection which appears to be contemplated by the Standard Jury Instructions themselves. Next to the standard instruction on transferred intent is the direction to the court "[G]ive if applicable"; defense counsel objected on the ground that, under the evidence in this case, a transferred intent instruction was **not** applicable. On appeal, appellant has argued the same thing [see appellant's initial brief, p. 44-49]. The portion of appellant's brief which anticipated the state's "harmless error" argument on appeal should not be confused with the around for the objection.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO APPELLANT'S BEING SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THERE WAS NO APPARENT REASON (MUCH LESS A MANIFEST NECESSITY) FOR THE SHACKLING; AND WHERE THE COURT GAVE NO JUDICIAL SCRUTINY TO THE DECISION TO SHACKLE APPELLANT, BUT MERELY DEFERRED TO THE SHERIFF'S ACTION

As with Issue 11, the state again argues that appellant failed to preserve this point for appellate review. The difference is that while the state's position as to the transferred intent instruction is at least on the borderline of being arguable, its position that the shackling issue was not preserved is nothing

short of preposterous. The state says that "[defense counsel] simply made a general motion for mistrial" (**S. 11,** see **S.** vii). The state says that defense counsel never asked the trial court to make a finding regarding the necessity of the shackling, or any reasonable alternatives thereto **(S. 11,** see **S.** vii). The state says "Absent specific motion for further findinus, the trial court had a reasonable basis for maintaining the extra security measure" [of shackling appellant] **(S. 11,** see **S.** vii) (emphasis supplied by appellant). And, as "authority" for these factually misleading assertions, the state relies solely on Lucas v. State, 376 So.2d **1149, 1151-52** (Fla. **1979),** a case in which (on **a** discovery issue) the defense attorney brought the state's non-compliance to the attention of the court, but never interposed an objection and instead "deferred to the trial court's statement of the applicable law." Lucas, therefore, would not be on point even if the state had its facts straight.

The state, however, does not have its facts straight. The record reflects that at the beginning of the penalty phase, counsel asked to approach the bench, and the following occurred:

> MR. LOPEZ [defense counsel]: May it please the Court, I'm going to obiect **and move for a mistrial at this time** in that I have iust looked over at my client's feet, and they are shackled in the Presence of this jury, and there's nothing underneath that table, any skirt of any kind. He has Presented no evidence of wanting to run or to iniure anyone. And to have my client appear shackled in the Presence of that jury is **very** preiudicial. and I would move for a mistrial at this time.

> THE COURT: All right. This is the very same jury that convicted him of murder in the first degree, and now he stands convicted, and perhaps it is a well thought out security measure. And I deny the motion for mistrial and overrule the objection.
>
> MR. LOPEZ: I would ask, then, in the alternative, Your Honor, that the Court order the takinu off of the shackles unless the State can show that there is a security threat.
>
> THE COURT: Well, I don't know why he's shackled at this point. Perhaps the Sheriff feels because he now stands convicted of that and the nature of the posture of the case, that it's necessary. I will again decline to grant the last request, and he will remain shackled. If he needs to testify, you can let me know before that happens, and we will see what we do then.
>
> (The bench conference was concluded).

(R919-20)

As can plainly be seen, defense counsel made a specific objection and a specific motion for mistrial, based on the fact that appellant was shackled in the presence and view of the jury, and on the legal grounds that (a) there was no necessity for the shackling ("He has presented no evidence of wanting to run or to injure anyone") and (b) the shackling was highly prejudicial. See e.g. Elledse v. Duuaer, 823 F.2d 1439, 1450-52 (11th Cir. 1987). The trial court, without making any inquiry into the reasons (if any) for the shackling, overruled the objection and denied the motion for mistrial, saying "[P]erhaps it is a well thought out

security measure." Appellant submits that even if defense counsel had sat down at this point and said nothing more, the issue would have been fully preserved for appeal, especially in view of the trial judge's unequivocal adverse ruling. Elledae v. Dusaer, supra; Castor v. State, supra; **see** also Simpson **v.** State, 418 So.2d 984, 986 (Fla. 1982). But defense counsel did not sit down, and he certainly did not "defer" to the trial court's statement. [Contrast Lucas]. Instead, he requested, in the alternative to his motion for mistrial, that the court order the removal of the shackles "unless the State can show that there is a security threat." Since the United States Supreme Court, and many other federal and state courts, have held that shackling is an inherently prejudicial practice which may not be employed as a security device absent a showing of necessity or "essential state interest"[3], it is hard to imagine a more appropriate request by defense counsel (after the denial of his objection and motion for mistrial) to apprise the judge of the putative error, to give him an opportunity to correct it at an early stage, and to preserve the issue for intelligent review on appeal. Castor. The trial judge, however, acknowledging that he did not even know why appellant was shackled, declined to find out. He speculated again that "perhaps" the

