IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 71,026
CIRCUIT COURT CASE NO.: 86-33032-A

SAMUEL RIVERA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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POINT I

WHETHER THE TRIAL COURT ERRED IN LIMITING THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 SOLELY AND NOT ADVISING THE JURY THAT IT COULD CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

In the case at bar, the prosecutor enumerated, one by one, what the jury had to consider as mitigating and aggravating circumstances. This was identical to what the Supreme Court rejected in *Hitchcock v. Dugger*,_____U.S._____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Accord, *Messer v. State*, 834 F.2d 890 (11th Cir. 1987) (prosecutor also discussed mitigating and aggravating circumstances under Florida Statute 921.141, one by one, and court held that this argument clearly implied to the jury that the statutory list was exclusive).

The prosecutor in the instant case, more clearly than in *Hitchcock or Messer* told the jury it could only consider the standards enumerated in Florida Statute 921.141. The prosecutor stated:

> [E]very defendant is judged by the same set of standards, and what these are, as you have heard, are the aggravating factors and the mitigating factors.
>
> ...
>
> What you do is, you weigh these...you can attach any weight you want to any *one* of these factors you want. (T. 1653)

The prosecutor then went to itemize the factors listed in the statute one by one. The State further argued:

> You just don't come to an opinion. You have to follow the law. We have gone through the aggravating and we have gone through the mitigating, and it is seven to nothing. (T. 1671)

Likewise, the Court instructed the jury that it could only consider those factors enumerated in the statute when it stated:

> You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations. (T. 1690)

The State asserts the jury was advised that it could consider any aspect of the defendant's character or record, and any circumstance of the offense. However, neither the prosecutor nor the judge explained to the jury that evidence outside those itemized in the statute could be considered. Rather, they were clearly told they had to remain within the considerations outlined by the statute. What the jury was told was that the statute required them to consider certain things as tending to mitigate the defendant's sentence and other things as aggravating the defendant's sentence. They were to weigh *these* in reaching their advisory sentence. The inference to be drawn from the prosecutor's argument, and the Court's instruction, was an unequivocal one: the statutory list which was enumerated one by one and read to the jury, was what the jury was to consider *exclusively*.

Furthermore, the State's argument that had non-statutory mitigating factors been properly presented to the jury, the

sentence would still be valid is ludicrous. First, the argument requires the Court presume that the jury would have given *no weight* to non-statutory mitigating factor. This is simply impossible in light of the jury's recommended sentence of death by a seven to five vote. Is this Court to presume that not *one of the twelve* persons would have been influenced? Secondly, the State is presuming that this Court can, in retrospect, determine that not one of these factors would have outweighed the aggravating factors determined by the jury to exist. This presumption flies in the face of the requirement that the jury is not simply to calculate how many aggravating factors exceed the mitigating factors.

The State's conclusion that the Court's sentence would likewise be unaffected is unfounded. Had the jury returned with a tie advisory sentence, or a sentence advising life imprisonment, the judge would be required to give weight to that recommendation.

The United States Supreme Court has announced a constitutional prohibition against misleading jurors in capital cases as to the significance of their sentencing responsibility. See, *Caldwell v. Mississippi*, 472 U.S. 320, 37 Cr.L 3089 (1985). The *Caldwell* rule was intended to avoid the capricious imposition of the death penalty by insuring that jurors are not mislead to the seriousness of their sentencing duty. The gravity of the jurors' decision in the overall sentencing scheme must not be belittled.

In *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987) the Court instructed the jury as follows:

> The mitigating circumstances which you may consider if established by

> the evidence, are these: [listing statutory mitigating circumstances]

In the instant case, the judge instructed:

> Among the mitigating circumstances you may consider, if established by the evidence are: [listing statutory mitigating circumstances] (T. 1688)

In *Hitchcock v. Dugger*,_____U.S._____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) the trial court instructed the jury that

> [t]he mitigating circumstances which you may consider shall be the following: [listing statutory mitigating circumstances]. 107 S.Ct. at 1824.

The instructions in the case at bar are indistinguishable from the instruction given by the Court in *Hitchcock v. Dugger* and *Magill v. Dugger*. In substance, the jury in the case at bar, was instructed the same as the juries in *Hitchcock* and *Magill* where the reviewing court found: "it could not be clearer that the advisory jury was instructed not to consider...evidence of non-statutory mitigating circumstances, and that the proceedings therefor did not comport with the requirements of *Skipper...Eddings...*and *Lockett...*" *Magill v. Dugger,* 824 F.2d at 893 (citing from *Hitchcock v. Duggger*, 107 S.Ct. at 1824).

