THE SUPREME COURT OF FLORIDA

CASE NO. 73,075

HENRY GARCIA,
aka DAVID GARCIA, aka ENRIQUE JUAREZ

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a judgment of guilt and sentence of death imposed by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. In this brief, references to the record will be made as follows:

R: The Record on Appeal

1SR: first Supplemental Record (filed August 8, 1989)

2SR: second Supplemental Record (filed September 13, 1989

3SR: third Supplemental Record (served with this brief)

STATEMENT OF THE CASE

The defendant was indicted for two counts of first degree murder, and one count each of sexual battery and armed burglary. (R.1-3a). A co-defendant was identically charged, but not tried with the defendant. (R.1-3a, 305-1901). The jury found the defendant guilty as charged and recommended on both murder counts that he be sentenced to death. (R.260-63, 285-6). The court ordered a pre-sentence investigation. (R.287). Upon further proceedings the court adjudicated guilt, imposed the death penalty upon the defendant for the two murder counts, and sentenced the defendant to two consecutive life sentences for the remaining counts. (R.264-5, 288-92, 293-8a). The co-

defendant was sentenced to life imprisonment. (3SR.2). Timely notice of appeal was filed. (R.300).

This Court subsequently relinquished jurisdiction to the lower court on two occasions for the purpose of supplementing the record. On August 25, 1989, this Court ordered that certain exhibits, original business-employment records, be transmitted by the clerk of the lower court to this Court. The lower court clerk did so as reflected in the September 13, 1989 supplemental record. (2SR.1).

STATEMENT OF FACTS

A. THE MURDERS

On Friday, January 14, 1983, two elderly women from Leisure City, Florida, did what they usually did on Fridays--they went shopping together for groceries. (R.1022-3). One, Rose Flight, had a car and assisted the other, Mabel Avery. (R.1023). Mrs. Avery lived in a house on Main Road with her ninety year old sister, Julia Balentine. (R.1023, 1034).

On the following Monday a neighbor of the sisters went to see Mrs. Flight because she was worried about the two women. (R.1025). The neighbor said that there were newspapers on the lawn and the drapes were drawn. (R.1025). There was no answer at the phone, a bag of fruit was left at the door, and no one came to the door or bedroom windows when both were rapped. (R.1026). The screen on the back patio door was slashed and

there were broken jalousies. **(R.1027).** Mrs. Flight and several neighbors gathered at the house and then one man, Mr. Diaz, went inside. **(R.1026, 1027-8).** Police were soon called to the scene and the investigation into the deaths of Mabel Avery and Julia Balentine began. **(R.1034).**

The women were found in their bedrooms. **(R.1042, 1052, 1088, 1096-7).** Other than broken kitchen jalousies and the bedrooms, the house was undisturbed, with no evidence of ransacking. **(R.1036, 1038-9, 1040, 1041, 1088).** Mrs. Avery's bed "had the sheets and bed spread turned down as if prepared for sleeping or having been used for sleeping . . . ." **(R.108-8).** Her body, clothed in pajamas, was found three or four feet from the bed, slumped on the floor against a closet or chest of drawers. **(R.1089, 1095, 1115).** She had been stabbed. **(R.1172).** Including cuts, there were fourteen wounds. **(R.1172).** Eight of the wounds were defensive. **(R.1180-7).** A chest wound and an abdominal wound were each fatal. **(R.1188).** The deepest wound was four and three-eights inches. **(R.1187).** Mrs. Avery was not sexually assaulted. **(R.1188).**

Mrs. Balantine was found lying on a bedroom rug. **(R.1100).** There was blood in her unmade bed. **(R.1099).** A clock, lamp, and shoe were found on the floor at a dresser near the bed. **(R.1096, 1100-1).** Her pajamas were up around her arm pits. **(R.1115).** She was stabbed or cut thirty times. **(R.1173, 1189).** Twelve wounds were defensive, and three to the heart, along with several others to the chest, were fatal. **(R.1194,**

1196). The deepest wound was five inches. (R.1194). There was evidence of vaginal hemorrhaging and abrasions, and blue discoloration of the labia, which was consistent with sexual battery prior to death. (R.1190-1).

Saturday's paper, with the cross-word puzzle completed, was found in the garbage. (R.1049-51, 1093-4). The house was extensively searched for finger prints and attempts were even made to lift latents from the body of Mrs. Balentine. (R.1105-6, 1114, 1116). Seven latents were recovered, although none were from the body. (R.1116, 1141). A photograph was taken of a partial foot print left in dust on the floor near the broken kitchen jalousies. (R.1151-2, 1160). Hair found at the scene was collected. (R.1568).

B. THE INDICTMENT AND EVIDENCE OF GUILT

Three years later a migrant farm worker was indicted for the first degree murders of the two women. (R.1A, 1008). The indictment specified the defendant was known by three names, "Henry Garcia," "David Garcia," and "Enrique Juarez." (R.1). He was also charged with sexual battery and armed burglary. (R.1-3A).

Two more years passed before the case was brought to trial. (R.4-49). The record reveals that there were neither eyewitnesses nor physical evidence which placed the defendant at the scene of the crimes or in any way "tied" him to their commission. (R.1-1902). Nor did the defendant ever confess to

the police that he had committed the killings, rape, or burglary. **(R.1-1902).**

At trial, the state proved that on the day of the murders, and possibly within one hour of the burglary:

1. The defendant arrived on foot at a friend's house and had come from the direction of the victim's home, which was one half mile away, **(R.1249, 1252-4, 1261, 1262-3, 1275, 1416, 1431-2),**

2. The defendant had clothing and shoes spotted with drying blood and his folding knife also had drying blood. **(R.1264, 1265, 1306, 1315, 1321; 1322).**

3. The folding knife was at least four inches long and had a bent tip which, at some unknown time before, was not bent, **(R.1306, 1315)**

4. The defendant, at worst, had something to hide and lied about both his recent whereabouts and the blood or, at best, could not corroborate his alibi explanation and was reluctant to use the front door to his home because of the still wet blood. **(R.1277-1357, 1405-1492).**

Additionally, the state presented evidence, and blocked all impeachment through artfully crafted argument, that it was the defendant who made a highly inflammatory confession to fellow workers a few days after the crime. **(R.1360-1382, 1532-1561).** According to a migrant who was not a party to the conversation, it was the defendant who was overheard bragging in the fields that he was unconcerned about entering a home through jalousies, and "fucking up" two women, because the women were in "hell." (R.1365-7).

C. THE STATE'S OPENING AND PRESENTATION OF EVIDENCE

In opening statement the prosecutor asserted the burglary happened at 6:00 a.m. on Sunday. (R.1013). The prosecutor explained that shortly after 6:00 a.m. the defendant arrived at the house of Feliciano Aguayo and asked for a ride home. (R.1008-9). Mr. Aguayo lived several blocks from the sisters' home. (R.1008-9). When the defendant arrived he had a knife with blood on it and was himself, according to the prosecutor, "covered" with blood. (R.1008). Also, according to the prosecutor, the medical examiner would testify that the victims' wounds "were inflicted with a knife, a certain sized knife, a knife that, interestingly enough as the knife described by Feliciano Aguayo as the knife that was covered in blood the morning that the defendant came to his home and asked for a ride." (R.1015).

Continuing her opening, the prosecutor told the jury that the defendant claimed he had been walking home from a bar some fifteen miles away when a car stopped and three men and a woman got out and began to attack him. (R.1009). According to the prosecutor, the defendant said he had to draw his knife and stab his attackers. (R.1009). The prosecutor told the jury that Mr. Aguayo, the defendant's friend, "did not believe his story" and, wanting "to know the truth," went out to the scene of the attack and "found absolutely nothing, no tire tracks, no sign of a car, no sign of a struggle, no blood." (R.1010).

The prosecutor completed her opening by telling the jury that Rufina Perez-Cruz, a co-worker of the defendant, would testify. (R.1010-12). According to the prosecutor, several days after the homicides Ms. Perez overheard the defendant say something at work to several of his friends. (R.1011). The prosecutor declined at that point to say what the defendant supposedly said; she instead told the jury of the statement's effect upon Ms. Perez:

> [I]t . . . alarmed her to the extent that it caused her to have contact with the police department in the investigation of these homicides and I think it appropriate that you hear the comments from Mrs. [Perez-]Cruz herself.

(R.1012).

The state's first witness was Rose Flight, the elderly friend of the victims who would go shopping with Mrs. Avery. (R.1021). Mrs. Flight testified as to the Friday routine, and then, in a long narrative, spoke of the discovery of the bodies. (R.1021-7). With prompting by the prosecutor Mrs. Flight explained how she told the victims' niece, a nun, of the murders and asked her to notify all the other relatives. (R.1027-8). The prosecutor then apologized to Mrs. Flight and concluded her testimony in the following manner:

> Q. Mrs. Flight, I'm sorry, I have to show you what has been marked as State's Exhibits 1-A and 1-B for Identification. I ask you to take a look at these and tell me if you recognize them, please (handing).
>
> A. Okay. Please, I don't want to see them no more, please.

MS. DANNELLY [The Prosecutor]: Indicating for the benefit of the record, the identification of the photographs, State's Exhibit 1-A and 1-B for Identification as Mabel Avery and Julia Balentine.

THE COURT: Let the record so reflect.

THE WITNESS: Please, I'm sorry, Judge.

THE COURT: That is quite all right, ma'am.

* * *

THE COURT: Thank you very much.

THE WITNESS: You are welcome, I'm sorry I broke down, but I didn't mean to.

(R.1028-30).