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[3] See e.g. Illinois v. Allen, 397 U.S. 337 (1970); Holbrook **v.** Flynn, 475 U.S. 560 (1986); **Elledge v. Dugger**, 823 F.2d 1439 (11th Cir. 1987); Zygadlo v. Wainwriaht, 720 F.2d 1221 (11th Cir. 1983); Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973); Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970); State v. Castro, 756 P.2d 1033 (Hawaii 1988); People v. Duran, 545 P.2d 1322 (Cal. 1976).

Sheriff felt that it was necessary, and said "I will again decline to grant the last request, and he will remain shackled." As in Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970), the trial judge here did not exercise his judicial discretion but merely deferred to the wishes of the sheriff. See also Elledse v. Duaaer, supra, 823 F.2d at 1451; State v. Castro, 756 P.2d 1033, 1045 (Hawaii 1988) (any decision to shackle defendant must be subject to "close judicial scrutiny"); People v. Duran, 545 P.2d 1322, 1329 (Cal. 1976) (trial court abused his discretion where decision to shackle defendant was based on a "general policy" to shackle all prison inmate defendants accused of violent crimes, rather than on individualized consideration of circumstances of the particular trial); cf. Matire v. State, 232 So.2d 209, 211 (Fla. 4th DCA 1970) ("A trial court, when exercising its discretion, must consider each case upon its individual facts and circumstances").

The state, however, claims that defense counsel never asked the trial court to make a finding "determining the necessity of or any reasonable alternatives to shackling Bello" (S. 11, vii). Counsel, according to the state, "simply made a general motion for mistrial", and "[a]bsent specific motion for further findings, the trial court had a reasonable basis for maintaining the extra security measure" (S. 11, vii). Further findings? The trial court made **no** findings - and refused to even inquire into the reason (if any) for the shackling - even though defense counsel specifically objected (on the grounds that the shackling was very prejudicial, and that there was no reason for it), unsuccessfully moved for a

mistrial, and then requested that the shackles be removed unless the state could show that there was a security threat. Under these circumstances, it is remarkable that the state can even argue with a straight face that appellant has waived the issue by failing to preserve it below.[4]

As for the trial court's supposed "reasonable basis" for requiring appellant to appear in shackles in front of the jury charged with deciding whether he should live or die, it should first be re-emphasized that the trial judge made it clear that he did not have a clue **why** appellant was shackled, other than that "perhaps" it was a well thought out security measure by the sheriff or his deputies. See Woodards v. Cardwell, supra. Despite the trial court's refusal to make any inquiry or findings at the time he was called upon to exercise his discretion as to whether the shackling was necessary, the state argues on appeal that the "extra security measure" was proper because "Bello was a convicted murderer with a history of mental illness" (S. **11,** vii). The fact that Bello was a convicted murderer, however, is equally true of every defendant in a capital penalty trial. Thus, under the state's logic, police or jail personnel or bailiffs (with no judicial scrutiny, and for no particular reason) could routinely require defendants to appear in shackles before the jury in the penalty phases of their trials. Fortunately, that is not the law.

