IN THE

SUPREME COURT OF FLORIDA

MICHAEL GEORGE BRUNO, SR.,	)	
	)	
Appellant,	)	
	)	CASE NO. 71,419
vs.	)	
	)	
THE STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

(On Appeal from the 17th Judicial Circuit
In and For Broward County, Florida)

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II. STATEMENT OF THE FACTS

The state plays fast and loose with many facts relating to the case. A more complete and objective statement of the facts appears in the Appellant's Initial Brief, and will not be repeated here. But a few corrections are called for.

The Indictment does not charge first degree murder under altenative premeditated and felony murder theories, as the state represents at page 2 of its Answer Brief.[1] The Indictment explicitly charges premeditated murder as Count 1, and robbery with a firearm separately, as Count 2. R 960.

In its description of the evidence bearing on the Motion to Suppress, the state recites as if uncontroverted some facts which are in dispute, and plainly misstates important testimony. Most of this meandering relates to the important issue of whether police had already taken Mr. Bruno's statement before they were contacted by his counsel.[2] For instance, the state states as fact that the questioning began at 8:59 p.m. Answer Brf. at 5. Yet on the same tape cited for that proposition, the Detective says the (ten minute) statement is concluded at 10:10 p.m. SR 16. There are conflicting accounts of the time the statement was taken, treated in Appellant's Initial Brief at pages 1-4 and 25. The state's representation to the contrary is misleading.

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[1] The manner in which first degree murder was charged here is especially relevant to Appellant's felony-murder and notice arguments relating to the guilt phase, at IV3 and IV6 of the Initial Brief.

[2] These facts are relevant primarily to the Haliburton issue raised at Point IV 1 c of the Initial Brief.

At page 7 of its Answer Brief, the state says one of Mr. Bruno's attornies arrived at the police station "at approximately 10:30 p.m., after Appellant's statement had already been taken". Those facts are also disputed. Only Detective Edgerton testified to the facts recited by the state. The attorney testified she arrived at the station "between 10 and 10:15 till 10:30", R 19, and that Edgerton advised her Mr. Bruno was "giving a statement at that time." R 19. Additional testimony relating to the time the statement was taken and whether Mr. Bruno's counsel told the police not to talk to him prior to the taking of his statement is recounted in Appellant's Initial Brief.

The state also distorts important facts in its recitation of the evidence at the guilt phase of trial. At page 12, the state represents to this Court that state witness Teague testified that "[a]ppellant said he [Mr. Bruno] wanted to remove `prints' from the apartment (R 355-356)." Answer Brf. at 12. That is not what the witness said, this is:

> Q Where did you go on the way back?
> A Stopped in Candlewood Square.
> Q Whose idea was it?
> A Mr. Bruno's.
> Q Did he say why he wanted to go there?
> A He said that he had to get something out of the apartment.
> Q Did he say what it was?
> A Exactly, no. He said prints or something.
> MR. STELLA: Objection.
> THE COURT: Exactly no. Tell us exactly what it is that you know for sure, okay?
> THE WITNESS: He just said that he had to get something out of there that he had left.

R 355-356 (emphasis supplied).

Four lines later, the state cryptically quotes the same witness as

testifying: "'I knew somebody was dead in there' (R. 357)." Answer Brf. at 12. What the state forgets to mention is that the witness also testified he had only surmised that conclusion from other things he had heard. After the above quote, the witness testifies:

> Q How did you know that?
> A Pieced it together, you know, what I heard.
> MR. STELLA: Objection.
> THE COURT: Overruled. Go ahead, finish your answer.
> THE WITNESS: I had heard stories. My gun was gone.
> MR. STELLA: Objection.
> THE COURT: Well, you can't tell us what you heard. Just what you know of your own knowledge.
> Q (By Mr. Coyle) What about your gun?
> A My gun was gone. I knew there was some foul play. Why else would my gun be gone? I couldn't get it back.
> Q Did you ask the defendant for your gun back?
> A Yeah. I asked where my gun was. He said I couldn't have it back.
> Q Did Bruno tell you what had happened in the apartment?
> A He said there was a fight, something had happened, bits and pieces here and there. Nothing in the exact words, you know, that he killed somebody or anything like that.

R 357 (emphasis supplied).

On the next page (13) of its Statement of Facts, the state says that "[o]n Monday,at about 8:00 a.m. Appellant was seen sitting on top of a car at Candlewood (R. 380)", then tries to infer guilt from that conduct by saying "[t]he police were on the premises". There is no record evidence that the police were "on the premises" at that time, and the state cites to none to support its assertion they were.

The state continues to mislead this Court in its description of the testimony of the next witness, Diane Liu. For example, the

state says that when witness Diane Liu was questioned by police, "she told them about Appellant's invitation to a murder party". Answer Brf. at 13. It is true that Ms. Liu says she told Detective Edgerton or Hanstein about that supposed statement by Mr. Bruno, but the state fails to advise this Court that her testimony on this point was directly contradicted by Detective Hanstein. Detective Hanstein testified that he questioned Ms. Liu about the homicide early on, that Ms. Liu did not mention anything about a "murder party", and that, "without a doubt", that is a piece of information he would have written down and remembered. R 506-07.

A central theory of the defense at trial was that the Spalding-Maheu clan was involved in the killing and in the theft of items from Merlano's apartment.[3] The evidence implicating the Spalding-Maheus and friends in this crime is described in detail in the Appellant's Initial Brief at pages 7-11, 38, & 83-85. The record also discloses profound problems with the credibility of these witnesses, but the state's Statement of "Facts" significantly distorts the evidence on this issue. In trying to explain the failure of Jody Spalding when questioned by police to tell the story he ultimately told at trial, the state says "Jody did not tell the truth when he originally talked to the police because Mike, Jr. was with him, and Jody was scared Mike, Jr.

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[3] The involvement of the Spalding-Maheus and their friends continues to be a critical consideration in determining the disparate treatment of Mr. Bruno relative to these other participants, issues addressed at Points IV B 3 B (iv) and IV B 4 of the Initial Brief.

might tell Appellant." Answer Brf. at 15. But the state neglects to mention that Jody Spalding was questioned again that day or the next at police headquarters, without Mike, Jr. being present, and he failed to tell the "truth" that time as well. R. 407-410.

