IN THE SUPREME COURT OF FLORIDA

No. 75,494

JAMES HUDSON SAVAGE
APPELLANT

v.

STATE OF FLORIDA
APPELLEE

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

JAMES HUDSON SAVAGE, Appellant, v. STATE OF FLORIDA, Appellee.	)	No. 79-494

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REPLY BRIEF OF APPELLANT

COMES NOW, APPELLANT, and files the following brief in reply to the *Answer Brief of Appellee* (hereinafter *"Answer"*):

A. INTRODUCTION: Appellee's edition of the Facts must be carefully Scrutinized.

As this Court will recall, James Savage is an Aboriginal Australian, who received his unfortunate name when forcibly adopted out of his family under the *White Australia* policies of the early 'Sixties. He has appealed his convictions, and the sentence of death which was imposed over an eleven-to-one life recommendation.

Appellee spends much of the brief lambasting Mr. Savage for failing to see the record in the dubious light in which Appellee would cast it. By and large, the faults perceived by Appellee are either petty or non-existent, and Appellant has no intention of responding to all of them. This Court is quite capable of sorting the relevant facts and issues in this case. However, Appellant

would have this Court review one or two themes which permeate Appellee's *Answer*.

First, there is the perennial exaltation of form over substance, even when the consequence is utterly incompatible with the most rudimentary notions of justice. For example, Appellee exhorts this Court over and over again to ignore "nonrecord hearsay evidence" of perjury by the State's witnesses. *Answer, at 36;* see also, e.g., *Id., at 59, 78, 79; App. at 6, 7, 13, 16, 18, 22.*

It is worth considering what it is that Appellee would have this Court ignore: The State's witnesses arrested Mr. Savage and held him on the pretext that he was on probation after parole from a prior conviction. Whem the State had safely secured a death sentence the victim's family sued the State for releasing Mr. Savage early. Astoudingly enough, the State defended by saying that Mr. Savage had never been on parole.

Appellee now argues that it is "ironic" that Mr. Savage relies on evidence of this perjury which the State allegedly "has never had an opportunity to rebut." Indeed, Appellee argues as follows:

> While Savage has asked this court to remand for a hearing to determine the nature and scope of the state's subornation of perjury, he has never asked this court to relinquish jurisdiction to the trial court to resolve the underlying issue of his probationary status. It is clear that [Mr.] Savage knew about this issue well before he filed his brief, yet he made no attempt to resolve it in the trial court before presenting it to this court. Consequently, appellee contends that any claim in the instant case related to [Mr.] Savage's probationary status must be found to be waived and procedurally barred as well.

Answer, at 79 (emphasis supplied).

The truth of the matter is this: Appellant found out about this machiavellian course of events immediately prior to filing his initial brief. Since then, Appellant has addressed the issue in the trial court, and -- with full notice to the State of Florida -- secured a ruling from the trial court that Mr. Savage's "probationary terms expired while he was in confinement. . . ." *Order on Motion to Vacate, at 4* (attached as ***Exhibit A***). This all occurred more than two weeks before Appellee made the contrary representation to this Court.[1]

Thus Appellee argues to this Court that Appellant should be procedurally defaulted for "failing" to do precisely what Appellant actually did. More offensive than this, however, is Appellee's argument that Mr. Savage should be defaulted because agents of the State successfully covered up the perjury they committed. This will be the subject of further discussion below.

The second, and most predominant, theme in the *Answer* may be stated as follows: Any fact which Appellee finds inconvenient should be ignored by this Court. For example -- with a ring of desperation -- Appellee objects to Appellant stating the overwhelming (eleven-to-one) nature of the jury's vote for life because the "jury was never polled as to its specific recommendation." *Answer, at App. 8*. So what? The trial court explicitly found this as a

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1. Mr. Savage does not mean to suggest that Appellee acted dishonorably in misleading this Court. It is quite possible that counsel who wrote Appellee's brief was unaware of the precise facts. Suffice it to say, however, that the knowledge of one state agent should be imputed to another. See Freeman v. Georgia, 599 F.2d 65, 70 (5th Cir. 1979) (citing cases).

fact in his sentencing order. (R. 3580) Just because Appellee does not like this fact does not mean it should be dismissed out of hand. See Douglas v. State, ___ So. 2d ___, No. 67,603 (Fla. Jan. 15, 1991) (reversing, noting appellant "sentenced to death over a unanimous jury recommendation of life imprisonment").