[4] Note also that defense counsel's objection in the instant case was considerably more thorough than the objection in Elledge v. Duaaer, supra, at **1451.**

In Holbrook v. Flynn, supra, 475 U.S. at 568-69, the U.S. Supreme Court described shackling as an "inherently prejudicial practice" which is permissible "only where justified by an essential state interest specific to each trial."[5] In Elledse v. Duuser, supra, 823 F.2d at 1451, n. 22, the Eleventh Circuit Court of Appeals noted that "Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the Court made its rule in Holbrook unaware that capital trials are bifurcated. We think Holbrook means what it says." The prohibition against shackling (absent compelling reasons for it) was not based on the presumption of innocence alone; there are broader concerns which apply just as forcefully in a life-or-death trial as they do in a guilt-or-innocence trial. See Elledae v. Dusser, supra, 823 F.2d at 1450-51. For example, the "jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as the proper decision." Elledue, at 1450. Also, the shackles might well influence the jury to view the defendant as a high escape risk, and therefore to conclude that a life sentence would be insufficient to protect society. Cf. Teffeteller v. State, 439 So.2d 840, 844-

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[5] The Holbrook Court contrasted shackling, which it deemed inherently prejudicial, with the presence of security personnel in the courtroom, which it did not find inherently prejudicial (475 U.S. at 568-69). Only when the challenged practice is **not** inherently prejudicial is the defendant required to show "actual prejudice" on the part of the jurors.

45 (Fla. 1983). Therefore, trial courts must be especially careful not to allow these prejudicial impressions to be conveyed to the jury by forcing the defendant to appear in shackles unless a strong showing of necessity is made. As stated in Woodards v. Cardwell, supra, 430 F.2d at 982:

> All authorities agree that it is prejudicial for a defendant on trial to be shackled in the courtroom. Loux v. United States, 389 F.2d 911 (9th Cir. 1968). The rule that a prisoner brought into court for trial is entitled to appear free from all bonds or shackles is an important component of a fair and impartial trial. And shackles should never be permitted except to Prevent the escape of the accused, to protect everyone in the courtroom, and to maintain order durina the trial. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Way v. United States, 285 F.2d 253 (10th Cir. 1960); Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951), cert. denied, 342 U.S. 873, 72 S.Ct. 116, 96 L.Ed. 656.

Flying in the face of Elledae; Woodards, and the U.S. Supreme Court's pronouncements in Illinois v. Allen and Holbrook v. Flynn, the state insists on characterizing shackling as a benign practice (S. 14), and as a "normal courtroom security measure" (S. 13). To the contrary, as Allen and Holbrook make abundantly clear, shackling is an extraordinary security measure, which cannot constitutionally be employed absent compelling justification.

The state also suggests that the shackling was justified by appellant's history of mental illness (S. 11). First of all, it should again be emphasized that the trial court made no finding

that appellant's mental condition necessitated that he be shackled. While undersigned counsel agrees that the record overwhelmingly establishes that appellant is severely and chronically mentally ill [see initial brief, p. 12-35 and Issues IV and V, p. 67-74], he strongly disagrees that this was any reason to shackle him in the presence of his penalty jury. Drs. Carra and Mussenden had determined that, while in chemical remission of his mental illness, appellant was competent to stand trial (and capable of manifesting appropriate courtroom behavior), *so* long as he received his antipsychotic medication. Appellant was not shackled in the guilt-or-innocence phase of the trial, and there is no indication of any "disruptive, contumacious, stubbornly defiant" behavior[6] on his part in that proceeding. Plainly the antipsychotic medication was sufficient for its purpose of keeping appellant under control at trial, and there was no need to prejudice him before the jury by use of the physical restraints. Moreover, even during the periods when appellant was **not** receiving his antipsychotic medication and the symptoms of his paranoid schizophrenia were at their most acute, he tended to become withdrawn and even catatonic. Without a showing of disruptive conduct or a threat to security, the fact that a defendant is mentally ill cannot be used to deprive him of his right to be tried free of physical restraints. This is especially true when the less restrictive (or at least less prejudicial) alternative of antipsychotic medication was already

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[6] See Illinois v. Allen, supra, 397 U.S. at 343,

being used, and was entirely sufficient to ensure appropriate courtroom behavior.

Quoting out of context from Elledae v. Duaaer, supra, (s. 12), the state suggests that it actually did appellant a favor by shackling him (see s. 12, 14). The complete discussion in Elledae, however (823 F.2d at 1450-52), Part VI, Shackling) makes it clear that the Eleventh Circuit (like the U.S. Supreme Court in Holbrook) is holding that shackling is inherently prejudicial, and certainly not benign or innocuous. Common sense supports the same conclusion. Defendants and their attorneys do not request to be shackled; rather, they tend to strenuously object to it. Defense counsel in the instant case made a much more extensive objection to the shackling than was made in Elledse [compare R919-20 with 823 F.2d at 14511; and as little basis as there was for the physical restraints in Elledae, there was even less in the instant case. The state's dissembling assertion that the shackles might have made the jury "feel sorry" for appellant (though not sorry enough to spare his life) (s. 14) flies in the face of all of the case law recognizing the prejudicial impact of shackling. See e.g. Illinois v. Allen; Holbrook; Elledae.