The state called the medical examiner to establish the cause of death and present the evidence of sexual battery. **(R.1165-1201).** He concluded that the murders occurred between midnight Saturday-Sunday and noon on Sunday. **(R.1202-3).** The medical examiner was never asked to, and did not, describe the murder weapon. **(R.1165-1201).**

The prosecutor then tried to pin-point the time of death with the testimony of a neighbor who lived behind the victims. **(R.1218-43).** This witness, Mrs. Evans, originally told police at the scene that she was awakened on Saturday at **6:00** a.m. by the sound of glass breaking. **(R.1231).** To the jury, the prosecutor had her testify that the noise occurred on Sunday. **(R.1221-3).** Mrs. Evans explained that her inconsistent testimony was based upon her recollection that the awakening happened after another neighbor's late night party. **(R.1221-3).**

A party-goer testified the party was on Saturday. (R.1210-1217). Mrs. Evans admitted that she had no idea where the awakening noise came from. (R.1232). The prosecutor tried, but did not get Mrs. Evans to say, that the noise sounded like jalousies breaking. (R.1225-6).

The record reflects that at 7:00 a.m. Sunday the defendant arrived at the home of Elizabeth Feliciano and her son, Feliciano Aguayo. (R.1249, 1252-4, 1261, 1262-3). The defendant had been in the Feliciano house before and was a friend of the family. (R.1252). Mr. Aguayo and the defendant had met one and a half or two months before through a mutual friend, Wally Gomez. (R.1278). The defendant lived with Mr. Gomez at the South Dade Labor Camp, about two miles away from the Feliciano home. (R.1280, 1304). The Felicianos lived one half mile from the victims. (R.1416, 1425-6). There is no evidence that the Felicianos, Mr. Gomez, or the defendant were acquainted with the victims or their neighbors. (R.1-1902).

It had rained over the Feliciano home during the night but at the time the defendant arrived it was cloudy and not raining. (R.1260, 1271). The defendant's clothes and shoes were dry. (R.1261). He had been drinking but was not drunk. (R.1263, 1273).

Mrs. Feliciano was at her bathroom window and saw the defendant running from across the street towards the house. (R.1254-5, 1275). The defendant was wearing a blue shirt, blue pants, and tennis shoes. (R.1257, 1288). He was carrying a

jacket. (R.1265, 1288). He had a little, or spots of, blood on his right shoulder and splattering below his knees. (R.1256, 1265, 1288). There was some blood drops around the sole of his right shoe. (R.1265, 1322). The testimony was conflicting as to whether there was blood on the defendant's jacket. (R.1264, 1322). The blood was still drying. (R.1304-6, 1323) The defendant was not "covered" with blood, but had "spots here, spots there." (R.1264, 1265, 1321, 1322).

Mrs. Feliciano asked the defendant if he wanted to come inside. (R.1254). The defendant, who looked like he was in a hurry, said no and began speaking with Mr. Aguayo and Mrs. Feliciano's husband. (R.1254-6, 1274, 1287). Mrs. Feliciano could not hear the conversation. (R.1266-7).

Mr. Aguayo testified but before relating the Sunday morning conversation he explained what he and the defendant had done the day earlier. (R.1279-86). Mr. Aguayo saw the defendant on Saturday morning at Mr. Gomez' house. (R.1279). Mr. Aguayo left, and then returned that afternoon. (R.1280). He and the defendant then went to a Circle K in Homestead and the defendant bought some beer. (R.1280-81). Mr. Aguayo himself does not drink nor go to bars. (R.1281, 1286). Sometime before 7:00 p.m. the two went to the Vista Amusement Center, also in Homestead, and played pool. (R.1281). Less than forty-five minutes later they left and went back to the Circle K and bought more beer for the defendant. (1281). The two then went to the

labor camp, where the defendant was supposed to get his date for the evening. (R.1282).

Over objection, the prosecutor elicited testimony that the defendant became upset when he saw his date with her ex-boy-friend. (R.1282). Defense counsel demanded that when objection is made and the court rules the prosecutor should not then make comments. (R.1283). The prosecutor replied "I have a right to answer" and, after the court stated that the objection had been overruled, elicited again the same testimony about the defendant getting upset. (R.1283-4).

Mr, Aguayo continued with his account of Saturday evening and testified he and the defendant left the labor camp, went back to the Circle K where the defendant had another beer, and then the two returned again to the Sky Vista. (R.1284, 1285). Mr. Aguayo later left alone but returned before 11:00 p.m. and offered to drive the defendant home. (R.1285). The two then departed, stopped briefly at the Circle K for more beer, and the defendant asked to be dropped off at the Leisure City Lounge Bar. (R.1286). The defendant was left at the bar and told by Mr. Aguayo to call if he needed a ride home. (R.1286). The defendant did not call but arrived at the house the next morning. (R.1286-7).

Mr. Aguayo described to the jury the defendant's next day appearance. (R.1287-9). Referring to the blood spots, the prosecutor asked, "Were you surprised?" (R.1289). Mr. Aguayo answered "yes" but the defendant's objection and motion to

strike were granted. **(R.1289).** The prosecutor then had Mr. Aguayo recount his Sunday morning conversation with the defendant. (R.**1289).**

Mr. Aguayo asked the defendant what had happened. **(R.1289).** The defendant replied he had been at the Cuervo Bar. **(R.1289).** This bar is located, relative to the Feliciano house, beyond the Glades Trailer Park and more than ten miles from the Leisure City Lounge Bar. **(R.1290-91).** The defendant said he was walking home from the Cuervo Bar and was past the trailer park when a car stopped and its occupants, three men and a woman, got out and attacked with a tire jack. **(R.1291).** Mr. Aguayo testified the defendant both explained and demonstrated how he drew his knife and stabbed his attackers more then twenty times. **(R.1291, 1294-5).** Using the prosecutor as a model, Mr. Aguayo re-enacted the defendant's demonstration before the jury. **(R.1294-5).** Mr. Aguayo then testified the defendant said he was thrown to the ground but escaped by running through a corn field. **(R.1298).**

Mr. Aguayo knew the area and, with prompting from the prosecutor, testified that from "the way he ran in the corn field" the defendant ran on a dirt road behind a prison, and on to Palm Drive through Florida City. **(R.1298, 1298-99, 1301, 1312-3).** Mr. Aguayo then concluded that the defendant went by the South Dade Labor Camp, where the defendant lived, to reach his (Mr. Aguayo's) house. **(R.1300-4).**

Mr. Aguayo saw that the defendant had a scratch over his eye but no bleeding, bruising, or lumps from which, as the prosecutor asked, he could conclude that the defendant had been attacked. **(R.1292, 1294).** The prosecutor then had Mr. Aguayo emphasize that the defendant did not complain of injuries and did not ask to be taken to a doctor or hospital. **(R.1295).** The prosecutor next asked Mr. Aguayo to give a narrative and return to the defendant's explanation. (R.**1295-6).** The following repetitive testimony was then presented:

> Q. Then explain to the members of the jury, please.
>
> A. Okay. I asked him what happened when he told me, you know, that he was walking home that morning and they stopped and they started beating on him for no reason at all and that is when he told me how he stabbed the woman, whatever and he just kept repeating, "I told them not to make me mad, that I had an animal inside of me" and "I told them not to make me mad, that I had an animal inside of me, I told them not to make me mad, that I had an animal inside of **me"** he kept repeating and repeating that all the time; after that I walked back in the house and got a T-shirt on or a towel or whatever and we went down to the South Dade Labor Camp and he just kept saying the same thing, "I told them not to make me mad, that I had an animal inside of me, I told them not to make me mad, that I had an animal inside of me, I told them not to make me mad, that I had an animal inside of me" and we headed down South Dade.
>
> Q. Are you saying that he said, "I told them not to make me mad"?
>
> A. Yes.
>
> Q. What is that you said about an animal? I didn't hear you.

A. He kept saying that he just--you know, like, he was repeating a bunch of times, then he said, "I told them not to make me mad, that I had an animal inside of me."

Q. "I told him not to make me mad, I have an animal inside of me"?

A. "I told them not to make me mad, I had an animal inside of me."

MR. PITTS [Defense Counsel]: Your Honor, I object to her repeating it.

MS. DANNELLY [The Prosecutor]: Judge, if it wasn't constant noise outside the courtroom, perhaps I would be able to hear the testimony.

THE COURT: I will overrule the objection.

MS. DANNELLY: Thank you, Judge. Would you please read back the portion of the testimony referring to, "I told them not to make me mad, I have an animal inside of me."

(Thereupon, the answer as above recorded was read back by the court reporter.)

(R.1296-7).

The prosecutor next had Mr. Aguayo describe the knife the defendant had taken out of its case and shown that morning. **(R.1305).** After Mr. Aguayo stated he was familiar with this type of folding knife and that the defendant's had blood on it, the prosecutor, for a second time, asked how Mr. Aguayo had seen the knife and whether the defendant had taken it out. **(R.1306).** Defense counsel's objection to leading Mr. Aguayo and asking a repetitive question was sustained, but the prosecutor persisted:

Q. Mr. Aguayo, how was it that you came to see the knife that morning?

A. He took it out of his case

Q. When he took it out, what did he do with it?

A. Opened it.

Q. What did you see when he opened the knife?

A. It had a bent tip and full of blood.

Q. It had a bent tip and full of blood?

A. It had a bent tip and full of blood.

(R.1306). The prosecutor did not have Mr. Aguayo repeat the testimony which showed that although he had seen the knife before, Mr. Aguayo did not know when the blade was last in an unbent condition. **(R.1306-7).**

The prosecutor next asked what happened when the two arrived at the labor camp. **(R.1309).** Mr. Aguayo testified the defendant said to go around the block a few times and appeared not to want to go to his home. **(R.1309).** Mr. Aguayo noticed that when the car was stopped the defendant appeared to avoid the front door and instead went towards the side door. **(R.1310).** The prosecutor then began to lead Mr. Aguayo:

Q. So, the defendant tried to go around to the side door?

A. We went to the side door.

MR. PITTS: I object.

THE COURT: Sustained.

MS. DANNELLY: I would like to have the question and answer read back, please.

THE COURT: All right.

Read back the last question and the last answer, please.

(Thereupon, the question and the answer as above recorded was read back by the court reporter.)

(R.1310).

Mr. Aguayo also testified that later in the day he took his mother and her daughter to the corn field. (R.1312, 1313). Mr. Aguayo did not testify that he did not believe the defendant; he told the jury "I don't know why, we just went and tried to find out and see [sic.] something really happened because--you know, we just went." (R.1312). Mr. Aguayo later added the reason was the defendant had no dirt on him but the area from the corn field to Palm Drive was dirt roads and water holes. (R.1315).