Sharon Spalding had put the stolen stereo equipment in the trunk of her car, after initially telling police she knew nothing about the homicide. R 410. It was only after the police came back to question her a second time and told her they knew she was holding back that she showed the officers the components she had stored in her trunk. R 453-455. Yet the state's description of her actions makes Ms. Spalding sound like a Treasure Coast Crimestopper, by reporting her concealment of evidence like this: "Sharon later put the electronic equipment in the trunk of her car and turned it over to the police". Answer Brf. at 17.

Finally, the state relates the testimony of Arthur Maheu (Sharon Spalding's husband), without mentioning that he did not come forward with his story until some six months after the killing. R 572. Answer Brf. at 19-20.

In its discussion of the evidence at penalty phase, the state makes the contentious and untrue assertion that Mr. Bruno's testimony in mitigation "essentially refut[ed] the testimony of every witness presented by the State in the guilt phase." Answer Brf. at 24-25. Such statements are more properly made as argument, not fact.

IV. ARGUMENT

A. The Guilt Phase Claims

1. MR. BRUNO'S CONFESSION WAS UNLAWFULLY OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17, FLORIDA CONSTITUTION, AND SHOULD HAVE BEEN SUPPRESSED ALONG WITH EVIDENTIARY FRUITS.

a. Bruno's custodial statement was involuntary: the trial court erred in denying the motion to suppress.

The state concedes Mr. Bruno was told by Detective Edgerton that if he gave a statement exculpating his son, then his son would not be charged in the homicide. The police knew of Mr. Bruno's fear that his son would be sexually molested while jailed, and trotted out this psychological battering ram to get him to confess. The near-unanimous authority condemning such hostage-taking, cited in the Initial Brief, is not challenged by the state. Instead, it argues affirmance because: the trial court's ruling is "presumed correct"; the police conduct here was not as bad as elsewhere; when Mr. Bruno was being questioned he said he was making a voluntary statement, so further inquiry is foreclosed; and that there was no "quid pro quo" agreement.[4]

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[4] The state does not argue harmless error. It is correct on this point. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, and even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. 375, 376 (1968) (citations omitted); see also Mincey v. Arizona, 437 U.S. 385, 398 (1978) ("But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law . ...") (emphasis in original). Accord, Smith v. Estelle, 527 F.2d 430, 431 (5th Cir. 1976); Martin v. Wainwright, 770 F.2d 918, 929 (11th Cir. 1985).

While Florida law does accord trial court voluntariness rulings a presumption of correctness, the state can only ride that wagon so far. "[T]reating the voluntariness of a confession as an issue of fact [is] difficult to square with `fifty years of caselaw' in this Court." Miller v. Fenton, 474 U.S. 104, 113 (1985). This Court follows the longstanding rule requiring federal appellate (and habeas) courts "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742 (1966); e.g., Brewer v. State,386 So.2d 232, 237 (Fla. 1980); But see, Thompson (Charlie) v. State, 548 So.2d 198, 204 n. 5. (Fla. 1989).[5]

In any event, the trial court made no subsidiary factual findings relating to the confession, reciting only the conclusory statement that the confession was "knowingly, freely and voluntarily given." R 97-98. The state admits that it "does not dispute the facts." Answer Brf. at 33. This Court is thus free to review the entire record to determine whether the state has shown voluntariness clearly and convincingly. Balthazar v. State,

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[5] In Thompson, this Court noted a trial court's "conclusion" on the issue of voluntariness would not be disturbed unless clearly erroneous, Id. at 204, n. 2, citing as authority Jurek v. Estelle, 623 F.2d 929, 932 (5th Cir. 1980). That proposition is a misreading of Jurek. In Jurek and elsewhere, the United States Courts hold that "on the ultimate issue of voluntariness, we may substitute our own judgment even in the absence of a conclusion that the district court's ruling was clearly erroneous". Id. at 932. The only trial court voluntariness findings subject to the deferential "clearly erroneous" standard are those viewed as subsidiary, or "specific" findings of fact made by the trial court. Ibid.

14 FLW 465 (Fla. Sept. 28, 1989).

The state's next argument is that the police (mis)conduct here is not as bad as conduct tolerated in other cases. The cases cited as similar do not at all address the many others cited in the Initial Brief which hold that using threats and promises directed to treatment of a defendant's relatives renders a confession involuntary.

Next, the state suggests a lack of evidence, saying "[i]t is merely an unsupported allegation on the part of Appellant that the reason he gave a statement was because he was told by Detective Edgerton that if he exculpated his son, his son would not go to jail." Answer Brf. at 33. The state argues that in fact, the evidence is to the contrary because at the time of questioning, "Appellant specifically stated under oath that he was giving the statement of his own free will without any inducements having been made (SR 6, 15)." Answer Brf. at 34.

Police procurement of Mr. Bruno's admission of voluntariness at the time of questioning carries no weight, for obvious reasons articulated by the United States Supreme Court:

> It would be anomolous, indeed, if such a statement, contained within the very document asserted to have been obtained by use of impermissible coercive pressures, was itself enough to create an evidentiary conflict precluding this Court's effective review of the constitutional issue. Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness. . . .

Haynes v. Washington, 373 U.S. 503, 512-513 (1963).

The state's contention that the voluntariness claim is otherwise factually "unsupported" is also unsupportable. Mr. Bruno testified at length about the police promises and their effect on him. R 75-87. Most of the events recounted by Mr. Bruno are consistent with what the detectives attested occurred, as fully detailed at pages 1-4 and 21-23 of the Initial Brief of Appellant.

Which brings us to the state's backup argument, that there was no "express quid pro quo" for the confession. What the state means by this is not clear. If it means the promises or threats must be explicit to render the confession involuntary, it is wrong on the law. Brewer, supra, 386 So.2d at 235 (Confession must be suppressed where preceded by "any direct or implied promises, however slight . . .)(quoting Bram v. United States, 168 U.S. 532, 542-43)(emphasis supplied). If it means there was no express threat or promise made, it is wrong on the facts: "I indicated to the defendant that if he, in fact, gave a statement and in his statement under oath he swore that his son was not involved that his son would not be charged." (Testimony of Detective Edgerton, R 646).