Take, as another example of this theme, Appellee's treatment of the psychiatric evidence in this case. Appellee would have this Court believe that there was really nothing wrong with James Savage. Indeed, Appellee criticizes Appellant for pointing out Mr. Savage's schizoid personality disorder. Appellee argues that this diagnosis cannot be true because Dr. Greenblum, the State's expert, "had a report describing [Mr.] Savage as a warm and intelligent individual, which is inconsistent with a diagnosis of schizoid individual." *Answer, at 28.* Rather, Dr. Greenblum must be correct in finding that Mr. Savage has an Anti-Social Personality Disorder. *Id., at 28, 53.*

Appellee chooses not to mention the definition of Anti-Social Personality Disorder, which is even more inconsistent with Mr. Savage's reported "warmth":

> The essential feature of this disorder is a pattern of irresponsible and antisocial behavior . . . . Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty. . . .

Diagnostic & Statistical Manual of Mental Disorders, Third Edition (Revised), at 342 (1987) (DSM3-R) (cited at R. 2802).

Next, without citation to the record, Appellee would have this Court believe that Dr. Phillips testified that a schizoid person-

ality disorder is insignificant because, while it "puts [Mr.] Savage within 'the world of mental illness', the problem that [Mr.] Savage has is not extreme." *Answer, at 53.*[2] Contrast what Dr. Phillips actually said: This "debilitating psychiatric disease" (R. 2811-12) (emphasis supplied) means that Mr. Savage has "more than comfortably entered the world of mental illness." (T. 2805)

If unsuccessful in denigrating its substance, Appellee would have this Court reject Dr. Phillips' testimony altogether. Emphasizing that Dr. Phillips's neurological examination was "cursory," Appellee argues that he only examined Mr. Savage for "approximately four and a half hours and conducted a phone interview for approximately one hour and fifteen minutes." *Answer, at 18-19.*

In contrast, omitted from Appellee's lengthy discussion of the admirable Dr. Greenblum's evidence is the rather critical fact that the State doctor relied on no objective testing, and only conducted one interview lasting less than an hour (R. 2900), directed solely towards the issues of competency and sanity. (R. 2902)[3]

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2. Cf. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) ("it would clearly be unconstitutional for the state to restrict the trial court's consideration solely to 'extreme' emotional disturbances").

3. By citing to a statute Appellee seeks to characterize this evaluation as broader than it actually was. *Answer, at 58 n.14.* The trial court's order actually set out the more limited nature of Dr. Greenblum's inquiry. (R. 3389-91) Most of the factors identified by Appellee were only to be considered by the expert if he "determined that the Defendant [wa]s not competent to stand trial. . . ." (R. 3390) Such was not the case.

A third theme emerges from Appellee's *Answer*: All Mr. Savage's arguments should be ignored as contradictory while all Appellee's contradictions should be ignored. Appellee demands, for example, how Appellant can argue that Mr. Savage was remorseful when a section of the brief is devoted to the alleged involuntariness of his statement? The simple answer is that Mr. Savage expressed remorse on more than one occasion. (See, e.g., R. 1308, 1615, 1626, 3066-67) However, it is curious that Appellee should be so disdainful of contradictions when the prosecution argued to the sentencing judge that there was no causal link between Mr. Savage's mental illness and his culpability because he expressed remorse and accepted full responsibility for the crime. (R. 3066-67)

In the final analysis, Appellee cries loudly for this Court to "recede from [i.e. overrule] its holding in Tedder v. State, 322 So. 2d 908 (Fla. 1975). . . ." *Answer, at 41-42*. An old aphorism teaches us that if an appeal is short on law, one emphasizes facts; if short on facts, one emphasizes the law. It was in *Henry V* that Shakespeare identified the loud drumbeat as the only recourse when one is short on both facts and law: "The saying is true, 'The empty vessel makes the greatest sound.'"[4]

Turning to the issues presented by Mr. Savage's appeal, such pertinent statements as may be found in Appellee's brief will be addressed in the course of the discussion.

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4. *Henry V, Act IV, sc. iv, l. 72;* see also Shakespeare, *Macbeth, Act V, sc. v, ll. 27-28.*

SECTION 1: THIS COURT SHOULD VACATE JAMES SAVAGE'S DEATH SENTENCE AND REMAND FOR IMPOSITION OF A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS.

Briefly, prior to discussing the merits of his challenges to his sentence of death, Mr. Savage addresses Appellee's claim that it is somehow "unfair" for him to seek guidance from this Court on the application of the Double Jeopardy Clause to these proceedings.