It was drizzling when the Felicianos arrived at the corn field. (R.1267-8). Mr. Aguayo testified he did not notice any bodies or "[w]hat we were looking for," and that the area was "clean." (R.1314).

Other than Ms. Perez, the migrant co-worker who testified that she overheard the inflammatory bragging, the prosecutor's remaining witnesses were entirely concerned with establishing the unlikelihood of the defendant's alibi explanation of both his whereabouts and the blood. (R.1360-69, 1395-1405, 1407-1494). The prosecutor first called a public works official who had assembled elaborate grid maps and aerial photographs of

southwest Dade County; then she called Detective LeClaire. **(R.1395-1405, 1407).**

The record reflects that more than two years after the murders Detective LeClaire, working what he called "cold cases," took Mr. Aguayo's sworn statement regarding the defendant's Sunday morning alibi explanation, **(R.1410)** The detective then went with Mr. Aguayo to various locations in southwest Dade County. **(R.1410, 1411).** Shortly thereafter the detective interrogated the defendant and obtained an oral alibi statement. **(R.1440).** The defendant told the detective that on Saturday night he had been drinking at the Cuewo Bar and was attacked as he walked home. **(R.1440-43).** The defendant also said that he stabbed his attackers five to six times and fled through a corn field to the Feliciano home. **(R.1443-46).** According to the detective, the defendant never described the exact direct route taken to the Feliciano home. **(R.1470-71).**

During Detective LeClaire's direct testimony the aerial exhibits[1] were aligned to scale and placed on the courtroom floor. **(R.1454-70).** The prosecutor removed her shoes so that she could walk among them. **(R.1456).** The jury left the box and walked around the perimeter as portions of testimony were presented. **(R.1455, 1465).**

Using the exhibits, Detective LeClaire identified the locations of the Leisure City Lounge, Cuewo Bar, trailer camp,

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[1] The exhibits were introduced into evidence but were not transmitted to this Court by the clerk because they are too large and voluminous.

and corn field, and the homes of the defendant, victims, Ms. Evans, and the Felicianos. **(R.1413-4, 1415-6, 1420, 1428-9, 1456, 1457, 1459-60, 1460).** The detective informed the jury of the various distances between the locations identified. **(R.1415, 1416, 1425-6, 1466).**

The prosecutor also had the detective locate the city hall building of Florida City, which housed their police. **(R.1417-8, 1423-4).** The defendant made a relevancy objection, and the prosecutor began to respond by arguing to the jury. **(R.1423-4).** Defense counsel interrupted and the court sustained counsel's objection to the prosecutor making such comments. **(R.1424).**

Detective LeClaire carefully described, using exhibits and specific locations and street names, the exact route he took while with Mr. Aguayo. **(R.1418-9).** This route took them past both the police and the defendant's residence before arriving at the Feliciano home. **(R.1418-19).** The prosecutor presented no testimony that there were signs (lighted or otherwise) for police or that the defendant was familiar with Florida City. **(R.1-1902).**

As the jury wandered about the exhibits the prosecutor had Detective LeClaire repeat his testimony of the improbable route, again and again, for a total of seven times. **(R.1418-19, 1420-21, 1440-42, 1446, 1455-60, 1463-5, 1468-9).** At one point the prosecutor asked Detective LeClaire if he had checked **"the** hospitals in Dade County" to see if there were any reported stabbings which were similar to that claimed by the defendant.

(R.1450). After the detective said yes, and that there were none, the prosecutor repeated the question, but added facts of her own. **(R.1450).** For the repeated **"question"** the prosecutor "testified" that twenty six hospitals had been checked; the detective agreed but added that his **"checking"** was pure hearsay. **(R.1450).**

While examining the detective the prosecutor repeatedly elicited negative responses on the defendant's failure during interrogation to provide details of corn field attack. **(R.1441, 1442, 1443, 1447).** On cross-examination, defense counsel showed that the defendant was at first cooperative but cut off questioning because, as he told the detective, he thought police, prosecutors and lawyers "twist things around." **(R.1473).** The prosecutor argued to the court that the defense had brought up this subject and, on re-direct, began to use leading questions to suggest that the defendant stopped the interrogation because he could not explain the details. **(R.1483-5).** Defense counsel's objection to such **"re-cross** examination" was sustained and the prosecutor was cautioned by the court. **(R.1485).** The prosecutor, however, continued, and before concluding with the detective, asked at least thirteen more leading questions on what details the defendant did not supply and how the investigation of the defendant was conducted. **(R.1486-90).**

D. THE DEFENSE

Defense counsel began his opening statement[2] by declaring that there was no evidence the defendant was even at the scene of the crime. (R.1018). Counsel stressed that none of the finger prints, suspect hairs, nor other evidence found by the police matched the defendant. (R.1019). The defense acknowledged Ms. Perez' testimony but made no mention of Mr. Aguayo or Detective LeClaire. (R.1020). Counsel concluded by stressing that there was no evidence whatsoever to "tie" the defendant with the crime. (R.1021).

The defense called David Rhodes, a criminalist with the Metro-Dade Police Department. (R.1562-3). Without objection from the state, the court declared Mr. Rhodes an expert. (R.1564-5). Mr. Rhodes had microscopically compared two hair strands that were found on Julia Ballantine's legs with known samples from both victims and the defendant. (R.1568, 1569-70, 1572). One of the strands could have come from the head of either victim. (R.1570, 1571). The second strand was a brown Caucasian hair which did not match the samples from either victim or the defendant. (R.1572-3, 1575-6).

Through extensive cross-examination, the state showed that the hair samples from the defendant were taken three years after the crime and that, because there is foreign material accompanying hairs which becomes part of the analysis, delays in collecting the samples might be significant. (R.1584-5).

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[2] The opening was given directly after the state's.

Cross-examination also showed that hair can be transferred innocently from one person or place to another person or place. (R.1598, 1607). Finally, Mr. Rhodes acknowledged that the brown Caucasian hair was probably thorax, abdomen, or pubic, that thorax or abdomen hairs cannot conclusively be compared to pubic or head hairs, and that only pubic and head hair samples were taken from the defendant. (R.1593-6, 1609-10, 1611-12, 1618). Despite this latter cross-examination, the criminalist refused to agree with the prosecutor's assertion that his microscopic examination of the hairs was inconclusive. (R.1616-7). The prosecutor was, at this point, cautioned by the court to ask a question and not comment to the jury on evidence. (R.1617).

There were other cautions and admonishments to the prosecutor during the cross-examination of the criminalist. (R.1586, 1587, 1590, 1591, 1597). Five regarded improper commenting to the jury on defense counsel's objections (R.1586, 1587, 1591, 1597), and one was for calling certain opinion evidence "ridiculous." (R.1590).

Before beginning his case, defense counsel had shown through cross-examination that there was no physical evidence which "tied" the defendant to the crime. (R.1483). Other cross-examination had shown that the defendant was also known as "Enrique Juarez." (R.1474). Still more cross-examination had shown that during the month of the murders the defendant had worked for a man named Trevino. (R.1334-5, 1335-6, 1337-8, 1380). Finally, cross-examination of Ms. Perez had made clear

that she recognized the defendant as the one who made the bragging confession because both she and the defendant were then working for Trevino. **(R.1380).**

The defense then called the custodian of payroll records for **Jose** Trevino, a crew leader for migrants. **(R.1522-3, 1506).** Testimony before the jury showed that the custodian brought, pursuant to subpoena duces tecum, the **1983** payroll records of both Ms. Perez and "Enrique Juarez." (R.**1500-1, 1523-5).** The records had been made contemporaneously as each person worked and were kept in the regular course of business. **(R.1525, 1530).** More testimony demonstrated that the custodian had looked for, but did not find, any payroll records under the names "Henry Garcia" or "David Garcia." (R.**1524).**

The records themselves demonstrate that both Ms. Perez and **"Enrique** Juarez" worked for Trevino during the first week in January, **1983. (2SR.1,** 2). The records further establish that while Ms. Perez continued to work for Trevino, "Enrique Juarez" could not have been the migrant bragging in the fields because he was last employed by Trevino more than one week before the homicides. **(2SR.1, 2).** The defendant then moved these business-employment records into evidence. **(R.1525).**

E. THE EXCLUSION OF EVIDENCE

During her voir dire of the custodian, in front of the jury, the prosecutor established that half the handwriting on the business-employment records was that of the custodian's

sister, another employee. **(R.1526-7).** More testimony showed that both the custodian and her sister were daughters of Trevino and were responsible for making payroll entries. **(R.1526).** The custodian did not know of any **"documents** to support the figures." (R.**1527).** Social security numbers ("authenticating social security numbers" according to the prosecutor) were omitted from the records because sometimes the migrants never provide them. **(R.1529).** The prosecutor's voir dire ended when the custodian admitted that she knew of no "authenticating" information which would **"tie"** the payroll record to the defendant. **(R.1531).**

Outside the jury's presence the prosecutor argued that the business-employment records were not made in the custodian's handwriting and there was no "supporting documentation." **(R.1532).** The prosecutor claimed that the records were not relevant or authentic. **(R.1533).**

The court then examined the business-employment records. **(R.1533).** When the court noted that the records were for "Enrique Juarez" and that the custodian had none for "Henry Garcia," defense counsel replied that the defendant was indicted as "Enrique Juarez," **(R.1533-4).** The court denied the records' admission, finding "they have [not] been established as a matter of law to be **trustworthy." (R.1536)**

The defendant asked for leave to call the custodian's sister, but the prosecutor quickly replied that the court's ruling should be the same regardless of the sister's testimony.

(R.1536-7). The prosecutor then wanted to make the record clear:

> The record itself--what is important here is it's not that the [custodian's] testimony has been questioned. I don't question her testimony.