The state cites two cases for its quid pro quo proposition, State v. Moore, 530 So.2d (Fla. 2d DCA 1988), and State v. Beck, 390 So.2d 748 (Fla. 3d DCA 1980). Neither apply here. In Moore, the defendant was not under arrest at the time of the questioning. He went voluntarily to the sheriff's office, and consented to be questioned. During questioning, the officers told him, among other things, that if the defendant "was being straight", it would assist

in determining the honesty of the victim. The Court found no inducement under those circumstances. In Beck, the defendant suggested he needed psychological help. The Court found that any "promise" to help was unrelated to Beck's statement: "[i]n other words, Slattery and Wagner pointedly did not say that, if Beck confessed, they would get him help or a psychiatric evaluation, . . ." Id. at 749. (emphasis in original).

The state's two cases dramatically demonstrate how there was a bargain struck here. Unlike the participants in Beck, here Edgerton "pointedly did [] say that if" Mr. Bruno "gave a statement" and "swore that his son was not involved that his son would not be charged." Now that's a bargain.

The state also says that Mr. Bruno really wanted to give a statement and the officers, though feeling they didn't need one, eventually acceeded to his "demand". Because Mr. Bruno "wanted" to give a statement exculpating his son, the state contends, there is a failure of consideration. But Mr. Bruno's repeated expression of desire to give a statement exculpating his son, particularly against the backdrop of his emotional concern about him being sexually molested in jail, only serves as further support that fear for his child was Mr. Bruno's motivation for confessing, and that he was particularly vulnerable to Edgerton's offer. In any event, for purposes of determining voluntariness, it does not matter whether the defendant or police initiate discussion of the threat or promise, only that the police make it. The "probable unreliability," Jackson v. Denno, 378 U.S. at 386, of a statement

made in such an environment remains the same in either instance.

"[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960). Mr. Bruno was not physically tortured. Manfre and Edgerton's exploitation of his anguish over his child was sufficient to do the trick. The confession was involuntary. It should have been suppressed. The convictions must be reversed.

b. Mr. Bruno was deprived of his fifth amendment right to remain silent.

The state has not pointed to evidence sufficient to meet its heavy burden of showing Mr. Bruno relinquished his right to remain silent.

c. The questioning violated the fifth and fourteenth amendments and Article I, sections 9 and 16, Florida Constitution.

The state's argument is based in part on a factual misstatement. The state says that Detective Edgerton testified he received the first phone call from Mr. Bruno's attorney at 9:15 p.m., "which is subsequent to the conclusion of the taped statement." Answer Brf. at 37. That isn't true. Edgerton testified he received the first call from Mr. Bruno's attorney at "9 or 9:15". R 53, 69. This places the phone call at the beginning of the time the statement was being taken, if the questioning began at 8:59 p.m.[6] The Initial Brief sets forth the complete sequence

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[6] The state's brief says "as acknowledged by Appellant in his brief, the trial court made a factual finding that Appellant had given his confession prior to the phone call from Michael Castoro (R. 98)". Answer Brf. at 36. To the extent Mr. Bruno made such an acknowledgement, see Initial Brief at 24, it is withdrawn. A close reading of the trial court's ruling shows that it found the

of events as shown by the present record[7], demonstrating that whenever the statement was taken, it was after counsel contacted the police.

The state also argues that Haliburton[8] is not retroactive. That issue is addressed in the Initial Brief of Appellant, page 26, footnote 23. Critical to this Court's retroactivity analysis is whether law enforcement could have "reasonably foreseen" Haliburton's limitations. Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988). As pointed out in the Initial Brief, law enforcement was notified of those limitations when this Court first announced the Haliburton rule on August 30, 1985. Haliburton v. State, 476 So.2d 192 (Fla. 1985). The questioning here took place on August 13, 1986, R 69, well after police were put on notice not to do precisely what was done to Mr. Bruno.

d. The trial court erred in deferring its function to the jury on the motion to suppress.

The state misapprehends the requirements first enunciated in Jackson v. Denno, 378 U.S. 368 (1968). The Court requires a "clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." Id. at 391. (emphasis supplied). The trial court here unlawfully left voluntariness fact-finding to

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sequence of events to be in dispute, and specifically found only that "the statement as related start[ed] at 8:59". R 98.

[7] The record shows that Mike,Jr. was questioned before Mr. Bruno, R 959, but does not show the time of the questioning, or how long it lasted.

[8] Haliburton v. State, 514 So.2d 1088 (Fla. 1987).

the jury, saying "that's what we have juries for...." R 97-98).

2. THE EVIDENCE OF ROBBERY IS INSUFFICIENT, REQUIRING REVERSAL OF THE ROBBERY CONVICTION.

The state argues the statutory change of the definition of robbery precludes relief for Mr. Bruno, without bothering to advise this Court that the change it relies on took effect October 1, 1987. Ch. 87-315, Sec. 2, Laws of Fla. The crimes at issue here occurred August 8th or 9th, 1986. R 960, 327. Obviously, retrospective application of the statutory change would violate the Ex Post Facto clauses of the state and federal constitutions. Miller v. Florida, 107 S.Ct. 2446 (1987).

This Court recently reaffirmed the state's heavy burden of proof in circumstantial evidence cases such as this, in Cox v. State, 14 FLW 600 (Fla. Dec. 21, 1989).

The state failed to prove the essential element of intent to steal at the time the force was used. No robbery has been shown, as more fully discussed in the Initial Brief. The conviction thus violates Florida law and the fourteenth amendment to the United States Constitution. See Jackson v. Virginia, 443 U.S. 307 (1979).

3. THE FIRST DEGREE MURDER CONVICTION URGED ON ALTERNATIVE THEORIES MUST BE REVERSED.

a. Because the evidence of the underlying felony of robbery was insufficient, the first degree murder conviction is unlawful.