POINT II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The State argues that the capital felony was especially heinous, atrocious or cruel on two bases: (1) the infliction of physical pain or mental anguish on the victim, and (2) the assertion that this killing was an execution-style killing. The arguments will be discussed in the sequence presented.

First, the State's reliance on *Tompkins v. State*, 502 So.2d 415 (Fla. 1987), *Stano v. State*, 460 So.2d 890 (Fla. 1984), and *Doyle v. State,* 460 So.2d 353 (Fla. 1984) is misplaced. All three of these cases involved victims which were strangulated. It is a well settled maxim in the law that murder by strangulation is especially heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of their impending death. *Doyle v. State,* 460 So.2d at 357. Additionally, in *Doyle* the evidence supported the conclusion that the victim had been sexually battered while still alive. *Stano v. State,* aside from the strangulation, had the additional facts that the defendant had struck two women in the head thereby stunning them, and then drove them approximately 25 miles (a total of 35 to 45 minutes). Each of the women were conscious and left the defendant's car under their own power. The evidence showed that

the defendant strangled one woman and shot the other in the head. The defendant had previously plead guilt to six counts of first-degree murder for the killing of six young women and pursuant to a plea bargaining agreement, had been sentenced to six consecutive sentences of life imprisonment. Like in *Doyle v. State,* the accused in *Tompkins v. State,* 502 So.2d 415 (Fla. 1987) had attempted to force himself on the victim and the victim had resisted. Thereafter, *Tompkin* strangled the victim to death.

The State cited *Roberts v. State,* 510 So.2d 885 (Fla. 1987) as supporting the position that the murder herein was especially heinous, atrocious and cruel. However, in *Roberts* the evidence showed that the murder victim, George Napoles, and a friend, Michelle Raimondi, were parked on the beach. The defendant approached them and impersonated a law enforcement officer. The defendant took both individuals out of their car and frisked them. When the defendant touched Raimondi on the breast and thighs, Napoles became suspicious and asked defendant for I.D. At that point, the defendant and Napoles walked to the defendant's car where the defendant pulled out a baseball bat and forcibly brought him to Raimondi and repeatedly hit Napoles in the back of the head with the bat. The defendant then pushed Napoles' body towards the beach. Still holding the bat, the defendant grabbed Raimondi and pulled her near the body of Napoles and ordered her to remove her clothing or she "was going to get it just like George or worse." 510 So.2d at 887. The defendant raped Raimondi twice and thereafter released her. The Court focused on the time sequence between the point at which the defendant threatened

Napoles with the bat and the time when the defendant killed Napoles by striking him repeatedly over the head with the same bat.

Similarly, *Francois v. State,* 407 So.2d 885 (Fla. 1982) is not persuasive. In *Francois,* the Court found that the capital felonies were especially heinous, atrocious and cruel on the basis of mental anguish inflicted on the victims as they waited for their executions to be carried out. The facts surrounding Francois are as follows: a home invasion was perpetrated by the defendant and several others and two individuals within the house were tied up. During the course of the robbery, another resident of the household arrived with five friends. All eight individuals were tied and robbed. When one of masks came off the face of one of the assailants, the defendant declared that *all* victims would be killed. Two victims were then taken into a bedroom and shot. The other six victims were then taken into another bedroom, made to lie down on the floor and shot on the head. 407 So.2d at 887.

The facts in *Mills v. State,* 462 So.2d 1075 (Fla. 1985) are likewise dissimilar to the case at bar. In *Mills,* the codefendants gained entrance to the victims's trailer and held a knife to the victim's throat. A shotgun was taken from the victim's trailer and the victim was forced into the defendant's truck. One defendant drove the vehicle and the other aimed the shotgun at the victim. The victim was told several times that she would be killed upon reaching their destination. Upon reaching a deserted area, the victim's hands were tied behind her back and she was hit over the head with a tire iron. The victim jumped up and ran after

receiving the head injuries, was chased, and killed with a shotgun blast at close range. The defendants then returned to the victim's trailer and burglarized it. 462 So.2d at 1078.