(R.1537)

The court reiterated its ruling and stated that it had no "confidence that those records are competent or relevant." (R.1538). Later, the court stated that the business-employment records were not "reliable," not "adequately authenticated," that there was "insufficient linkage between the persons or person purported to be listed on the document and the defendant," and there was "the possibility that they could have referred to so many other people . . . ." (R.1561).

F. CLOSING ARGUMENTS ON GUILT-INNOCENCE, JURY DELIBERATIONS, AND VERDICT

The prosecutor began her initial closing by declaring that representations made by defense counsel in opening statement were "IOUs" to the jury. (R.1656). Specifically referring to defense counsel and his six "promises," the prosecutor directly argued that each were false. (R.1657-1659, 1660-1661, 1661-3, 1663-5, 1665-6, 1666-79).

The prosecutor made no argument or comment on burden of proof, elements of crimes, lesser included offenses, or the like. (R.1656-79). Instead, she used the first five "promises" to say that she was "sorry to have put" Mrs. Flight in the

position of having to identify the "bodies of . . . her friends," that Mr. Aguayo did not "believe the story . . . ," and that the testimony of Mr. Aguayo and Ms. Perez was the "most compelling in this case." **(R.1666, 1672, 1673).** The attack on defense counsel's last **"promise"** was a step by step analysis of how the defendant's story made no sense. **(R.1675-8).** Here the prosecutor described how odd it was for the defendant to go to the Cuervo Bar, how incredible it was for him to fend off the attackers, how ridiculous it was for him to go past the police, and how absurd it was for him to choose not to go home but to continue on to the Feliciano home. **(R.1675-7).**

Defense counsel, in his closing, first declared that he had not promised anything because he had no burden at all. **(R.1680).** He then responded to the prosecutor, point by point. **(R.1680-1, 1681-2, 1682-6, 1686-7, 1687-8).** During his argument defense counsel did not claim that the defendant's explanation of his whereabouts and the blood should be believed or were a basis for acquittal; he argued the inconclusive nature of the evidence:

> Circumstances, yes. Circumstances says, well, it's only a half mile, I believe Detective LeClaire said, from this location where Feliciano Aguayo lived to the home of Mabel Avery and Julia Ballentine. ***So***, based upon that circumstance and the fact that he had blood on him means that he must have been over at Mabel Avery and Julia Ballentine's house.

(R.1687-8).

Defense counsel then began to address the problem of the Trevino business-employment records, the existence of which was in evidence but the contents of which was not. **(R.1687).** Counsel argued that based upon Mr. Aguayo's testimony, the defendant was not in the fields when Ms. Perez thought she heard him bragging. **(R.1688-1700).** Then counsel declared that the state should have brought "someone in here from Mr. Trevino," but that they had decided otherwise:

> Let's go with circumstantial evidence. Don't give them nothing direct because that might confuse them and that might make them use the [sic.] common sense. Give them a lot of bloody pictures and give them a lot of long distances showing circumstances that's not really direct and not really exact and make them mad as hell because once they get that way, they will convict anybody.

(R.1700).

Towards the end of his argument defense counsel criticized the police investigation and said, referring the state's witnesses, **"[p]eople** are not telling you the truth in this case." **(R.1701, 1704, 1707-9).** Counsel ended his closing by arguing that the evidence was circumstantial and not enough to convict the defendant without something direct and physical. **(R.1711).**

The prosecutor began her rebuttal by declaring she was "sick and tired of sitting there and listening to this assault on the State's witnesses, without grounds, with no response from defense," **(R.1713).** She later claimed defense counsel never addressed the defendant's **"story"** because it was "without a grain of truth . . . and [defense counsel] knows it," **(R.1724).**

Still later she asked the jury to "take exception to [defense counsel's] misstatements of fact and misstatements of evidence." **(R.1733.)** She declared **"I'm** sorry for raising my voice at this moment, but I am greatly disturbed by these **allegations."** **(R.1734).**

When she actually began to argue in rebuttal the prosecutor first zeroed in on defense counsel's argument that the state's circumstantial evidence was not enough to convict. **(R.1715-6).** She gave her opinion of the expected adverse effect upon the criminal justice system if the jury agreed:

> . . . I can assure you, ladies and gentlemen, that every single time a burglary is committed without fingerprints and no witnesses, every single time a murder is committed with circumstantial evidence, every single time any crime is committed without an eyewitness then there could never be a conviction . . . .

(R.1716).

The prosecutor next "testified" on her own and responded to defense counsel's argument that the state should have called a witness from Trevino:

> . . . you can't get the records. I wouldn't say we didn't look for them. You better believe we looked for them. The police looked for them but they simply didn't exist, and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some.

(R.1726).

The prosecutor then tried to support the credibility of her witnesses by arguing that they needed sympathy for having suffered at the hands of the defendant and defense counsel:

> [T]he defendant is directly responsible and must be held accountable for the brutal murder and the sexual battery of Julia Ballentine and Mabel Avery, because the person who committed those crimes is seated before you in this courtroom, and he has admitted the same to witnesses who . . . were victims too . . . were in a position to have contact with that man and simply came before you and told you what happened, and because of that they have to be vilified as witnesses in this case. These people are without motive.

(R.1731).

The prosecutor gave the jury her personal opinion that the defendant was lower than an animal and, in the same breath, she deliberately confused the jury with what the defendant had said about his attackers:

> Feliciano Aguayo told you that when the defendant explained to him the circumstances of that night he said, "I told them not to make me mad. I told them not to make me mad. When I get mad it brings out the animal in me."
>
> Well, I will show you a picture right now and I will tell you that what happened to Julia Ballentine and Mabel Avery that morning was certainly animalistic behavior, and I think it's an insult to the animal kingdom to have to even describe it that way . . . .

(R.1729).

Finally, the prosecutor deliberately misled the jury by implying that what the defendant allegedly said on two different occasions was a single, highly inflammable **"confession":**

> There is no explanation other than his guilt for the man to have made the statements he made for the circumstances in which the crime was committed and for the comments that were made by Rufina Perez and Feliciano Aguayo during this trial. "I told them not to make me mad. It brings out the animal in me.["] "I went around the back door. I ripped the screen." "They're already in hell," and, "Yes, I fucked them up."

(R.1733).

During deliberations the jury told the court that they "have a question as to when Mr. Feliciano Aguello [sic.] testified the defendant said ' . . . I have an animal in me'". (R.120, 121). The court responded that jurors must rely on their own recollection of the testimony. (R.102, 121). The jury subsequently returned verdicts of guilt, as charged, on all four counts. (R.260-263).

G. THE SECOND PHASE TRIAL AND SENTENCING

Following the guilt-innocence phase the jury returned an advisory twelve-zero verdict recommending the imposition of the death penalty. (R.285-6). The court then ordered a presentence investigation (PSI). (R.287). The PSI included a victim impact statement (VIS) written by Jeanne Cavagnagh Mealy, a niece of the victims. (3SR.5-6). The VIS contained a description of the victims' lives, their relationship with their family, the ruthlessness of the crime committed against them, and the writer's opinion of the defendant. (3SR.6). Ms. Cavagnagh stated in the VIS that "[a]fter consultation with various members of our family . . . we believe that [the defendant]

should pay with his life . . . ." (3SR.6). The court conducted a hearing on the PSI for the specific purpose of allowing counsel to argue its persuasiveness. (R.1878-9). Both counsel did so without mentioning the VIS. (R.1878-85).

The court subsequently announced sentence and filed its sentencing order; the imposing the death penalty. (R.288-92, 1892). The court declared in reaching its decision that it had "considered at length all of the evidence . . . in this case . . . ." (R.289). The court stated it had "independently reviewed and weighed the evidence presented before the jury and to the Court itself." (R.290). It found four aggravating circumstances: the defendant was under a sentence of imprisonment, the defendant had previously been convicted of a violent felony, the murders were committed while the defendant was committing a sexual battery and burglary, and the murders were especially heinous, atrocious, and cruel. (R.289). The court also found to exist the mitigating circumstance of the defendant having been drinking beer the night before the crimes. (R.289).

These facts form the basis of his appeal.

ISSUES PRESENTED FOR REVIEW

I

WHETHER THE COURT ERRED IN EXCLUDING BUSINESS-EMPLOYMENT RECORDS WHERE THE RECORDS WERE AUTHENTICATED AND REBUTTED THE STATE'S PIVOTAL EVIDENCE BY SHOWING THAT THE DEFENDANT COULD NOT HAVE BEEN THE MIGRANT WORKER OVERHEARD IN A FIELD CONFESSING, THEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS.

II

WHETHER DUE PROCESS OF LAW WAS DENIED WHERE THE ENTIRE BURDEN OF PROOF WAS LAID UPON THE DEFENDANT AND REQUIRED HIM TO PROVE THE TRUTH OF AN ALIBI, WHICH HE DID NOT RAISE, IN ORDER TO BE FOUND NOT GUILTY.

III

WHETHER DUE PROCESS WAS DENIED WHERE IN A CASE WITH VERY LITTLE EVIDENCE AND THE DEFENDANT DID NOT TESTIFY THE PROSECUTOR DELIBERATELY INFLAMED THE JURY'S PASSION OVER A REVOLTING CRIME BY APPEALING TO EMOTION, ATTACKING THE DEFENDANT AS A LIAR, CHALLENGING THE DEFENSE TO PROVE INNOCENCE, CREATING ILL WILL AGAINST DEFENSE COUNSEL, AND BY "TESTIFYING'' AGAINST THE DEFENDANT IN CLOSING ARGUMENT.

IV

WHETHER THE COURT ERRED IN CONSIDERING AN INFLAMMATORY VICTIM IMPACT STATEMENT FOUND IN THE PRESENTENCE INVESTIGATION REPORT WHEN IT SENTENCED THE DEFENDANT TO DEATH.

SUMMARY OF ARGUMENT

This is an extraordinary case. It does not present an attractive picture of our adversary system and our sense of fair play. It shows how an over zealous lawyer entrusted with a revolting crime to prosecute can overcome deficiencies in the evidence by deliberately provoking a jury's passion, appealing to emotion, and by attributing an inflammatory confession to the accused.