As this Court will recall, undersigned counsel sought assistance from this Court in advising Mr. Savage of his options. It is Mr. Savage's contention that the eleven-to-one jury vote for life was clearly appropriate, and should be upheld by this Court pursuant to Tedder v. State, 322 So. 2d 908 (Fla. 1975). Had the trial court properly followed the jury's recommendation, there would be no doubt that Mr. Savage could appeal his conviction, secure in the knowledge that the death penalty would not be an option at any retrial. See Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). Although fairness would seem to militate in favor of applying Bullington in this context, no precedent from this Court informs counsel -- who are charged with advising Mr. Savage -- whether this Court's ratification of the jury's sentence would similarly bar imposition of a death sentence on retrial.

Therefore, Appellant requested that this Court first address the issue of the improper override. If, as Appellant respectfully urges, this Court agrees with the jury that life imprisonment was a reasonable punishment, Appellant seeks guidance on the double jeopardy implications of such a ruling. Only when Appellant is

fully informed of the true state of the law may Appellant then make a knowing, intelligent and voluntary decision whether to pursue challenges to his conviction.[5]

(a) Appellee's preference that Mr. Savage should roll the dice and guess whether he will be reexposed to the death penalty will ultimately defeat Appellee's purpose and waste this Court's time.

Briefly, Appellant addresses the position which Appellee has taken. Appellee believes that "[Mr.] Savage should be required to waive or not to waive [his challenges to his unconstitutional conviction]. . . ." *Answer, at 39*. Appellee apparently fails to foresee the natural consequence of forcing Mr. Savage to make an election predicated on blind guesswork.[6] Appellee's preferred course of action is self-defeating, and frustrates undersigned counsel's effort to assure finality in this case.

Consider two of the permutations on Appellee's theme. First, assume that Double Jeopardy has attached to bar reimposition of the

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5. Appellee makes one argument which is barely worthy of a response: "[I]f the recommendation is so reasonable as [Mr.] Savage claims, why is he willing to forego 'serious constitutional challenges' to his conviction so that he will not receive another one?" *Answer, at 35*. It should be sufficient to remember the words coined by Benjamin Franklin: "Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes." *Letter to M. Leroy (1789)*. Indeed, Mr. Savage must be aware that Appellee is rather intent on securing a death sentence against him at all costs.

6. It is somewhat surprising that Appellee wants counsel to advise Mr. Savage on this point from a position of ignorance. It is, after all, axiomatic that "a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimum level [of effectiveness]." Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

death penalty, because of the erroneous Tedder override: If undersigned counsel incorrectly advise Mr. Savage to forego his challenges to his conviction because of future exposure to the death sentence, Mr. Savage's purported waiver will not be knowing, intelligent and voluntary. See, e.g., Kennedy v. Maggio, 725 F.2d 269, 272-73 (5th Cir. 1984) (purported waiver "based on the fear of a non-existent penalty can be neither knowing or intelligent").[7] He will therefore be permitted to challenge to his conviction in subsequent, post-conviction proceedings.

Second, assume that Double Jeopardy has not attached, yet counsel erroneously advise Mr. Savage that he is safe from reexposure to the death penalty. If Mr. Savage is then granted a new trial, the shocking news that he will have to face a death penalty anew will be swiftly followed by a challenge to counsel's ineffective assistance on appeal. As the court held in Bell v. Lockhart, 795 F.2d 655 (8th Cir. 1986), a litigant may be "denied his constitutional right to effective assistance of counsel on appeal when his attorney failed to correctly advise him of the risks of a direct appeal. . . ." Id. at 657; see also Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

The very purpose of this Court's existence is, of course, to resolve important questions of law. Appellee's assertion that Mr.

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7. See also United States v. Ammirato, 670 F.2d 552, 555 (5th Cir. Unit B, 1982) (waiver "involuntary if it is made in ignorance of its consequences"); Gonzales v. Grammer, 848 F.2d 894, 898 (8th Cir. 1988) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

Savage may not solicit guidance from this Court on this fundamental issue is simply self-defeating and unfair.

(b) With all due respect, then, this Court should first consider the propriety of the death sentence imposed upon Appellant.

Mr. Savage therefore turns first to his challenges to the death sentence imposed upon him.

I. THE TRIAL COURT SHOULD NOT HAVE OVERRIDDEN AN 11-1 JURY VOTE FOR LIFE IN THE FACE OF OVERWHELMING EVIDENCE IN MITIGATION.

For the most part, Appellant invites this Court's attention to his initial brief, rather than repeat the arguments set forth therein. Three of Appellee's points call for a brief response.