Mr. Bruno will rely on his Initial Brief in support of this argument that the conviction violates Florida law and the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

b. The absence of a unanimous jury finding of guilt on any one theory requires the verdict be set aside.

The state's contention that our view is in the minority is not supported. Though there is a split of authority on this issue, the Initial Brief sets forth the numerous state courts which have required theory unanimity, and probably most importantly, the Eleventh Circuit has weighed in with its view that theory unanimity is required. United States v. Acosta, 748 F.2d 577, 582 (11th Cir. 1984); United States v. Gipson, 533 F.2d 453, 458 (5th Cir. 1977). Nearly all the cases relied on by the state draw upon the rationale of a 1903 case, People v. Sullivan, 65 N.E. 989 (N.Y. 1903). Eighth and fourteenth amendment jurisprudence have traveled far since 1903.

The state also pleads with this Court to find this argument waived by failure to object. At least one United States Court of Appeals finds the failure of unanimity to be fundamental error. United States v. Payseno, 782 F.2d 832 (9th Cir. 1986).

c. The first degree murder conviction violates due process and florida law where the underlying felony used to transfer intent, if it occurred at all, happened well after the killing.

Appellant relies on his Initial Brief on this point.

4. THE TRIAL COURT ERRED IN FAILING TO HAVE A COURT REPORTER PRESENT DURING BENCH CONFERENCES DURING VOIR DIRE.

The state points to language in Loucks v. State, 471 So.2d 131 (Fla 4th DCA 1985) which implies that it is counsel's burden to object to the absence of a court reporter. This language is in

conflict with the plain and mandatory language of Rule 2.070, Fla. Rules of Judicial Administration, as set forth in the Initial Brief. The broader appellate review required in a capital case further counsels treatment of the rule as mandatory.

5. THE TRIAL COURT ERRED IN REFUSING TO RELEASE GRAND JURY TESTIMONY OR TO CONDUCT AN IN CAMERA INSPECTION OF THAT TESTIMONY.

The state's brief on this point is striking in two respects: it misstates Mr. Bruno's argument on this issue, and it completely ignores the major decisions of the United States Supreme Court, Eleventh Circuit, and other courts, which have been rendered since 1987. The state prefers to stick with the outdated pre-1987 caselaw.

Mr. Bruno does not agree, as the state contends, that the defense must proffer a detailed factual predicate "to obtain access to grand jury testimony". Answer Brf. at 47. As discussed in the Initial Brief, the Supreme Court held that a criminal defendant in a sex abuse case was entitled to the alleged victim's statutorily confidential Youth Services file based upon the following request:

> "Ritchie argued that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other unspecified exculpatory evidence."

Pennsylvania v. Ritchie, 107 S.Ct. 989, 995, 1004. (1987).[9] Mr. Bruno contends a general request for exculpatory grand jury evidence is adequate to trigger in camera review of grand jury

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[9] The Court clearly revealed its intent that the Ritchie principles apply to grand jury cases by its remand of Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986), in Dugger v. Miller, 107 S.Ct. 1341 (1987), as Miller involved grand jury testimony.

materials. Even if the predicate urged by the state is required, Mr. Bruno met that predicate, by alleging the facts set forth at page 36 of the Initial Brief. See also p. 38, n. 40.

The state fails to respond to the complete revolution of caselaw on the grand jury issue recited in the Initial Brief, which draws into serious suspicion the validity of the cases upon which it relies.[10]

6. THE COURT ERRED IN LETTING THE PROSECUTION PURSUE A FELONY-MURDER THEORY AS THE INDICTMENT GAVE NO NOTICE OF SUCH A THEORY.

Mr. Bruno relies on his Initial Brief on this point.

7. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR PSYCHIATRIC EXAMINATION OF THE STATE'S STAR WITNESS.

Asserting estoppel, the state's sole response is that the record does not show the trial court ruled on the defense motion for a psychiatric examination of state witness Mike, Jr., and that Appellant has not pursued the remedy suggested by this Court's order of April 28, 1989. The state is wrong on both counts.

This Court's Order on the Motion to Supplement the Record on this issue denied a hearing to reconstruct "without prejudice to appellant's right to seek supplementation by affirmatively stating that any document filed of record has not been included in the record on appeal or that any specifically identified hearing recorded by a court reporter has not been included in the record on appeal or transcribed for inclusion in the record." Order of

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[10] Since the Initial Brief was filed, the United States Supreme Court granted certiorari in Smith v. Butterworth 866 F.2d 1318 (11th Cir. 1989). Butterworth v. Smith, 110 S.Ct. 46 (1989).

April 28, 1989. Counsel for Apellant reviewed the entire file at the Clerk's Office, including the docket sheet, and found no order on this issue, and no notation of any hearing on the issue. We therefore could not "affirmatively state" that such an order existed and was not included in the record, or point to a "specifically identified hearing" on the issue which was recorded. Appellant continued to object to the denial of a complete record, and this Court's failure to permit reconstruction of the record on this point. See Initial Brf. of Appellant, p. 40, n. 43. Appellant continues to object to the failure to permit full appellate review.

In the absence of a record reflecting the trial court's ruling on the motion, and of this Court's permission to reconstruct the record, Appellant filed with the Initial Brief an affidavit of trial counsel. In the affidavit, trial counsel attests in pertinent part that "to the best of [trial counsel's] recollection, the Defendant, MICHAEL GEORGE BRUNO's, Motion for an Independent psychological evaluation of his son was heard before Circuit Court Judge Thomas Coker and pursuant to that hearing was denied." Affidavit of Craig Stella. This Court should therefore treat the motion as denied in the absence of any contrary evidence, or alternatively, remand for a hearing to reconstruct the record on this issue.

This issue requires reversal even if there was no explicit denial by the trial judge. In both counsel's motion for a psychiatric examination, and accompanying Emergency Motion for

Continuance, R 119-124; 128-131, the defense brought to the trial court's attention information which brought Mike, Jr.'s competency to testify into substantial doubt. Under these circumstances, the trial court had an independent obligation to conduct an inquiry into his competency to testify. The Eleventh Circuit so held in Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987), ruling that where an opposing party challenges the mental competency of a witness:

> it becomes the duty of the court to make such an examination as will satisfy the court of the competency of the proposed witness. And if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness.