Similarly, *Phillips v. State,* 476 So.2d 194 (Fla. 1985) is misleading. Therein, the evidence shows that the victim stalked the defendant and shot him twice in the chest. Notwithstanding these injuries, the victim fled. The victim was followed by the defendant and thereafter killed by repeated shots to the head and back. 476 So.2d 196. The Court held that these facts were sufficient to support a finding that the murder was especially heinous, atrocious and cruel. The Court reasoned that based upon the evidence presented, the trial court correctly surmised that between the two vollies of gunfire, the victim must have agonized over his ultimate fate. 476 So.2d at 197. (citing with approval *Francois v. State,* 407 So.2d 885 (Fla. 1982)).

EXECUTION STYLE KILLING

The State's second basis for argument that this case was especially heinous, atrocious and cruel is at that the murder was an execution-type killing. However, once again the State fails to cite a case factually controlling. Rather, the State cites *Hargrave v. State,* 366 So.2d 1 (Fla. 1979). In *Hargrave,* the evidence showed that the defendant entered a U-tot-em store and announced to the clerk his intentions to rob the store. The register jammed and the defendant shot the employee twice in the chest. A customer entered and the defendant diverted him without

arousing suspicion. When the customer left, the defendant shot the victim a third time. The evidence revealed that the two shots to the chest immobilized the victim. Thereafter, the third shot to the head was found to have been a calculated fashion of "executing the victim to avoid later I.D." 366 So.2d at 5. Two other cases cited by the State for the proposition that this was an execution-type killing where *Smith v. State,* 424 So.2d 726 (Fla. 1982) and *Knight v. State,* 338 So.2d 201 (Fla. 1976). However, a reading of these cases fails to adduce any mention of execution-style killings. In *Smith,* the victim was abducted to a neighboring county where she was taken to a motel room and three men committed sexual battery upon her. Afterwards, the victim was taken to a wooded area, was ordered to walk into the woods and shot three times in the back of the head. The Court held that these actions constituted heinousness for purposes of the death sentencing proceeding. In *Knight v. State,* the Court held that the murder was especially heinous, atrocious and cruel where the evidence showed the defendant murdered two victims in the course of a kidnapping and robbery. The defendant approached Mr. Gans (one victim) at his business parking lot with an automatic rifle. The defendant told Mr. Gans to re-enter his vehicle, go home and get his wife and drive to the bank to get fifty thousand dollars ($50,000.00). While at the bank, Mr. Gans informed the bank president of the abduction and the police were notified. Mr. Gans returned to his car with the money and he and Mrs. Gans were shortly thereafter found dead with the fatal shots perforating their necks.

Clearly, the cases cited by the State for the proposition of

upholding the trial court's decision that this crime was especially heinous, atrocious and cruel are not persuasive. In all of these cases, the injuries committed upon the defendants were *not* instantaneous or in the heat of passion. Rather, the victims had plenty of time to fear for their lives because of verbal and physical threats that they would die. On the other hand, the instant case concerned a police officer who was confronted with a situation he was trained to confront. The police must effectuate arrests daily. At times, those arrests are resisted with violence. Unlike ordinary citizens, the law enforcement persons are cognizant of the dangers that surround their employment. This fact is illustrated by the simple necessity of police officers carrying weapons.

The State elaborates on what must have been Officer Miyares' frame of mind upon being shot. The State argues that the record establishes the execution-style murder and Officer Miyares' anguish and knowledge of impending death because he struggled for his own gun; he sent an emergency signal for help; and he saw his assailant shoot him. However, this sequence is not accurate. The record shows that Officer Miyares sent an emergency signal for help *prior* to the physical struggle. Additionally, the exchange between Officer Miyares and the defendant from the time a physical struggle commenced was extremely brief in time. The Defendant did not take this police officer as a hostage, the officer was not prodded or verbally threatened with bodily harm. The Defendant surrendered his own weapon believeing it was that which Officer Miyares was after. The scuffle between the Defendant and Officer

Miyares was brief, and heated. Although the State contends that there were no other officers in the area when the Defendant shot Officer Miyares, this is simply not supported by the record. The record clearly shows that the Defendant knew that there were other officers in the area. (the Defendant and his brother were initially stopped in the parking lot by two officers. Additionally, Officer Miyares had already signaled for help.)