Factually, this case could not be much simpler. In the darkness of night the home of two elderly sisters was burglarized and they were brutally stabbed to death in their bedrooms. One was raped. That morning a migrant farm worker was seen one half mile away, coming from the direction of the murder scene. He had some drying blood splattered on his clothing and more blood on his knife.

The prosecutor could not prove with physical evidence or eye witnesses that the migrant was the perpetrator. But the prosecutor thought the migrant's pre-arrest alibi explanation for both his whereabouts and the blood could be turned upon him to show he was a liar. She also had at her disposal electrifying testimony that a few days after the murders someone was overheard in the fields bragging that he was unconcerned about entering a home through jalousies and "fucking up" two women because they were now in hell. The prosecutor must have thought that although there were business-employment records which

proved that the migrant with the splattered blood was not the braggart, a jury could be made to believe he was.

And so the case was tried. One witness identified the migrant — now a defendant--as the braggart. The business-employment records were kept from the jury because of the prosecutor's artful objection. The defendant did not testify and did not present an alibi, but the prosecutor used elaborate exhibits and repetitive testimony, consuming nearly the entire trial, to "prove" that the defendant was a liar and that his alibi was false. The prosecutor inflamed the jury's passion and abused her official position to create ill will against the defendant, and later, in final argument, against defense counsel. The prosecutor fell her lowest when she "testified" in closing and mislead the jury by claiming that the business-employment records — just excluded upon her objection--had been the subject of a police search but were not in evidence because they did not exist.

This case must be reversed for three reasons. First, the court prejudicially erred and denied the defendant his rights to compulsory process and to present a defense when it excluded the perfectly authenticated business-employment records that were specifically material, and indeed critical, to the defense. Second, the defendant was denied a fair trial and due process when the prosecutor successfully shifted the burden of proof to the defendant by requiring him to prove the truth of an alibi he never raised. Finally, due process requires a new trial because

the prosecutor's deliberate and offensive conduct rendered the proceedings fundamentally unfair and incapable of yielding an accurate result.

On top of the fundamental errors occurring in the first phase of trial, the defendant was irreparably prejudiced in the sentencing proceedings. Before determining what sentence to impose, the court considered a highly inflammatory victim impact statement submitted by the deceaseds' relatives. This was error which vitiated the sentence of death and now requires this Court to reverse.

ARGUMENT

I

THE COURT ERRED IN EXCLUDING BUSINESS-EMPLOYMENT RECORDS WHERE THE RECORDS WERE AUTHENTICATED AND REBUTTED THE STATE'S PIVOTAL EVIDENCE BY SHOWING THAT THE DEFENDANT COULD NOT HAVE BEEN THE MIGRANT WORKER OVERHEARD IN A FIELD CONFESSING, THEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS.

The state had no physical evidence or eye witnesses to even hint at the identity of the perpetrator of the crimes. (R.1-1902). Instead, as declared by the prosecutor in both opening and closing arguments, the pivotal evidence included the testimony of Rufina Perez, a migrant farm worker who identified the defendant as the co-worker she overheard bragging in a field

about committing the crimes. **(R.1011-2, 1672).** Ms. Perez was sure the bragging occurred after the crimes were publicized and during the time she worked for a man named Trevino. **(R.1361, 1362-3, 1380).** Yet the jury never knew that Trevino's business-employment records proved the defendant could not have been the braggart because while Ms. Perez and the defendant worked together before the crimes, they never worked together afterwards. **(2SR.1, 2).**

The state built its confession evidence around Ms. Perez' testimony that she knew the defendant as a co-worker. **(R.1361, 1380).** To challenge her identification, the defendant subpoenaed Trevino's payroll records and called the custodian to provide authentication. **(R.1522-3).** The witness testified that she was the custodian, that the employment records were made contemporaneously as each person worked, and that the records were kept in ordinary course of business. **(R.1525, 1530).**

The prosecutor admitted that the custodian's testimony could not be **"questioned" (R.1537),** but she nonetheless wanted voir dire in front of the jury **(R.1526).** While conducting what amounted to cross-examination, the prosecutor established that half the handwriting on the records belonged to another employee **(R.1526-7),** that there were no known "documents to support the figures" on the records **(R.1529),** and that there was no "authenticating" information which **"tied"** the records to the defendant **(R.1531).** Then, away from the jury, the prosecutor argued that the records were not accompanied by **"supporting"** documentation,

not in the witness' own hand, and thus, not **"relevant"** or **"authentic." (R.1532, 1533).** Unfortunately for the defendant, and contrary to all existing law, the court was impressed by these frivolous arguments and excluded the business-employment records. **(R.1536, 1538).** The court later attempted to support exclusion by declaring that there was no **"reliable"** or **"linkage"** evidence which "adequately authenticated" the records as being the payroll records of the defendant. **(R.1561).**

Florida codified law requires admission of records contemporaneously made in the course of regularly conducted business if authenticated by a custodian or other qualified person. Sec. **90.802 (6)**(a), Fla. Stat. There is no requirement that handwriting be identified or that the person preparing the documents testify. *Holley* **v.** *State,* **328 So.2d 224, 225-6** (Fla. 2d **DCA 1976)** (prior law, sec. **92.36(2),** Florida Statutes (1975), passed to avoid necessity of calling preparer as witness); *McEachern* V. *State,* **388 So.2d 244, 246** (Fla. 5th **DCA 1980)** (prior law, sec. **92.36(2),** Florida Statutes (1975), does not require that persons making entries be identified). Nothing in the codified law, or in cases, requires that there be "authenticating" or "supporting" documentation.

The unrefuted testimony, declared by the prosecutor herself to be unquestionable, demonstrates how fallacious **the** authenticity objections were. The custodian fully explained how the documents were prepared and even identified the two persons who prepare the entries. **(R.1525, 1526-7, 1530, 1537).** This

testimony was not challenged. Although the prosecutor complained that the records were not accompanied by "authenticating" or **"supporting"** documentation, the custodian's unquestionable testimony was that *these* were *the* regularly kept payroll records for two workers, "Rufina Perez" and "Enrique Juarez."

Viewed correctly, the only conceivable legal basis for excluding the records is that those for "Enrique Juarez" are not relevant because the defendant is not "Enrique **Juarez."**[3] But this is not true, and the evidence proves it beyond all doubt.

Recall that the pivotal evidence to which the records related was Rufina Perez' identification of the defendant as the co-worker she heard bragging while both she and the defendant worked for a man named Trevino. If this is true, and Trevino keeps payroll records, then there had better be payroll records for both Ms. Perez and the defendant which show that the two worked together on at least one day subsequent to the date the crime was committed.

Trevino did keep records, and those for **"Rufina** Perez" showed she worked before and after the commission of the crime. (2SR.2). The records thus corroborated Ms. Perez' testimony that she worked for Trevino and could have overheard a co-worker bragging about the crime after it was publicized. More impor-

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[3] This is apparently what the judge was trying to say when, while attempting to support his ruling, he later declared that there was no **"reliable"** or **"linkage"** evidence which "adequately authenticated" the records as being the payroll records of the defendant. (R.1561)

tantly, Ms. Perez' testimony corroborates the conclusion that the records for "Rufina Perez" are accurate. So should be the records for "Enrique Juarez."[4]

Who is "Enrique Juarez"? According to the grand jury, the defendant is "Enrique Juarez." (R.1). This fact alone should settle the question, but there is more. The detective investigating the case knew the defendant as "Enrique Juarez." (R.1474). But there is still *much* more. The prosecutor herself admitted, and the court acknowledged, that the defendant is "Enrique Juarez."

The prosecutorial admission and judicial acknowledgement came in the trial's second phase. The prosecutor used, to establish aggravating circumstance 5(b), documents from the State of Texas which adjudged "Enrique Juarez," also known as "David Garcia," guilty of two separate violent felonies. (R.272-5, 278-82). In its order imposing death, the court found that the defendant had previously been convicted in Texas of a violent felony. (R.289, 1894). There was no "authenticating" or "supporting" documentation which "tied" these documents to the defendant--it was simply an established fact that the defendant is "Enrique Juarez." No one can now suggest that evidence which was "reliable" enough to impose the death penalty

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[4] The logic of this conclusion is inevitable because there is no suggestion that there was even the slightest motivation for Trevino, or a custodian, to falsify the records to create evidence for the defendant. Indeed, the custodian testified that the records had not been tampered with since their creation. (R.1534-5).

was not "reliable" enough for a jury to *consider* on the question of guilt or innocence.

It should be of no surprise that the "Enrique Juarez" records were the defendant's. After all, if the state is right that Ms. Perez, correctly identified the defendant as the bragging co-worker, then there *must* be employment records for the defendant. The custodian testified that she had searched for records under the defendant's other AKA's ("Henry Garcia" and "David Garcia") and that there were none. (R.1524). The existence of such records, along with those for "Enrique Juarez," would show that there could be more than one worker, any one of which could have been the defendant. But since there were only records for "Enrique Juarez," and there *must* be records for the defendant, the "Enrique Juarez" records *must* be those of the defendant.

The trial court's prejudicial error in failing to allow the jury to review the critical business-employment records is best demonstrated by *Holley* v. ***State,*** supra. The accused in that case, Bobby Earl Holley, was convicted of robbery upon an eye witness identification and upon a similar act robbery in which there also was an identification. To rebut the similar act evidence, the accused offered out of town motel records showing that "one Bobby Holley" was registered at the time of the crime. There was no "authenticating" or "supporting" documentation which "tied" the accused to the records, but the custodian did testify. The Second Circuit held that it was error to exclude

the records upon the grounds that the desk clerk did not testify (presumably to identify the accused as "Bobby **Holley**"). 328 **So.2d,** at 226. In considering possible harmless error, the Second Circuit fully recognized that the records were not conclusive proof of innocence; but the court held that since the similar act evidence was important enough to be considered, the records were equally important and the conviction had to be reversed. ***Ibid.***

This case is just like Holley in all respects. The records may not have been sufficiently **"tied"** to the defendant for the prosecutor to be satisfied, but it was for the jury alone to judge the evidentiary weight. While proof that the defendant was not the braggart does not mean that the defendant must be innocent, it does mean the prosecution would loose its most compelling evidence. This kind of error, the result of which leaves a confession unchallenged, cannot be harmless where there is no other significant evidence of guilt. Indeed, without the testimony attributing the bragging confession to the defendant, there would be no evidence to sustain the verdicts. The exclusion of the business-employment records thus denied the defendant his rights to present a defense and to compulsory process, and he must now be given a new trial in which the jury will consider this critical evidence.