The defense made specific allegations that Mike, Jr. was mentally ill, and those allegations are set forth in the Initial Brief at pages 5 and 39. They are supported by a letter from the witness's psychiatrist. R 124. The record shows the trial court made no inquiry into Mike, Jr.'s competency to testify though these facts were brought to its attention. The failure of the trial court to permit a psychiatric examination or to conduct any inquiry into the competency of the witness violated Mr. Bruno's right to a fair trial and due process.

8. THE ERRONEOUS ADMISSION OF TESTIMONY CONCERNING WITNESSES' FEAR OF APPELLANT DEPRIVED HIM OF A FAIR TRIAL.

Blaming defense counsel for the prosecutor's unlawfulness, the state posits a unique new doctrine: ex post facto invited error. It relies on the cross-examination of Sharon Maheu to show that the

improper testimony previously elicited by the state was "invited". Answer Brf. at 55-56. (Compare R 463 with 403-404, 452). "Invited error" presupposes defense counsel opened the door first. That didn't happen here.

The remaining arguments of the state have already been addressed in the Initial Brief.

9. APPELLANT WAS DENIED DUE PROCESS OF LAW AND THE PRESUMPTION OF INNOCENCE BY REPEATED TESTIMONY ABOUT HIS ARREST AND JAIL STATUS.

The state's argument that "common knowledge" teaches anyone charged with first degree murder is in jail before being found guilty is both factually incorrect and legally irrelevant. People charged with first degree murder are bond-eligible under "the proof is evident and the presumption great" standard. Art. I, Sec. 14, Fla. Const.; State v. Arthur, 390 So.2d 717 (FLa. 1980). Jurors think nearly everyone charged with a crime remains free pending trial. In any event, the state's reasoning has been soundly and repeatedly rejected. Estelle v. Williams, 425 U.S. 501 (1976); Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987).

The challenged testimony was designed to show that the state authorities and the judge must have thought not only that Mr. Bruno was guilty, but highly dangerous and a bad risk for release on bond, else he would have been freed pretrial. Its admission requires reversal.

10. THE SUBMISSION OF THE CASE TO THE JURY WITHOUT THE PRESENTATION OF A DEFENSE CASE REQUIRES A NEW TRIAL.

On this point, the state is correct that Mr. Bruno responded affirmatively when asked by the Court, after an opportunity to

consult with counsel, whether he had changed his mind and decided not to take the stand or call any witnesses. R 665.[11] That "waiver" is insufficient for two reasons: (1) it cannot be deemed voluntary in light of the pressures exerted on Mr. Bruno both by the trial judge and trial counsel; and (2) the colloquy is inadequate to show Mr. Bruno's forfeiture of his right to present a defense case was knowing and intelligent in the face of his previous assertion of that right.

As explained in the Initial Brief, Mr. Bruno's counsel brought his desire to put on a defense case to the trial court's attention. R 655. Mr. Bruno and his attorney were in disagreement on this issue. R 655-656. To persuade Mr. Bruno to follow his recommendation, trial counsel announced in open court that putting on other witnesses "is against my advice, and I have advised my client that I do not wish to put that particular testimony on. I think it would, in fact, be detrimental to his case." R 655-56. Trial counsel also announced his advice was that Mr. Bruno should not take the stand. R 656.[12] Taken alone, these comments were fair enough, but then counsel essentially told the trial court that he believed Mr. Bruno was guilty, immplying that Mr. Bruno's evidence

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[11] This colloquy should have been included in the Initial Brief, and our argument on the point is overstated without reference to it. Counsel did not seek to mislead the Court, and regrets the omission.

[12] The Court also joined in, explaining to Mr. Bruno, among other things, that the defense would lose the concluding closing argument if he called any witnesses other than himself. R 659. We have challenged the constitutionality of this forfeiture at pages 44-45 of the Initial Brief.

to the contrary should not be believed. This is what counsel told the court before Mr. Bruno "waived" his right to present evidence:

> This is another thing that I would like to put on the record and that is Mr. Bruno and I have had extensive discussions prior to this particular case regarding the possibility of taking a plea in this case. It is my advice that he do so. My strenuous advice that he do so. However, as is his privilege, he elected not to, which, is fine, and I think as the record will bear out, I have done my very best to give him the most competent representation that I am capable of, but I did, in fact, want that on the record.

R 660-661 (emphasis supplied).

Then, after the defense rested and the jury was released for the day, the trial court obtained the "waiver". R 665. No wonder. Trial counsel's response to Mr. Bruno's assertion of his right to present a defense case had been to protect himself by revealing his privileged advice to Mr. Bruno that he plead guilty, with the implicit revelation that counsel thought the proposed testimony was false. The trial judge joined defense counsel in trying to persuade Mr. Bruno to give it up, and told him only of the pitfalls of presenting his case. The trial judge/trial counsel tag team put Mr. Bruno in a forfeiture hammerlock. This is coercion, not voluntary waiver.

The cryptic colloquy cited by the state to demonstrated waiver is insufficient in any event. It was only after the defense had rested and the jury excused for the day that the trial judge again questioned Mr. Bruno about his assertion of his right to present a defense case. The sum total of that inquiry is as follows:

> I assume since he had already made his

recommendation to you but you and he were conversing, that it was your decision at that point in time not to take the stand nor to call any witnesses. Is that right, Mr. Bruno?
THE DEFENDANT: Yes, sir.
THE COURT: Sir?
THE DEFENDANT: Yes, sir.
THE COURT: Okay.

R 665.

As argued in the Initial Brief, the right to present a defense case is a fundamental one, requiring a knowing and intelligent waiver. Initial Brf. 43-45. Mr. Bruno continues to assert that position, though this Court apparently ruled otherwise in Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988). Even if Torres-Arboledo is correct, Mr. Bruno's case is distinguishable.

In Torres-Arboledo, the defendant did not take the stand and was convicted of first degree murder. On appeal, he argued for the first time that the trial judge should have conducted an inquiry to determine whether he had knowingly and intelligently waived his right to testify. This Court rejected the notion that a trial judge has an affirmative duty to inquire into the defendant's waiver of his right to testify, Id. at 411 n.3, holding that while the right to testify was a constitutional right of some import, it "does not fall within the category of fundamental rights which must be waived on the record by the defendant himself." Id. at 410-411.