The cases cited by the Defendant in his Initial Brief were cases dealing with police officers, and it is clear that the fact they were killed in the line of duty does not suffice to escalate the killing to one committed in a especially heinous, atrocious and cruel manner. The State has failed to cite even one case wherein the facts concerned a police officer shot in the line of duty.

The instant case does not concern a murder committed in an especially heinous, atrocious and cruel fashion. This aggravating factor was created by the legislature to cover cases where death is applied in an extremely wicked or shockingly evil manner with the design to inflict a high degree of pain. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). See, *Bunoano v. State*, 13 F.L.W. 401 (Fla. June 23, 1988). (Systematically poisoning of one's husband over a period of time until it causes death and witnessing the effects is an unusual manner and method of committing a homicide.) *Turner v. State*, 13 F.L.W. 426 (Fla. July 7, 1988). (Murder considered especially heinous, atrocious and cruel, when evidence showed that the defendant pursued and cornered one of his victims in a telephone booth after having killed his wife in front of said

victim, and despite her pleas, the defendant stabbed her and cut her to death.) *Harris v. State,* 438 So.2d 787 (Fla. 1983), affirmed, 13 F.L.W. 420 (Fla. July 1, 1988) (the seventy-three year old woman died during the night of multiple stab wounds and wounds inflicted by a blunt instrument. A knife, a bloody rock and a blood covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands and shoulders. Blood was spattered over the walls and furnishings of the bedroom, living room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten. Facts supported the finding that murder was committed in an especially heinous, atrocious and cruel manner. 438 So.2d at 797.)

The instant case does not fall within the category of crimes considered especially heinous, atrocious and cruel.

POINT III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

In *Rogers v. State,* 511 So.2d 526 (Fla. 1987), cert. denied., 108 S.Ct. 733 (1988), the defendant shot his victim in the back during an aborted robbery attempt. The evidence revealed that two of three shots struck the victim after the victim had fallen. The defendant was quoted as saying "the victim was playing hero and I shot the son of a bitch." 511 So.2d at 529. In addressing the finding that the crime was one committed in a cold, calculated and premeditated fashion, the Florida Supreme Court said:

> We also find that the murder was *not* cold, calculated and premeditated, because the State has failed to prove beyond a reasonable doubt that Roger's actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in capital sentencing statutes, is to give ordinary words their plain ordinary meaning. See, *Tatzel v. State*, 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculated" as "[t]o plan the nature of beforehand: think out...to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is

> insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." *Rogers v. State*, 511 So.2d at 533.

Rogers v. State was relied upon by this Court in *Hamblen v. State*, 13 F.L.W. 361 (Fla. June 2, 1988). In *Hamblen*, the Defendant confessed to the killing of a woman within a boutique. Hamblen told the police he had driven to Florida from Texas (where he alleged later he had murdered an estranged lover) and needed money to park his rental car at the airport so decided to steal the necessary funds. He drove around the Jacksonville area, and upon seeing a potential target store, he entered and demanded the money in the cash drawer from the clerk. After the initial robbery, he told the clerk to go to a dressing room and disrobe. Hamblen told the police he had no intention of sexually abusing the clerk, he only wanted to make it difficult for her to follow him as he made his escape. The evidence shows that while in the dressing room, a shot was fired from Hamblen's pistol. The clerk then told Hamblen she had more money in the back of the store. As they proceeded towards the rear of the store, the defendant saw the clerk touch a button that he suspected was a silent alarm. Angered, Hamblen ordered her back to the dressing room and shot her in the back of the head.

This Court found that Hamblen had not committed a murder in a cold, calculated and premeditated manner. The Court noted the well-established maxim of law that simple premeditation of the type necessary to support a conviction for first degree murder is not sufficient to sustain a finding that a killing was committed

in a cold, calculated or premeditated fashion and without any pretense of moral or legal justification. *Hamblen v. State,* 13 F.L.W. at 363 (citing *Jent v. State*, 408 So.2d 1024 (Fla. 1981), cert. denied., 457 U.S. 1111 (1982)). The Court went further and stated:

> What is required is a heightened form of premeditation which can be demonstrated by the manner of the killing. Those that are executions or contract murders fit within that class. *Hamblen v. State,* 13 F.L.W. at 363 (citing *Routly v. State,* 440 So.2d 1257 (Fla. 1983), cert. denied., 468 U.S. 1220 (1984).