II

DUE PROCESS OF LAW WAS DENIED WHERE THE ENTIRE BURDEN OF PROOF WAS LAID UPON THE DEFENDANT AND REQUIRED HIM TO PROVE THE TRUTH OF *AN* ALIBI, WHICH HE DID NOT RAISE, IN ORDER TO BE FOUND NOT GUILTY.

In Williams v. *Florida,* **399 U.S. 78 (1970),** the United States Supreme Court upheld Florida's notice-of-alibi rule as a constitutional mechanism for avoiding surprise at trial. The rule requires the defense, on written demand of the prosecuting attorney, to provide notice if an alibi defense is intended. However, when an accused does not provide notice and does not offer an alibi defense the rule does not grant the prosecution new trial strategies to exploit before the jury. Yet in this case, where the defendant filed no notice, did not raise an alibi, and did not even testify, the prosecutor tried virtually the entire case by attacking the defense for failing to substantiate his pre-arrest alibi explanation of innocence.

Having a case with neither physical evidence, eye witnesses, or a confession to the police that showed guilt, the prosecutor chose to present the jury with the defendant's pre-arrest alibi statements. **(R.1289-1313, 1440-1471).** The alibi was that at the time of the crime the defendant was walking home from a bar when he was attacked near a corn field. **(R.1289-91, 1440-43).** The defendant said he had to use his knife on the assailants and then ran through the corn field, eventually reaching the home of a friend, Mr. Aguayo. **(R.1291, 1294-5,**

1298-1313, 1443-6, 1470-71). The alibi explained his whereabouts and his presence one half mile from the murder scene with fresh blood on his clothing and knife.

The reason for the prosecutor's tactic soon became apparent: after the state proved the murders were committed all the remaining witnesses, except a migrant co-worker who allegedly overheard the defendant bragging about the crime,[5] were called solely to disprove the alibi explanation. Thus the prosecution "proved" its case by showing that the defendant was a liar who could not "prove" his alibi--which the defendant never raised. Precedent shows this strategy improperly shifted the burden of proving innocence to the defendant.

Our district courts have strongly condemned this unique form of prosecutorial misconduct. In one of the first known instances where it occurred, *Kindell* v. ***State***, 413 So.2d 1283 (Fla. 3d DCA 1982), the prosecutor commented upon the accused's failure to substantiate an alibi when he did not call certain witnesses. Judge Pearson, concurring, explained:

> An inference adverse to the defendant is permitted when the defendant fails to call witnesses *only* when it is shown that the witnesses are peculiarly within the defendant's power to produce and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent . . . . In the present case, the State not only totally failed to establish the competency and availability of the so-called alibi witness

[5]See Issue I for argument regarding the exclusion of business employment records which proved that the defendant was not the migrant who made the bragging confession.

> as a predicate to its arguments, but--even more egregiously---itself created, in order to later destroy, the alibi defense.

413 So.2d, at 1288 (emphasis in original, citations and footnotes omitted).

Kindell was followed by *Bayshore* v. State, 437 So.2d 198 (Fla. 3d DCA 1983), where the accused was convicted upon the testimony of a victim who said she awoke to find the accused going through her purse. The victim identified the accused as a neighbor, and was able to select his picture from a photo lineup. The accused did not file a notice of alibi, or even hint at trial that he had one. The defense was simply that the prosecution offered conflicting evidence identifying the accused as the criminal.

However, the prosecutor in *Bayshore* had the investigating detective tell the jury of the statements the accused made. The detective testified that the accused "'kept making statements that he wasn't in the neighborhood. He wasn't anywhere near there. That he was at his father's house the night of the burglary . . . '." 437 So.2d, at 199. Later, in closing, the prosecutor argued: "'[I]f Thomas Bayshore was with his father as he told officer (sic) Rivera, where's the one person who can corroborate that?'" Id.

The Third District first held that by eliciting Bayshore's statements the prosecution deliberately, and improperly, created an alibi defense for an accused who had no intention of doing so. The court reversed because the prosecutor's tactic wrong-

fully shifted the burden of proof to the accused, suggesting to the jury that he had to prove innocence.

The Fourth District followed Bayshore in ***Brown*** v. ***State,*** 524 So.2d 730 (Fla. 4th DCA 1988), where the prosecutor cross-examined a testifying accused about who he was with while he watched a football game before the crime was committed. The accused had not raised an alibi for the time the crime was committed. The accused's defense was simply that he was not the person who committed the crime.

The court in ***Brown*** found that "***but for*** the State's introduction of the alibi issue no testimony pointing to any alibi defense would have been presented to the jury." 524 So.2d, at 731 (emphasis in original). The court held that given the victim's uncertainty in her identification of the accused, the insinuations that the defendant had the burden of proving his innocence were prejudicial and required reversal of the conviction. 524 So.2d, at 731.

The First District has also applied ***Kindell's*** logic and reversed a conviction where the prosecutor tried to shift the burden of proving an alibi. ***Gilbert*** v. ***State,*** 362 So.2d 405 (Fla. 1st DCA 1978). In ***Gilbert,*** the First District held that the error was harmful even though the trial judge had given a curative instruction which purported to restore the burden of proof upon the prosecution.

The prosecutor did here exactly what was condemned in ***Kindell, Bayshore, Brown, and Gilbert.*** Defense counsel never made

mention of an alibi or the defendant's explanation for his whereabouts or the blood; it was the prosecutor who said in opening statement that the defendant had given his explanation and that it could not be believed. (R.1009-10).

In fact, it was the prosecutor who introduced the defendant's alibi that gave the jury the innocent explanation. (R.1289-1313, 1440-1471). It was the prosecutor who called four witnesses to show that the alibi was false. (R.1248, 1276, 1395, 1405). It was the prosecutor who had Detective LeClaire, despite objection and the court's caution, recite the defendant's refusal, inability, or failure to provide details that would support the alibi. (R.1441, 1442, 1443, 1447). It was, again, the prosecutor who offered the elaborate aerial exhibits and, while having the jury walk about them, had Detective LeClaire repeat the improbability of the defendant's alibi explanation of the route taken from the corn filed attack. (R.1418-9, 1420-21, 1440-42, 1446, 1455-60, 1463-5, 1468-9). And, of course, it was the prosecutor in closing who did not bother to argue the burden of proof, or even elements of the crimes, but who instead gave a detailed analysis of how the defendant's alibi explanation was a lie. (R.1675-8). It was she who attacked defense counsel, claiming that he did not address the defendant's explanation because he personally knew it to be untrue. (R.1724). It bears repeating that the defendant did not even take the stand, let alone present an alibi.

In this case, the prosecution had no eye witnesses or physical evidence and thus came upon a strategy to avoid its burden of proof. It first introduced, and then "disproved," an alibi which the defendant never intended and never did raise. The prosecutor thus mislead the jury with the belief that the defendant had the burden of proving innocence. The shifting of the burden of proof was fundamental error; it denied the defendant due process of law, and now requires that this Court reverse the conviction so that trial can be held upon the evidence--or lack thereof.

III

DUE PROCESS WAS DENIED WHERE, IN A CASE WITH VERY LITTLE EVIDENCE AND THE DEFENDANT DID NOT TESTIFY, THE PROSECUTOR DELIBERATELY INFLAMED THE JURY'S PASSION OVER A REVOLTING CRIME BY APPEALING TO EMOTION, ATTACKING THE DEFENDANT AS A LIAR, CHALLENGING THE DEFENSE TO PROVE INNOCENCE, CREATING ILL WILL AGAINST DEFENSE COUNSEL, AND BY "TESTIFYING" AGAINST THE DEFENDANT IN CLOSING ARGUMENT.

Prosecutors have the duty to see that justice is done. This duty is owed to the people of the State of Florida and is not satisfied when a conviction is achieved at the expense of a fair trial. The attitude of conviction at any cost is wholly inconsistent with the prosecutor's role.

Generally, where the trial record simply indicates some instances of prosecutorial misconduct, such are harmless error, unless the errors involved are so basic to a fair trial that they could never be treated as harmless and are so prejudicial

so as to vitiate the entire trial. *State v. Murray,* 443 So.2d 955, 956 (Fla. 1984); Cobb v. *State,* 376 So.2d 230, 232 (Fla. 1979). An important illustrative case is *Hill v. State,* 477 So.2d 553 (Fla. 1985), where the accused was convicted of first degree murder and appealed improper prosecutoriai comments. This Court found that the comments, while improper, were harmless error. However, this Court explained that had the case involved substantial factual disputes the prosecutor's inexcusable comments would have resulted in harmful error requiring reversal of the convictions. 447 So.2d, at 556-57.

In *Teffeteller v. State,* 439 So.2d 840 (Fla. 1983), this Court reversed the imposition of a sentence of death because of prosecutorial misconduct during the penalty phase. It was declared: "we cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase." 439 So.2d, at 845. In *Garron* v. *State,* 528 So.2d 353 (Fla. 1988), this Court developed the analysis further. There the prosecutor's remarks were "so egregious, inflammatory, and unfairly prejudicial" that a mistrial was the only proper remedy.