Just as far off base is the state's reliance on Hildwin v. State, 531 So.2d 124, 126 (Fla. 1988). In Hildwin, a juror inadvertently saw the defendant being transported from the jail in the custody of the sheriff. (The opinion does not indicate that Hildwin was shackled or physically restrained). The judge and defense counsel questioned the juror in chambers, and the juror

said he had not drawn any inferences from seeing appellant in custody, and had not talked to any of the jurors about it. Under these facts, this Court held that the trial judge did not abuse his discretion in denying the defense's motion to disqualify the juror. The cases cited in the Hildwin opinion - Heinev v. State, 447 So.2d 210, 214 (Fla. 1984) and Nearv v. State, 384 So.2d 881, 885 (Fla. 1980) - involve situations where some of the jurors may have inadvertently and "for a fleeting moment'' caught sight of the defendant being transported to or from the courthouse in handcuffs (Neary) or shackles (Heinev). In both cases, this Court, emphasizing that the defendants "[were] not forced to stand trial in prison clothes or handcuffs" (384 So.2d at 885, 447 So.2d at 214), held that the inadvertent sight of the defendant in restraints was not ***so*** prejudicial as to require a mistrial.

Hildwin, then, is totally irrelevant to the instant case. Heinev and Nearv might tend to support the state's position if the trial court had denied defense counsel's motion for mistrial, but sranted his request to remove the shackles unless the state could show that they were necessary. But what actually happened is that the trial court denied the request to remove the shackles, refused to even inquire as to whether there was a reason for the shackling, and thus did force appellant to be tried in shackles throughout the penalty phase before the jury. Therefore, Heinev and Nearv, if anything, support appellant's position, not the state's.

Finally, the state (without citing any authority for the proposition) seems to suggest that appellant bears a burden of

showing "actual prejudice" (S. 13, 14). However, Holbrook v. Flynn and Elledae v. Dugger make it clear that there is no such requirement. Where a practice is inherently prejudicial, as forcing a defendant to be tried in shackles has been held to be [Holbrook; Elledae], the fundamental fairness of the proceeding and the reliability of the capital sentencing decision are irreparably compromised.

> [Where] a procedure employed by the State involves such a possibility that prejudice will result that it is deemed inherently lacking in due process," Estes v. Texas, 381 U.S. 532, 542-543, 14 L.Ed.2d 543, 85 S.Ct. 1628 (1965), little stock need be placed in jurors' claims to the contrary. See Sheppard v. Maxwell, 384 U.S. 333, 351-352, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966); Irvin v. Dowd, 366 U.S. 717, 728, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961). Even though a Practice may be inherently Prejudicial, jurors wi11 not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," Williams, 425 U.S., at 505, 48 L.Ed.2d 126, 96 S.Ct. 1691.

Holbrook v. Flynn, supra, 475 U.S. at 570.

Shackling is a prime example of how prejudice can be subtle yet insidious. Seeing the defendant in shackles may cause some jurors to consciously think he must be an uncontrollable individual or a chronic troublemaker or an escape risk [Elledae]; on the other hand, the shackles may simply create a subconscious negative impression in the minds of other jurors. Still other jurors may be unaffected. But it can never be known beyond a reasonable doubt that the prejudicial effect of the defendant being tried in shackles did not contribute to the jury's decision to find him guilty, or to recommend that he be put to death. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). See Holbrook v. Flynn, supra, at 570. This is especially true where (as here) the life-or-death decision was determined by a single vote, and where there was strong mitigating evidence concerning appellant's mental illness which would have made a life recommendation eminently reasonable.

Shackling is an inherently prejudicial practice, and, unless there is a showing of necessity under the individual circumstances of the case, it is constitutional error requiring reversal. No showing of "actual prejudice" is required. Holbrook; Elledae; see also Zvaadlo v. Wainwriaht; Kennedy v. Cardwell; Woodards v. Cardwell; State v. Castro; People v. Duran.