Here, Mr. Bruno asserted not only his right to testify, but to present a defense case with the testimony of other witnesses. The profound effect on the fact-finding process of complete denial of the opportunity to present a defense case surely has been considered "so fundamental as to require the same procedural

safeguards" as waiver of the right to counsel and to a jury trial. See Rose v. Clark, 478 U.S. 570, 578 (1986).

Most importantly, unlike Mr. Torres-Arboledo, Mr. Bruno did assert his right to present the testimony of witnesses. Under the view expressed by this Court in Torres-Arboledo, such an invocation should be treated as the assertion of the right to self-representation. Id. at 411. See Faretta v. California, 422 U.S. 806 (1975).

This Court construes Faretta to require the trial court: (1) inform the defendant of the benefits he would relinquish, and the dangers and disadvantages of self-representation; (2) make an inquiry to determine whether the defendant has made his or her choice knowingly and voluntarily; and (3) determine whether the defendant's age, education, mental status, or lack of knowledge or experience would preclude the defendant from exercising self-representation. Johnston v. State, 497 So.2d 863, 868 (Fla. 1986). The Faretta analogy does not fit neatly into determining the precise inquiry necessary to determine a valid waiver of the right to present defense testimony. But applying Faretta's requirements, it is clear the trial court made no effort whatsoever to advise Mr. Bruno of the "dangers and disadvantages" of failing to present a defense case, and aside from permitting consultation with counsel, to determine whether the waiver was knowing and voluntary; nor did the trial court inquire into Mr. Bruno's background, education, knowledge or other personal characteristics which would be relevant to his ability to waive the right to present testimony on

his behalf. Under these circumstances, the waiver of the right to present defense testimony, including that of Mr. Bruno, is invalid.

11. THE PROSECUTOR'S CLOSING ARGUMENT AT GUILT PHASE DEPRIVED MR. BRUNO OF A FAIR TRIAL AND IS FUNDAMENTAL ERROR.

The state says the challenged arguments are a "fair reply to the remarks of defense counsel," Answer Brf. at 63, but does not enlighten us what the arguments were fairly replying to. There could be no lawful basis for the arguments of the ilk used by this prosecutor.

12. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN ITS INACCURATE JURY INSTRUCTIONS.

The state concedes the long form excusable homicide instruction is "a more detailed explanation of the use of a dangerous weapon" than that given here. Answer Brf. 64-65. But, the state contends, the instruction here was not affirmatively misleading enough to rise to the level of fundamental error. This precise argument was recently rejected in Shuck v. State, Case No. 89-0618 (Fla. 4th DCA Jan. 24, 1990). The Court held:

> Appellant maintains that the phrase, `without any weapon being used,' is inherently misleading, because it suggests that a killing committed with a deadly weapon is never excusable. Our sister courts have construed the short form excusable homicide instruction to be misleading because it suggests that an excusable homicide defense is unavailable if a dangerous weapon is used. Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989); Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988). We agree.
>
> It is well settled that giving a misleading jury instruction constitutes both fundamental and reversible error. Doyle v. State, 483 So.2d 89 (Fla 4th DCA 1987), review denied, 520 So.2d 583 (Fla. 1988); Christian

> v. State, 272 So.2d 852 (Fla. 4th DCA 1973), cert. denied, 275 So.2d 544 (Fla. 1973).
>
> Accordingly, appellant's conviction and sentence is reversed and this case is remanded for a new trial.

Shuck, supra, slip op. at 2-3.

The Second District has also found the instruction to be fundamental error. Smith v. State, 539 So.2d 514, 515-517 (Fla. 2d DCA 1989).

The principle relied on in Shuck and Smith (that an affirmatively misleading instruction can be fundamental error) has been applied by Florida courts to a wide range of instructional errors, most recently by this Court in its unanimous holding in Rojas v. State, 14 FLW 577, 578 (Fla. Nov. 22, 1989)(inaccurate manslaughter instruction). See also, Motley v. State, 155 Fla. 545, 548, 20 So.2d 798, 800 (1945)(self-defense instruction); Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960)(defense of another); Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1989)(no duty to retreat in the home); Thomas v. State, 526 So.2d 183 (Fla. 3d DCA 1988)(good faith belief in ownership of property in robbery case); Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986)(erroneous instruction on the elements of third degree murder). The error here was fundamental.

The state cites a proposition and case which demonstrate the necessity for reversal, saying "[t]he dangerous weapon exception to the excusable homicide defense applies only to sudden combat criterion . . .. Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1986)." Answer Brf. at 56. This

principle, accepted by the state, is precisely why the error is prejudicial here and reversal is required as in Bowes. See Initial Brf. p. 50, n. 58.

13. APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT SEVERAL STAGES OF THE PROCEEDINGS.

The state asserts that the record does not "conclusively support counsel's allegation that Appellant was absent" at the trial call and motion to continue. Answer Brf. at 67. This is false. Mr. Bruno's absence is apparent from the record of the proceedings. This is what the record shows:

> THE COURT: Michael Bruno, Sr.
> MR. ADLER (defense counsel): Russell Adler on behalf of Craig Stella.
> Judge, we gave him a motion to continue. I know Mr. Coyle doesn't have objection to it, but I believe the copy he gave was not signed by Mr. Stella.
> THE COURT: That is right.
> Do you have any objection to it?
> MR. COYLE (prosecutor): I have no objection to it.
> THE COURT: Mr. Bruno, I assume, has no objection?
> MR. ADLER: No, sir. Also, your Honor, he has a violation of probation. I don't know which case number you called. He has one pending in front of you; first degree murder and also violation of probation.
> COURT DEPUTY: He is not up yet.
> MR. ADLER: He put in motions to continue on both. Mr. Stella will file his appearance today.
> THE COURT: 10-21, 10:30.

2SR 9.