It is acknowledged that much of the prosecutorial misconduct occurred in this case without objection and motion for mistrial. However, the lack of objection does not validate egregious misconduct which denies a fair trial. In *Peterson v. State,* 376 So.2d 1230 (Fla. 4th DCA), the accused was convicted

of delivery of heroin and cocaine. The court held that even though most of the prosecutor's closing arguments were without objection, the "contents of the final argument taken as a whole were such as to utterly destroy the defendant's right to essential fairness of his criminal trial, thus the record presents fundamental error." 376 So.2d at 1230. The convictions were reversed. Moreover, this Court has held that some prosecutorial misconduct is so egregious that curative instructions are not effective and new trials must be awarded. *Oglesby* v. *State*, 23 So.2d 558, 559 (Fla. 1945); *Carlile* v. *State*, 129 Fla. 860, 176 *So.* 862, 864 (Fla. 1934). *See also Ruiz* v. *State*, 395 So.2d 566 (Fla. 3d DCA 1981) (reversed because curative instruction not effective); Reed v. *State*, 333 So.2d 524 (Fla. 1st DCA 1976) (same). In this case, because there was very little evidence of the defendant's guilt, the overwhelming cumulative effect of the misconduct rendered the trial unfair and it matters not that not all of the misdeeds were accompanied by objection.

The trial record in this case demonstrates that the prosecutor engaged in relentless attempts to inflame the jurors passions by appealing to their emotions over a revolting crime, by attacking the defendant as a liar, by challenging the defense to prove innocence, by creating ill will against defense counsel, and by "testifying" against the defendant. Though obviously effective, such cumulative prosecutorial misconduct is always contrary to the underpinnings upon which our legal system

is based. Thus, because there was very little evidence of guilt, this incessant pattern of misconduct was fundamental error.

The prosecutor began the trial with, as demonstrated in the preceding argument, an opening statement that began to shift the burden of proving innocence upon the defendant. The prosecutor then proved the revolting nature of the crime by deliberately eliciting emotional testimony from the victims' friend about how the family, including a nun, had to be contacted after the bodies were discovered. (R.1021-8). The friend, Mrs. Flight, left the stand in tears after the prosecutor openly apologized before the jury for being forced to show her the gruesome photographs of the victims. (R.1028-30).

The prosecutor did not stop with this simple ploy for emotional sympathy and prejudice but took up the task again in closing argument. In her initial argument the prosecutor apologized for putting Mrs. Flight in the position of having to identify the victims. (R.1666). Later, after defense counsel argued that the evidence was insufficient and that witnesses had not told the truth, the prosecutor, this time apologizing to the jury for raising her voice, emotionally declared she was "sick and tired of sitting there and listening to this assault on the State's witnesses . . . ." (R.1713). Shortly thereafter the prosecutor asserted that the defendant is "accountable," and in the same breath, she complained that persons who testified for the state "were victims too[,] . . . vilified as witnesses . . .

." (R.1731). The prosecutor obviously wanted the jury to feel sympathy for Mrs. Flight and others, simply because it was the defendant who made the trial necessary.

These arguments violated several well established prohibitions against misconduct. It is wrong for a prosecutor to display her emotions to the jury by making inflammatory arguments. *Hill* v. *State*, 515 So.2d 176 (Fla. 1986); *Adams* v. *State*, 192 So.2d 762 (Fla. 1966); *Peterson* v. *State, supra,* Nor is it right for a prosecutor to ingratiate herself to the jury by thanking them on behalf of the victim, or as in this case, by apologizing to them for the tearful trauma suffered by the victim's friend for having to come to court, *See Harris* v. *State*, 414 So.2d 557 (Fla. 3d DCA 1982). Moreover, it is never appropriate for a prosecutor to blame the defendant or defense counsel for a witness' tearful breakdown on the stand. *Harris* v. *State, supra.*

However, the prosecutor did not limit her improper tactics to ordinary emotional appeals for sympathy and prejudice. Repetitive questioning of witnesses, especially when defense counsel chose to object, was employed in a number of instances to achieve nothing but unfair prejudice. This tactic was first used when defense counsel made his first objection to the prosecutor commenting to the jury on counsel's evidentiary objections. (R.1283-4). The prosecutor apparently took the court's overruling as an invitation to have witnesses repeat testimony. (R.1283-4). Later, on several occasions, the court

cautioned and reprimanded the prosecutor for making jury comments during objections, (R.1423-4, 1617, 1586, 1587, 1591, 1597, 1590), but such came too late to effect the prosecutor's desire to have testimony constantly repeated for prejudicial effect.

Repetitive questioning was used to show, after objection, that the defendant's blood-stained knife had a bent tip, (R.1306), and that the defendant might have been trying to avoid being seen with the blood spots on his clothing. (R.1306). Incredibly, this last repetition came when the prosecutor asked the reporter to read back a question and answer to which objection had been ***sustained.*** (R.1306).

But these occurrences were only a precursor to the overwhelming prejudice the prosecutor was to gain from her presentation of Mr. Aguayo's testimony. The defendant told Mr. Aguayo on Sunday morning that he had told his attackers, when he fought them off near the corn field, "not to make me mad, that I have an animal inside of me." (R.1296-7). Mr. Aguayo actually repeated the statement six times before the jury, mimicking how the defendant had said it. Not satisfied, the prosecutor asked, in immediate succession:

> Are you saying that he said, "I told them not to make me mad"?
>
> * * *
>
> What is that you said about an animal? I didn't hear you.
>
> * * *

"I told him not to make me mad, I have an animal inside of me"?

(R.1296-7).

Now that the defendant's statement (considering the above questions and answers) had been repeated four more times, defense counsel objected to the repetition. **(R.1297).** The prosecutor responded by disingenuously complaining about noise *outside* the courtroom and her inability to hear Mr. Aguayo's testimony. **(R.1297).** The court then allowed the prosecutor to have the reporter read back the testimony for a final, eleventh, time. **(R.1297).**

The prosecutor, however, was hardly satisfied with simply attributing the "make me mad, animal inside **me"** statement to the defendant. In closing argument she did not say, as the state's evidence showed, that the defendant made the statement while referring to the corn field attack. Instead, the prosecutor held up a picture of the victims, gave her personal opinion that the defendant was lower than and animal, and declared that the defendant's **"animal"** statement referred to the victims. (R.**1729).** Continuing with this distortion of the state's evidence of what the defendant said, the prosecutor argued that the defendant had made the "make me mad, animal inside **me"** statement along with the alleged bragging confession overheard in the fields. **(R.1733).** Without doubt this intentional misconduct succeeded in prejudicing the jury by its deception--despite clear evidence, the jury told the court during deliberations that they "have a question as to when Mr. Feliciano

Aguello [sic.] testified the defendant said ' . . . I have an animal in me'". (R.120, **121).** The court's response, that jurors must rely on their own recollection of the testimony, **(R.102, 121),** could have done nothing to alleviate the prejudice since it told them nothing of the obvious source of their confusion, the prosecutor's misrepresentations.

Before considering the impropriety of the prosecutor's deceptive arguments, it is important to note that the defendant's statement about the corn field attack did not justify the prosecutor's personal insult that the defendant was lower than an animal. This unprofessional behavior has been uniformly condemned. *Darden* v. *Wainwright,* **477 U.S. 168 (1986);** *Gomez* v. *State,* **415** So.2d **823** (Fla. 3d **DCA 1982).** It is cannot be justified upon the ground that it was the defendant who said he had "an animal **inside"--the** defendant was clearly referring to the corn field attack. *Compare Darden* v. *State,* **329 So.2d 287** (Fla. **1976), *aff'd, Darden* v. *Wainwright,* 477 U.S. 181 (1986)** (defense counsel's "animal" description of perpetrator invited prosecutor to use the same term for accused). In fact, this misconduct laid the ground work for the prosecutor's evidentiary distortion, that the defendant made the statement as a "confession" which referred to the victims.

But, unfortunately, the "make me mad, animal inside me" distortion was not the only occasion in which the prosecutor seriously and prejudicially misrepresented evidence. The state's key witness, Rufina Perez, had identified the defendant

as the co-worker she had overheard in the fields giving the bragging confession. (R.1360-82). The defendant then called the custodian of the business-employment records for Mr. Trevino, the employer of Ms. Perez and the defendant. (R.1532-61). Before the custodian was excused, the jury learned that the records existed. (R.1522-31). But because of the state' artful objection, the records--which showed the defendant could not have been the braggart--were excluded.[6] (R.1532-61). Defense counsel argued this testimony by simply stressing, correctly, that the state had the burden of proof and that other testimony from Mr. Aguayo showed that the defendant was not the braggart. (R.1687-1700).

The prosecutor's rebuttal was not fair response.[7] She "testified" on her own, claiming, without any evidentiary support:

> . . . you can't get the records. I wouldn't say we didn't look for them. You better believe we looked for them. The police looked for them but they simply didn't exist, and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some.

(R.1726). This "testimony," which did everything but lie to the jury, was enough to say that the state had fully investigated

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[6]The exclusion of these records is addressed in Issue I.

[7]Defense counsel does not "invite" prosecutorial misconduct by arguing the absence of evidence in the state's case because such argument is entirely proper. See *Starr* v. *State,* 518 So.2d 1389 (Fla. 4th DCA 1988); *Williamson v. State,* 459 So.2d 1152 (Fla. 3d DCA 1984); *Wright* v. *State,* 363 So.2d 617 (Fla. 1st DCA 1978).

the defendant's evidence and had determined, for the jury's benefit, that it does not help his case. As Point I of this brief demonstrates, nothing could be further from the truth.

It is fundamental that it is wrong for a prosecutor, because of her official position, to "testify" or give a personal opinion that either mis-states the case or suggests that there is evidence not presented to the jury. *Walker* v. *State,* 473 So.2d 694 (Fla. 1st DCA 1985); *Briener* v. *State,* 462 So.2d 831 (Fla. 4th DCA 1984); *Williamson* v. *State, supra: Salazar-Rodriguez v. State,* 436 So.2d 269 (Fla. 3d DCA 1983) (prosecutor "testifying" for missing witnesses); *Flicker* v. *State,* 296 So.2d 109 (Fla. 1st DCA 1974) (mis-stating case). The prosecutor in this case violated this rule. She deliberately confused the jury about the defendant's corn field statement. She "testified" that the police determined that the business-employment records did not substantiate defense counsel's claim that the defendant was not the braggart.