The Court reasoned in *Hamblen* that the evidence did not indicate that the Defendant had a conscious intention to kill the clerk when he decided to rob her store. It was only after he became angered because the clerk had pressed the alarm button that he decided to kill her. The case was unlike those cases wherein the robbery victims have been transported to other locations and have been killed sometime later. Hamblen's conduct was described as "more akin to a spontaneous act taken without reflection." *Hamblen v. State*, 13 F.L.W. p. 364.

In the instant case, Mr. Rivera put himself in a position wherein because of fear, anger and emotional distress, he killed Officer Miyares. The record lacks any indicia of evidence he intended to kill anyone.[1] The evidence is abundantly clear of the fact that the Defendant had in his possession a gun that was more powerful than the weapon Officer Miyares carried. Just as in

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[1]The Defendant gave up his weapon prior to a physical struggle with Officer Miyares.

Rogers v. State, "[t]here is an utter absence of any evidence that...(Rivera) in this case had a careful plan or prearranged design to kill anyone during the robbery." *Rogers v. State*, 511 So.2d at 533. There was no evidence presented to substantiate that this felony was designed, prepared, or carefully planned. Thus, it does not fall within that category of murders committed in a cold, calculated and premeditated fashion.

In *Harris v. State*, 438 So.2d 787 (Fla. 1983), affirmed, 13 F.L.W. 420 (Fla. July 1, 1988) (facts outlined on page 12) notwithstanding the death of a seventy-three year old woman found dead of multiple stab wounds and wounds inflicted by a blunt instrument. The Court held that the murder was not committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification because the legislature did not intend to apply this aggravating factor to all premeditated-murder cases. The State failed to present evidence that the murder was planned and in fact the instruments of death were all for the victim's premises.

In the case at bar, the heightened level of premeditation necessary to apply this aggravating factor was not present. Secondly, there is not one indicia of evidence that the murder was calculated. It was the Defendant's brother who carried a gun. The Defendant, RIVERA, only took control of the bag containing the weapon after the police approached in an attempt to help his brother. The Defendant, RIVERA, did not use his brother's gun. He surrendered it to Officer Miyares the first opportunity he had. The death of Officer Miyares was as unexpected to the Defendant,

RIVERA, as it was to anyone else. It clearly was not the type of death intended by the legislature to fall within the type of killings committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

POINT IV

WHETHER TRIAL COUNSEL WAS DEFICIENT AT SENTENCING BY FAILING TO INTRODUCE EVIDENCE OUTSIDE SECTION 921.141 THEREBY PREJUDICING THE OUTCOME OF THE HEARING.

The Appellant relies on the authorities and arguments cited in its Answer Brief.

POINT V

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE PROSECUTION'S REPEATED IMPROPER ARGUMENTS, WHICH SINGULARLY, AND IN THE CUMULATIVE WERE IMPROPER AND PREJUDICED THE DEFENDANT.

The State cites *Garron v. State*, 13 F.L.W. 325 (Fla. May 27, 1988) as authority. In *Garron*, the statements amounting to prosecutorial misconduct in the penalty phase were not unlike the errors committed by the prosecutor in the instant case. There, the prosecutor made the following remarks which when taken together in their totality, justified a new penalty proceeding:

> [T]he people of the state of Florida, ladies and gentlemen, have determined that in order to deter others from walking down the street and gunning down...
>
> . . . .
>
> [Y]ou can just imagine the pain this young girl was going through as she was just laying there on the ground dying.
>
> . . . .
>
> Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.
>
> . . . .
>
> The law is such that when the aggravating factors outnumber the mitigating factors, then death is an

appropriate penalty.

. . . .

If Le Thi were here, she would probably argue the defendant should be punished for what he did.

. . . .

Ladies and gentlemen, I believe that at this point, that the jurors will listen to the screams and to her desires for punishment for the defendant and ask that you bring back a recommendation that will tell the people of Florida, that will deter people from permitting

. . . .

[I]t is your sworn duty as you came in and became jurors to come back with a determination that the defendant should be punished for his atrocious actions.