ISSUE IV

BECAUSE OF APPELLANT'S SEVERE AND CHRONIC MENTAL ILLNESS, IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN HIS CASE

In his initial brief, appellant compared the instant case with Fitzpatrick v. State, 527 So.2d **809** (Fla. **1988);** and argued that, as in Fitzpatrick, the death penalty is proportionally unwarranted in light of the overwhelming evidence that appellant suffers from a severe mental illness. The state, in its answer brief, contends that this case is more similar to Hudson v. State, ___ So.2d ___ (Fla. **1989)** (case no. **70,093,** opinion filed January **19, 1989) (14** FLW **41),** and says "Bello's, like Hudson's mitigating evidence is not as compelling as that presented by Fitzpatrick" **(S. 17).**

Appellant strongly disagrees. In Hudson (on which, it should be noted, this Court split **4-3** on the question of proportionality; Hudson's motion for rehearing is still **pending)**[7], a forensic psychologist, Dr. Berland, testified that Hudson suffers from paranoid schizophrenia, and that there was some evidence of brain tissue impairment. While Hudson was competent to stand trial and legally sane, Dr. Berland concluded that both mental mitigating circumstances were applicable. The trial court found that Hudson's

[7] Because appellant and Timothy Hudson are both represented by undersigned counsel, and because the undersigned believes that their interests conflict, appellant moved to extend the time for filing his reply brief until after Hudson's motion for rehearing has been resolved. This Court denied appellant's motion for extension.

capacity to conform his conduct was impaired "to a certain extent", but concluded that "the evidence does not support the fact that any emotional or mental disturbance that the defendant may have been suffering from .... was in any way of an extreme nature"[8]. At no time was Hudson ever found incompetent to stand trial, nor was there any indication that antipsychotic medication was necessary to maintain Hudson's competency.

In the instant case, in contrast, the mitigating evidence concerning appellant's mental illness is overwhelming - in some ways, more ***so*** even than in Fitzpatrick. Without antipsychotic medication, appellant would never have been able to stand trial, or to be sentenced. Without antipsychotic medication, he sees visions and hears voices - paranoid delusions of heavily armed bandits or "pistoleros", riding horses, coming to kill him or telling him to kill himself. Without antipsychotic medication, appellant is irrational, autistic, catatonic, and "in minimal contact with reality" (see e.g. **R1540, 1543, 1547, 1588, 1605, 1613, 1645, 1647-48, 1699-1700, 1712-13, 1160, 1163).** Appellant has been examined by no fewer than seven psychiatrists[9] - four from the community (Nodal, Gonzalez, Carra, Cadena), and three from the state hospitals (Guerrero, Koson, Vaughn) - each of whom unequivocally diagnosed him as suffering from chronic schizophrenia

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[8] Sentencing order in Hudson v. State, case no. **70,093.**

[9] This number does not include the Cuban psychiatrists who - long before the offense occurred - diagnosed appellant as paranoid schizophrenic and hospitalized him at the Mazorra State Hospital.

of the paranoid and catatonic type. This diagnosis remained unchanged throughout the five-and-a-half year period of his psychiatric hospitalization. Psychological tests administered at the North Florida Evaluation and Treatment Center "were internally consistent in support of the judgment that Mr. Bello is psychotic" (R1678).

As in Fitzpatrick, the expert opinions were corroborated by lay testimony (R920-23, testimony of Mercedes Rodriguez) and also by reports from the NFETC detailing appellant's personal and family history of mental illness while in Cuba.[10] Appellant is the youngest of eleven children (all of whom are at least a decade older than he) born to elderly parents (R1668). It was feared that he had a brain tumor at birth, and "[a]lthough it was medically treated ..... the alleged tumor was given as the primary reason for his bizarre, nervous and seclusive behavior patterns through adolescence" (R1668). His father died when he was nine (R1668). Raised by a godmother, appellant went to school through the sixth grade, became a baker, and married at age 18 (R1668). Because of his mental problems, appellant's wife twice had him committed to the Mazorra State Hospital, Cuba's state psychiatric facility (R1668). [Several of his siblings had also undergone psychiatric treatment (R1668)]. Appellant's service in the Cuban military was cut short after only a month because of "nerve" problems (R1668).