The colloquy clearly shows Mr. Bruno's absence. Defense counsel submitted a motion to continue. The prosecutor stated he had no objection. The judge then asked if Mr. Bruno had an objection; only defense counsel spoke. The deputy then said "he is not up yet". This can only mean that Mr. Bruno had not been brought up

to court from the holding cell.[13] Mr. Bruno was clearly absent when he had a right to be present.

14. THE TRIAL COURT ERRED IN ALLOWING THE BAILIFF TO RESPOND TO A SUBSTANTIVE JURY REQUEST WITHOUT THE PRESENCE OF THE JUDGE, DEFENDANT, OR DEFENSE COUNSEL.

The state asserts that Florida Rule of Criminal Procedure 3.400 controls this issue, Answer Brf. at 71, but the plain language of the rule shows it is inapplicable:

> The court may permit the jury, upon retiring for deliberation, to take to the jury room:
> (a) a copy of the charges against the defendant;
> (b) forms of verdict approved by the court, after first being submitted to counsel;
> (c) any instructions given; but if any instruction is taken all the instructions shall be taken;
> (d) all things received in evidence other than depositions. If the thing received in evidence is a public record or a private document which, in the opinion of the court, ought not to be taken from the person having custody, a copy shall be taken or sent instead of the original.

Fla.R.Crim.P. 3.400 (emphasis supplied).

The rule limits giving the listed materials to the jurors at the time they retire for deliberation.

The limited application of Rule 3.400 is also shown by a reading of the next numbered rule, 3.410, which applies "[a]fter the jurors have retired to consider their verdict".

In Williams v. State, 488 So.2d 62 (Fla. 1986), this Court held the distinction made a difference:

> After the jury retired for deliberation, it

---

[13] If this Court is unsure, it should relinquish jurisdiction to permit reconstruction of the record on this issue, as well.

> requested a copy of the jury instructions from the bailiff. The judge, who was simultaneously conducting a second trial while the jury deliberated, told the jury through the bailiff that the instructions were not available in a suitable form, but that he would reread the instructions to the jury if it so desired. The prosecutor and defense counsel were not advised of the jury request. The jurydid not request a rereading and returned a guilty verdict with the words 'with mercy' appended.
>
> Florida Rules of Criminal Procedure 3.400 and 3.410 both bear on the issues presented. Pule 3.400(c) permits the jury, at the discretion of the judge, to take to the jury room a copy of the jury instructions. The assumption underlying the rule is that both the state and the defendant will be present at the time the judge directs the material to be taken and may be heard. Rule 3.410 is more explicit. It provides that if the jury requests additional instructions or to have testimony read to them, after it retires to consider its verdict, such instructions or testimony will be given in open court and only after notice to both the prosecutor and counsel for the defendant.

Williams, 488 So.2d at 63-64.

There can be no doubt post-Williams that Rule 3.400 applies only to furnishing the jury with materials when it retires, while all participants are present.

In this case, the jury did ask for some of the evidence after commencing deliberations, and the bailiff dealt with the request alone. 2SR 172-73,762-63. This violates Rule 3.410, as in Williams, and reversal is required.

The District Court of Appeal cases relied on by the state do not control. See Answer Brf. 71-72. Bradley v. State, 497 So.2d 281 (Fla. 5th DCA 1986) was subsequently reversed. Bradley v. State, 513 So.2d 112 (Fla. 1987). Dixon v. State, 506 So.2d 55 (Fla. 3d DCA 1987), Turner v. State, 431 So.2d 328 (Fla. 3d DCA

1983), Crews v. State, 442 So.2d 433 (Fla. 5th DCA 1983), and McGriff v. State, 14 FLW 2651 (Fla. 1st DCA Nov. 15, 1989) are all contrary to Williams. Additionally, none of the cases cited by the state are capital decisions.

The state also ignores this Court's unanimous opinion in Brown v. State, 14 FLW 53 (Fla. Feb. 2, 1989). In Brown, this Court reversed a conviction when both counsel answered a jury's request for transcripts without the presence of the trial judge, finding trial judge absence subject to personal waiver requirements.

15. THE TRIAL COURT ERRED IN COMMUNICATING WITH THE JURY WITHOUT ANY PRIOR CONSULTATION WITH DEFENSE COUNSEL OR THE DEFENDANT, ESPECIALLY WHERE SUCH COMMUNICATION WAS DESIGNED TO COERCE THE JURY INTO REACHING A VERDICT.

The state claims the record does not show that the trial judge spoke to the jury without prior communication with the parties. The record reflects the judge giving the contested communication to the jury. R 769-770. There is nothing anywhere in the record reflecting prior consultation with anyone. The contention that the record must affirmatively show nothing happened is pure sophistry.

The state also argues that the judge's challenged comment was merely "housekeeping or administrative matters". Answer Brf. 74. The state must have read a different record. The judge here explicitly expressed frustration with the length of jury deliberations and attempted to coerce a verdict.

B. Penalty Phase Claims

1. THE SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION, AND SECTION

921.141, FLORIDA STATUTES (1986).

a. The trial court's sentencing findings are incorrect as a matter of law or not supported by the record.

(i) Prior violent felony

The state concedes this factor was improperly found. Answer Brf. at 75.

(ii) Robbery Murder

The appellant relies on his Initial Brief.

(iii) Avoid Arrest

Even though the prosecutor did not argue this factor to the jury, and conceded at sentencing it was not applicable, R 950, the state urges this Court uphold the finding here. The state is estopped from relying on an agravator here which it waived in the trial court.

Although the trial court offered no reason why this factor applies, the state says it does because Mr. Bruno and Mr. Merlano were acquaintances, citing Harmon v. State, 527 So.2d 182 (Fla. 1988). Answer Brf. at 76. Appellant's Initial Brief describes the proper standard adopted by this Court for finding this aggravator, and authority apparently contrary to Harmon. In any event, Harmon is distinguishable. There, an admission by the defendant showed witness elimination was the reason for the killing. Harmon, 527 So.2d at 188. There is no such direct evidence here, and this Court plainly holds that the victim's ability to identify the defendant is not in itself sufficient to prove this aggravator. E.g., Perry v. State, 522 So.2d 817, 820 (Fla. 1988).