In the instant case, the prosecutor similarly intended to and did inject elements of emotion and fear into the jury's deliberations, thereby venturing far outside the scope of proper argument. The States concedes that the comment, "we would have a lot of dead police officers in this community" (R. 2010) is improper. However, this statement taken in context to the other prejudicial highly emotion-seeking reaction amounts to the type of egregious conduct not tolerated by this Court. The prosecutor in the instant case was admonished over and over again to desist from his line of argument. However, he did not comport with the court's admonitions. Notwithstanding the objections, and the trial court's curative instructions, the prosecutor insisted on making the unfair prejudicial statements. This is made clear when while

commenting on Mr. Rivera's lack of remorse, Mr. Guralnick makes an objection, however, the prosecutor continues his statement and asks the jury:

> Does he say "I'm sorry that Officer ---"
>
> Mr. Guralnick: Objection.
>
> Mr. Purow: "---Officer Miyares is dead." (T. 1666)

Similarly, the prosecutor twice makes mention of the fact that this crime was more terrible than other murders since a policeman was involved. (See T. 1659 and T. 1669) The comment that it is not an extreme emotional or mental disturbance that you are about to be arrested by a police officer, otherwise, "we would have a lot of dead police officers in this community." (T. 1659 is tied in to the statement "...it is extra, extra terrible when a police officer dies and that is why we have ---" T. 1669). When the first statement was made, the prosecutor was reprimanded, however, the State went on and made the second improper statement ignoring its effect.

The State correctly points that remorse may be a mitigating circumstance, however, it must be the Defendant who introduces this evidence. Argument by the State on lack of remorse is error. See, *Patterson v. State*, 513 So.2d 1263 (Fla. 1987); *Pope v. State,* 441 So.2d 773 (Fla. 1983).

Lastly, the prosecutor's comment to the jury:

> [Y]ou can just imagine this gun is pointing down to him while he is on his knees, hands raised up in

> the air and sees this man
> fire the gun and the
> bullet rips into his body
> and the man fires the gun
> again and this other
> bullet rips into this
> body, and then, the man
> fires again and another
> bullet blows apart Emilio
> Miyares' heart and he
> starts to bleed
> internally

is not unlike the second statement uncondoned in *Garron v. State,* 13 F.L.W. 325, 327 (May 19, 1988)[2]

The Court in *Garron* reiterated the concerns expressed by this Court in *Berlotti v. State*, 476 So.2d 130 (Fla. 1985), where the Court determined that disciplinary proceedings against the prosecutor, not mistrial, was the proper sanction. However, the Court in *Garron* noted that the admonitions in *Berlotti* had gone unheeded and that the misconduct cited in *Garron* far outdistanced the misconduct in *Berlotti.* Thus, a mistrial was the appropriate remedy in addition to the possible penalties that disciplinary proceedings impose upon the prosecutor. Similarly, in the case at bar, when the improper comments of the prosecutor are taken in their totality there is but one result. The prosecutor in this case conducted himself in an egregious fashion intending to inject elements of emotion and fear into the jury's deliberation. This conduct ventured far outside the scope of proper argument and was the classic case of an attorney over stepping is bounds of zealous

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[2]"[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying...Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired."

advocacy and entering the forbidden zone of prosecutorial misconduct. These actions tainted the jury's deliberations and the verdict reflected an emotional response to the crime and appropriate penalty.

POINT VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADVISE THE JURY, DURING THE PENALTY DELIBERATIONS, ONCE ASKED BY THE JURY, THE PRISON TIME CALLED FOR BY THE CHARGES OF WHICH THEY HAD CONVICTED THE DEFENDANT.

The State cites *Garcia v. State*, 492 So.2d 360 (Fla. 1986) as controlling. However, in *Garcia v. State*, the issue was not whether the trial court erred in not answering the jury's question. Rather, *Garcia* complained that the jury should have been fully reinstructed on the law and functions of the Court. 492 So.2d at 366. In the instant case, it was clear that the jury was weighing the considerations of proper punishment. The Court should have informed the jury that while if they recommended life, and the defendant was in fact sentenced to life, that this Court could have sentenced him to additional time for the additional convictions.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the Defendant, SAMUEL RIVERA, submits that his conviction and sentence should be reversed with direction that he be discharged; alternatively, if this Court opines that the Defendant is immediately entitled to a resentencing, the Defendant requests the lower court be instructed to hold a full evidentiary hearing and resentence the Defendant.

Respectfully submitted,

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MILY RODRIGUEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copyof the foregoing was mailed this 23rd day of July, 1988, to: Mr. Michael Neimand, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128.

MILY RODRIGUEZ