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[10] Record references are to the December, 1983, Komaniecka report. The same information can also be found elsewhere in the record.

Because of his previous psychiatric hospitalizations, appellant, along with two sisters, was given clearance in 1980 to leave Cuba on the Mariel boatlift (R1668). While living in New York with an older brother, he worked in a clothing factory and received outpatient psychiatric treatment and medication (R1669). However, when he moved to Florida to help support his sister's family, the treatment and medication were discontinued (R1669).

As previously mentioned, when appellant was first evaluated to determine his competency to stand trial for the murder of Detective Rauft, the four psychiatrists' respective diagnoses were as follows:

> Nodal: "schizophrenia, paranoid type (R1541).
>
> Gonzalez: "schizophrenia, mixed type, with paranoid and catatonic features" (R1543) (also commenting on Bello's "overt psychotic condition", R1543).
>
> Carra: "catatonic schizophreni[a] with severe paranoid ideation" (R1547) (also stating that Bello was not malingering, and that "the nature of his mental illness is severe", (R1548).
>
> Cadena: "schizophrenia, catatonic type" (R1395, see R1588) (also noting that Bello is "acutely psychotic", R1589, and that he was not feigning his condition, R1398).

Each of the four psychiatrists found unequivocally that appellant was incompetent to stand trial, and recommended that he be hospitalized.

During the first portion of his hospitalization, at South

Florida, appellant continued to be acutely psychotic, hallucinating, delusional, and nearly catatonic. [See the report of Dr. Koson, **R1610, 1613-14].** He was receiving large dosages of antipsychotic medication, which at that point was having little or no effect. He was still "grossly" incompetent to stand trial **(R1614).** Eventually, however, during the later portion of his hospitalization at the North Florida treatment center, appellant 'began to respond favorably to the medication, and his hallucinations and delusions began to clear. On at least two occasions, he was returned to Tampa upon recommendation of the treatment team that he was in chemical remission and was competent to stand trial. On each occasion, the treatment team expressly added the caveat that appellant "is a chronically mentally ill person who is stabilized only with antipsychotic medication and who needs constant viailance". Despite this strong warning, jail officials on each occasion failed to give appellant his medication, and within a matter of days the overt symptoms of his psychosis - the hallucinations and delusions and catatonia - returned in full force, leaving him again incompetent to stand trial.

Dr. Gerald Mussenden, a clinical psychologist, on whom the state relies in support of its assertion that "there was sharp disagreement by experts" in this case (S. 16), did not come into the picture until the summer of 1986, by which time appellant had undergone nearly five years of hospitalization and antipsychotic medication. Unlike the four psychiatrists who originally diagnosed appellant in **1981** (two of whom continued to evaluate him at various

times throughout his hospitalization), and unlike the state hospital psychiatrists who were responsible for his treatment, Dr. Mussenden never saw appellant at a time when he wasn't in chemical remission. Moreover, Mussenden was not even aware of the two incidents when appellant rapidly decompensated when he failed to receive his medication in the county jail. And even Mussenden, while he maintained that appellant malingered to avoid prosecution[11], grudgingly conceded that appellant does suffer from chronic paranoid schizophrenia which must be stabilized with antipsychotic medication.

Contrary to the state's contention, the evidence of appellant's severe mental illness is at least as compelling as that in Fitzpatrick, and certainly far more compelling than that in Hudson and in Remeta v. State, 522 So.2d 825 (Fla. 1988) (see s. 16-17). Appellant's death sentence should be reversed, and the case remanded to the trial court with directions to impose a sentence of life imprisonment without possibility of parole for twenty-five years.

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[11] With regard to the question of malingering, see appellant's initial brief, p. 68-69, and see especially the testimony of Dr. Gonzalez:

> ....[Y]ou can be psychotic and be manipulative ..... Somewhere along the way the medication has worked on him and put his condition .... in partial remission chemically. And as a result, it had opened up an area where, then, he can manipulate.....