(iv) Pecuniary Gain

Appellant relies on his Initial Brief.

(v) The trial court erred in finding the killing was heinous, atrocious or cruel.

The state relies on yet another false factual premise, this time to support the trial court's HAC finding. The state falsely contends that the deceased "had defensive wounds to his hands (R. 537)". Answer Brf. at 77. As pointed out in the Initial Brief, the Medical Examiner testified he could not determine whether the hand wounds were defensive. R 544-545; 548.

The remaining arguments of the state are addressed under this heading in the Initial Brief.

(vi) Cold, Calculated, or premeditated

The cases cited by the state are inapposite, or use pre-Rogers analysis. In addition, the state does not respond to our contention that Mr. Bruno had a "colorable claim" of a moral or legal justification.

b. The trial court unlawfully found pecuniary gain as a separate aggravating circumstance.

The state concedes this point. Answer Brf. at 77. However, the state wrongly says the pecuniary gain aggravator merges with "D", the robbery aggravator. Assuming any of the aggravators are properly found, the trial court's finding that "aggravating circumstances B, D, and E are based on the same aspect of the criminal episode . . .", R 1107, a finding not challenged by the state here, requires this Court to find that all four aggravators should have been considered by the trial court as only one. See

pages 55 and 63, Initial Brief.

c. The trial court gave unlawful deference to the jury's death recommendation.

By citing the standard of review adopted by this Court in Leduc v. State, 365 So.2d 149, 151 (Fla. 1978) as that followed by the trial court here, the state proves our point. The reason for this Court's deferential review of trial court death sentencing decisions is that it assumes the lower court has conducted an independent weighing process. The capital sentencing statute would violate Furman in its operation if it permitted both this Court and the trial court to give the jury the extraordinary deference urged by the state. The proper standards governing trial judges in determining whether death is appropriate are set forth in the Initial Brief. They were not followed here.

d. The trial court committed Gardner error

The state says there is no error because, among other things, the letters in question "were written to Appellant." Answer Brf. at 82. There is no record support for that assertion. The trial court referred to "the letters from Miss Grunger". R 950. (emphasis supplied). We do not know what those letters say, but it is clear they were relied upon by the trial court in imposing a sentence of death. Gardner has been violated.

e. The trial court erred by relying on the Pre-Sentence Investigation Report.

Appellant relies on his Initial Brief.

f. The trial court erred in failing to adequately consider, find or weigh mitigation.

Appellant relies on his Initial Brief.

g. The rejection of the mental health testimony was an abuse of discretion and violation of Due Process, and the Sixth and Eighth Amendments.

The state refuses to address the merits of this meritorious issue. Answer Brf. at 82. Appellant relies on the Initial Brief.

2. A MULTITUDE OF ERRORS IN THE CONDUCT OF THE PENALTY PHASE RENDER THE DEATH SENTENCE UNLAWFUL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17, OF THE FLORIDA CONSTITUTION.

Mr. Bruno carefully set forth each argument under separate subheadings, but the state has failed to respond in any legally sufficent manner. Its general assertion of waiver is insufficient to preserve that issue. Appellant relies on his Initial Brief, pages 68-78, in support of relief on each claim, separately or cumulatively.

3. THERE IS SUBSTANTIAL RECORD EVIDENCE IN MITIGATION CALLING FOR A SENTENCE LESS THAN DEATH.

The state again declines to specifically address the arguments made by Mr.Bruno in the Initial Brief, save one. Instead it urges this Court to abdicate to the trial court its responsibility to consider and weigh mitigation. Such weighty appellate court deference is precluded by the eighth amendment, an issue fully addressed at pages 78-79 of the Initial brief. This is particularly so where the mitigation is uncontroverted, as it is here.

The one argument the state does address is Mr. Bruno's contention that the disparate treatment of the other participants should be considered in mitigation. See Initial Brf., pages 83-85. On this issue, the state says only: "the undersigned submits that

discretionary decisions of state prosecutors to grant immunity to some participants of [sic] a crime and not others is not arbitrary or cruel and unusual under the constitution . . . [a]ccordingly, Appellant's claim is not a cognizable basis for relief". Answer Brf. at 86. That's silly. This Court has issued a virtual blizzard of decisions holding treatment of other participants in the killing extremely relevant to the death sentencing decision. See, e.g., Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989), and cases cited in the Initial Brief at pages 83-85.

4. DEATH IS DISPROPORTIONATE.

The state's perception of Mr. Bruno's argument is erroneous, as is its computation of aggravating factors. Mr. Bruno contends the death sentence is disproportionate on two grounds: (1) the invlaidity of several aggravators leaves the greater weight to mitigation, and (2) the "entire picture of mitigation and aggravation . . . does not warrant the deth penalty." Smalley v. State, 546 So.2d 720, 723 (Fla. 1989). These issues are addressed in the Initial Brief.

Even though the state concedes aggravating circumstance "B", (prior violent felony) was improperly found, and that "F" (pecuniary gain) should have been merged with "D", the robbery aggravator, it says four aggravators remain. Answer Brf. at 87. That can't be. The trial court held that "aggravating circumstances B. D, and E are based on the same aspect of the criminal episode and have been considered by the Court as a single aggravating circumstance." R 1107. The state has not challenged that finding.

Assuming any of the aggravators are valid, the state's concessions of error leave only three remaining: (1) the single aggravator encompassing "D", "E", and "F"; (2) "H" (heinous, atrocious or cruel; and (3) "I" (cold calculated).

5. FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AND AS APPLIED

Appellant relies on his Initial Brief.

C. APPELLANT'S SENTENCE ONCOUNT II OF THE INDICTMENT MUST BE VACATED AND APPELLANT REMANDED FOR RESENTENCING SINCE NO GUIDELINES SCORESHEET WAS FILED OR USED BY THE SENTENCING COURT.

Appellant relies on his Initial Brief.

V. CONCLUSION

For the foregoing reasons, Mr. Bruno's convictions must be reversed, and his sentence of death vacated or reduced to life, and the life sentence for robbery must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John M. Koenig, Jr., Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 31ST day of January, 1990.

_____
Of Counsel