The pattern of prosecutorial misconduct even extended to personal attacks on defense counsel and his non-testifying client, the defendant. The prosecutor began her initial closing by an offensive "baiting" technique. She declared that representations made by defense counsel in opening statement were "IOUs" to the jury. (R.1656). She specifically referred to the six "promises" of defense counsel. (R.1657-1659, 1660-1661, 1661-3, 1663-5, 1665-6, 1666-79). The prosecutor thus improperly invited the jury to try defense counsel, rather than the

defendant. *See Briggs* **v.** *State,* 455 So.2d 519 (Fla. 1st DCA 1984).

Defense counsel, in his closing, did not bite the hook. He declared that he had not promised anything because the defense had no burden at all. (R.1680). He did not claim that the defendant's alibi explanation, introduced by the state, should be believed or was a basis for acquittal. Never mentioning his client's explanation, defense counsel argued the inconclusive nature of the evidence of guilt, (R.1687-8); he cautioned the jury about responding emotionally to the gruesome nature of the crime, (R.1700); and, criticizing the police investigation, he said witnesses "are not telling you the truth." (R.1701,1704, 1707-9).

This rather conventional closing argument some how brought out the prosecutor's venom. She began her rebuttal by declaring that she was "sick and tired of sitting there and listening to this assault on the State's witnesses, without grounds, with no response from defense." (R.1713). She called the defendant a liar by arguing that his own lawyer, defense counsel, never addressed the defendant's "story" because he personally knew it to be untrue. (R.1724). She implored the jury to "take exception to [defense counsel's] misstatements of fact and misstatements of evidence." (R.1733.) The prosecutor ended her attack on defense counsel with one of her now familiar apologies to the jury: "I'm sorry for raising my voice at this moment, but I am greatly disturbed by these allegations." (R.1734).

It is absolutely wrong for a prosecutor to criticize defense counsel for attacking the credibility of witnesses. *Harris* v. *State, supra,* or suggest that defense counsel is not being honest with the jury. *Ryan* v. *State,* 457 So.2d 1084, 1089 (Fla. 4th DCA 1984). Here the prosecutor not only violated these rules and **"tried"** defense counsel, she threw in her claim that even defense counsel knew his client was a liar.

Moreover, it is wrong to call a non-testifying accused a liar since it cannot be justified as a comment on the credibility of a witness, Craig v. *State,* 510 So.2d 857, 865 (Fla. 1987), and is therefore either an improper comment on silence, *Ryan* v. *State,* 457 So.2d, at 1090, or an impermissible attack on the defendant's character. See *State* v. *Murray,* 443 **So.2d,** at 956. In this case, given the tone and content of the prosecutor's other arguments, she probably intended it to be the latter. In either event, she succeeded in prejudicing the defendant before the jury.

But even this was not the extent of the prosecutor's misconduct. She responded to defense counsel's entirely proper argument that the circumstantial evidence was not enough by giving the jury her personal opinion of the consequences of a verdict which accepted the defense argument. (R.1716). The prosecutor did not just opine that *a* guilty man would go free, she **"assure[d]"** the jury that the criminal justice system would then be unable to convict *any* criminal if defense counsel's arguments were accepted. (R.1716). The

prosecutor obviously wanted the jury to fear that by acquitting the defendant dire consequences would result — the unleashing of criminals into the community. Given the paucity of evidence showing the defendant's guilt, the prosecutor was probably successful.

The tactic of alluding to the jury's apprehension of crime in the community has been universally condemned. *E.g., Gomez* v. *State, supra; McMillian* v. *State,* 409 So.2d 197 (Fla. 3d DCA 1982); *Reed* v. *State,* 333 So.2d 524 (Fla. 1st DCA 1976). Yet the prosecutor here did not resist the temptation. Along with her other misdeeds, this improper argument must be considered in determining whether the defendant was fairly tried. See Pope *v. Wainwright,* 496 So.2d 798, 801 (Fla. 1986) (combining improper comments).

This prosecutor so tainted the proceedings with emotional sympathetic appeals and prejudice that there can be no saving the defendant's conviction. This Court in *Garron* put it well by declaring that "when comments in closing argument are intended to and do inject elements of emotion and fear in the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." 528 So.2d, at 353. The tactics used in this case are clearly the type of offensive conduct rightly condemned by this Court.

Undoubtedly the state will now argue, as was done for example in *Redish,* 525 So.2d 928, 931 (Fla. 1st DCA 1988), that the prosecutor's misconduct was harmless. However, in *Redish*

the court held that due to the prosecutor's repeated misconduct "it cannot be said beyond a reasonable doubt that the appellant at bar would have been convicted without a taint of impermissible remarks made to the jury." 525 So.2d, at 931. In this case, because there was only the barest of evidence, the prosecutor probably felt compelled to resort to the repeated tactics that were used. But that hardly allows for the relentless misconduct and certainly does not validate a conviction in which there is no reliability.

The United States Supreme Court in ***Darden*** v. ***Wainwright, supra,*** found that the prosecutor's improper closing argument did not deprive the accused a fair trial. The Supreme Court held that the relevant question was whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Quoting ***Donnelly*** v. ***DeChritoforo***, 416 U.S. 637 (1974). In ***Darden,*** the Supreme Court held that because there was overwhelming eye witness and extensive circumstantial evidence, and the prosecutor's improper arguments did not manipulate or mis-state the evidence, the misconduct did not ***so*** infect the trial so as to deny due process.

In this instance just the opposite of ***Darden*** is true. What little evidence of guilt existed was distorted and mis-stated by the prosecutor throughout the trial. One need only to consider her "testimony" about the missing business-employment records or the jury's question about when the defendant made the

"make me mad, animal inside me" statement to know that the prosecutorial misconduct seriously affected the jury's verdict.

The misconduct here was calculated to inflame the jury, and the record is replete with statements that are either offensive, improper, or misleading. Considering the lack of evidence of guilt, the exclusion of exculpatory evidence (Issue I), and the shifting of the burden of proof (Issue 11), the likelihood of a cumulative prejudicial effect is a certainty. The resulting conviction was fundamentally unfair and a denial of the defendant's constitutional right to due process of law.

IV

THE TRIAL COURT ERRED IN CONSIDERING *AN* INFLAMMATORY VICTIM IMPACT STATEMENT FOUND IN THE PRESENTENCE INVESTIGATION REPORT WHEN IT SENTENCED THE DEFENDANT TO DEATH.

In Booth v. Maryland, **482 U.S. 496 (1987),** the United States Supreme Court held that consideration of a VIS by the sentencer in a capital case violates the Eight Amendment. The VIS in ***Booth*** contained a description by the victims' families of the personal characteristics of the victims, the emotional impact of the crimes on family members, and family members' opinions and characterizations of the crime and the defendant. **471** U.S., at **503.** The Supreme Court held that such information is irrelevant to a capital sentencing decision, and that a VIS creates an impermissible risk that the sentencer "may impose the

death penalty in an arbitrary and capricious manner." 471 U.S., at 503.

Booth has been applied by this Court. In Skull v. *State*, 533 So.2d 1137 (Fla. 1988), the jury recommended the death penalty and the judge subsequently entered an order sentencing the defendant to death. There was a VIS contained within a PSI seen by the judge. This Court found that the Skull VIS, though not as articulate and detailed as the one in *Booth*, had the same effect. It served only to put emotional and irrelevant material into the sentencing process, This Court then held that the trial judge, as the sentencer in Florida, may not consider a VIS contained in a PSI when sentencing the defendant to death. 533 So.2d, 1142-3. However, this Court held that it is not error for a judge to merely see a VIS that is contained within a PSI.

Skull was concerned with whether the judge had actually considered the VIS in sentencing the defendant to death. Part of the problem is that "[b]ecause such statements are usually contained in a PSI, it is unreasonable to expect judges to excise those portions of the report that are not proper for consideration." 533 So.2d, at 1143. In making sure that this type of uncertainty would not occur again, this Court declared "that victim impact statements may no longer be made a part of presentence investigation reports in capital cases." 533 So.2d, at 1143, at note.

In this case the court ordered a PSI into the background of the defendant.[8] (R.287). The court heard oral arguments for the specific purpose of considering the persuasiveness of the PSI. (R.1879). The PSI included a VIS which went into detail describing the personal characteristics of the victims, and their opinion and characterization of the crimes and the defendant. (3SR.6).

The entire PSI was implicitly incorporated into the written sentencing order. The court declared:

> This court has evaluated and considered at length ***all of the evidence*** and arguments which have been made in this case in reaching its decision.

(R.289). (emphasis added). In support of the death sentence the court said it "independently reviewed and weighed the evidence presented before the jury ***and the court*** *itself*." (R.290) (emphasis added).

This case is thus very different than ***Grossman v. State,*** 525 So.2d 833 (Fla. 1988), where there was a VIS presented to the judge. The sentencing order in ***Grossman*** contained no reliance, or even a hint of reliance, on the VIS. Indeed, the order recited that the PSI, which contained the VIS, had been requested to gain insight into the defendant's background. 525 So.2d, at n.8.

In this case, unlike ***Grossman,*** the trial judge found mitigation. (R.289). Unlike Skull, the trial judge considered

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[8]The order was entered prior to Skull.

the VIS. This case is therefore analogous to other instances where the sentencing judge has found and relied on an invalid aggravating circumstance and at least one mitigating circumstance exists which is to be weighed. In such cases, this Court has held that the weighing of aggravating and mitigating factors is the sentencer's function, and "[a]s a reviewing court we do not reweigh the evidence." *Bates* v. *State*, 465 So.2d 490, 493 (Fla. 1985). ***Accord:*** *Brown* v. *Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981). Accordingly, the court's consideration of the VIS deprived the defendant of a fair sentencing hearing, and requires reversal of the sentence of death.

CONCLUSION

Based upon the foregoing cases, authorities, and arguments the defendant requests that the judgment of guilt be vacated and that he be awarded a new trial, and that the sentence of death be vacated and sentencing be remanded for further proceedings.

CERTIFICATE OF SERVICE

I DO CERTIFY that copy of hereof has been furnished to: Yvette Prescott, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128, by U.S. Mail/~~hand~~ delivery this 27 day of September, 1989.

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