(R966)

ISSUE VI

THE TRIAL COURT ERRED IN FINDING, AND IN INSTRUCTING THE JURY THAT IT COULD FIND, TWO AGGRAVATING FACTORS (CRIME COMMITTED "TO AVOID LAWFUL ARREST" AND CRIME COMMITTED "TO DISRUPT OR HINDER LAW ENFORCEMENT") BASED ON THE SAME ASPECT OF THE OFFENSE

In support of its untenable argument that these aggravating factors were not based on the same aspect of the offense, the state says:

> At the time of the murder, Bello was attempting to avoid arrest for his part in the drug sale. The shooting of both Ulriksen and Rauft is evidence of the attempt to avoid arrest for the drug deal. After shooting Ulriksen, Bello was confronted with a second problem. Ulriksenwas still alive, and several officers were coming to his aid. Ulriksen testified that after he was shot, the alert went up that an officer was "down". Ulriksen could see and hear the officers coming to his rescue. It can be reasonably determined that Bello was also aware of the impending rescue attempt by law enforcement. Thus, the murder of Rauft accomplished two separate goals; allowing Bellothe opportunity to avoid arrest and hindering law enforcement from coming to the aid of the downed officer.

(S. 19-20)

The state's reasoning is convoluted, to put it mildly. If appellant intended to prevent the rescue of Detective Ulriksen, the obvious thing to do would have been to shoot Ulriksen again, not shoot blindly through the door. In fact, Ulriksen testified that he was concerned that appellant would "finish me off" (R367),

but appellant did not do so.

The prosecutor's own words to the jury demonstrate that he was using a single aspect of the crime to persuade them to find two separate aggravating factors. He argued, "[T]here can't be any reasonable doubt in anybody's mind that Carlos Bello murdered Detective Rauft to hinder the lawful exercise of a governmental function, that governmental function being the enforcement of the law. And he hindered it by trying to avoid beina taken into custody" (R1060).

The evidence in this case supports the finding that appellant fired the shots which wounded Ulriksen and killed Rauft in order to avoid arrest. It does not support double consideration in aggravation of this single aspect of the offense. Sims v. State, 444 So.2d 922, 925-26 (Fla. 1983); Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984); Thomas v. State, 456 So.2d 454, 459-60 (Fla. 1984); Jackson v. State, 498 So.2d 406, 411 (Fla. 1986).

For the reasons explained at p. 75 and 81-82 of appellant's initial brief, the error was harmful, and requires reversal for a new penalty trial before the court and a newly impaneled jury.

ISSUE VII

THE TRIAL COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE MITIGATING CIRCUMSTANCE OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" WAS INAPPLICABLE BY VIRTUE OF APPELLANT'S CONVICTION OF CONTEMPORANEOUS CRIMES

The state acknowledges that this Court held in Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) that a "history" of criminal conduct cannot be established by contemporaneous crimes (s. 21). The trial court in the instant case incorrectly concluded that the "prior violent felony" aggravating circumstance and the "no significant history of criminal activity" mitigating circumstance are mutually exclusive; therefore, since the contemporaneous convictions established the aggravating factor, they also negated the mitigating factor (R1965, 1367). Since the trial court, based on this erroneous conclusion, refused as a matter of law to consider or weigh the mitigating factor, the resulting death sentence is constitutionally invalid. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). The state says the trial court "exercised his discretion" by not finding the mitigating factor (s. 21). The trial court's own comments show otherwise; he believed that he had no discretion to consider or weigh the mitigating factor because it was (he thought) legally negated by the aggravating factor. As for the state's cryptic comment (accompanied by no citation to the record) that "it is clear from a reading of the court's sentencing order that [the "no significant

history" mitigating factor] was taken into consideration when the appropriate sentence was determined" (s. 21), appellant wonders what record counsel for the state is reading. The sentencing order says only this on the subject:

> 1. Fla. Stat. § 921.141(6)(a): "THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY". BY virtue of the fact that the aasravatina circumstance under Fla. Stat. § 921.141(5)(b) has been found to have been established beyond reasonable doubt, this mitiaatinq circumstance is not applicable herein.

(R1965)

Scull (and the Lockett rule) requires reversal.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at page **89** of the initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, **1313** Tampa Street, Tampa, Florida, **33602**, and to Carlos Bello, Correction Mental Health Institution, DC No. **107051**, P.O. Box **875**, Chattahoochee, Florida **32324**, by mail on this 21 day of March, **1989.**

Steven L Bolotin
STEVEN L. BOLOTIN

SLB/an