(i) The Tedder rule is not broken, so why fix it?

Appellee calls for the overruling of Tedder v. State, 322 So. 2d 908 (Fla. 1975). See *Answer, at 41-42*. In asking this Court to fix that which is not broken, Appellee apparently finds solace in Justice Scalia's concurring opinion in Walton v. Arizona, 497 U.S. ___, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). Appellee echoes Justice Scalia's rather extreme view that placing evidence in aggravation besides evidence in mitigation creates a tension akin to the tension "between the Allies and the Axis Powers in World War Two. . . ." See *Answer, at 42* (citing Walton, 110 S. Ct. at 3062, 111 L. Ed. 2d at 535 (Scalia, J., concurring)). Apparently, this Court's recognition of a constitutional right to present evidence in mitigation is the intellectual equivalent of siding with the Nazis (or, one must assume, Saddam Hussein).

Such disdain for the breadth and depth of the jury's prerogative of mercy smacks of attitudes long since superseded. Cf. *Fielding, Tom Jones, bk. III, ch. 10 (1749)* ("Thwackum was for doing justice, and leaving mercy for heaven"). Unfortunately for Appellee's reactionary theory, Justice Scalia's preference for the abolition of mitigating circumstances runs head first into a solid decade of judicial precedent,[8] as well as the law which the Florida legislature has laid down. See *Fla. Code Ann. § 921.141 (6)*.

Short of actually abolishing mitigating circumstances, Appellee would eliminate all deference for the jury's verdict, since "the rankest of speculation is required to determine what its recommendation is based upon." *Answer, at 43*. With all due respect, Appellee's criticisms of the "speculative" quality of this Court's Tedder rule are totally bogus. In rejecting a jury verdict, the trial court does not have to "speculate" in order to identify the actual basis of the jury's recommendation. Rather, the trial court's review is carefully guided by the following inquiry:

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8. See, e.g., Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Bell v. Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Truesdale v. Skipper, 480 U.S. 527, 107 S. Ct. 1394, 94 L. Ed. 2d 539 (1987); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 256, 106 L.Ed.2d 256 (1989); McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 369 (1990).

> In order to sustain a sentence of death, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d at 910.

In contrast, if Appellee's invitation to wreck havoc with precedent were accepted, the standard of review would not be speculative so much as utterly arbitrary. Appellee's proposed rule might be stated as follows:

> Whether the trial court got out of bed the wrong side that morning and, willy-nilly, decided to differ from the jury.

Sixteen years of precedent from this Court has established a workable, appropriate rule. Other than a preference for the execution of everyone charged with first-degree murder, Appellee offers no reason to turn away from Tedder now.

(ii) Appellee simply fails to cite authority for the proposition that the jury's life recommendation should be rejected in this case.

While on this subject, it is worth noting that most of the cases cited by Appellee in "support" of an override actually condemned the judge's rejection of the jury's decision.

For example, Appellee argues without citation that the trial court should properly reject the argument that Mr. Savage's retarded emotional maturity -- equivalent to a fourteen-year-old (R. 2775) -- was to be considered in mitigation. *Answer, at 53.* In contrast, in Scull v. State, 533 So. 2d 1137 (Fla. 1988) (cited in *Answer, at 58*), this Court held that the "low emotional age" of the accused could be considered in mitigation. Accord Amazon v.

State, 487 So. 2d 8 (Fla. 1986) (cited in *Answer at 56*) ("emotional maturity of a thirteen-year-old" should be considered mitigating).[9]

According to Appellee, the trial court properly gave insignificant weight to Mr. Savage's impaired mental state because he was not "substantially impaired. . . ." *Answer, at 52 (emphasis supplied)*. In contrast, in Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (cited in *Answer, at 50*), an override was reversed, in part because "any emotional disturbance relevant to the crime must be considered and weighed by the sentencer. . . ." Id. at 912 (emphasis in original).

Appellee also argues without support that, although "[Mr.] Savage's drug and alcohol use had some effect on his judgment," this should be rejected as insignificant because the "crime of financial gain was completed well before the murder and sexual battery occurred." *Answer, at 51*. This notion flies in the face of other cases cited by Appellee. See, e.g., *Answer, at 45*, citing Pentecost v. State, 545 So. 2d 861 (Fla. 1989) (override reversed in part because of alcohol and drug abuse); *Id., at 52*, citing Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (override reversed in part because of intoxication); *Id., at 56*, citing Amazon v. State,

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9. In addition to ignoring reality, Appellee's argument that no "link" had been shown between emotional immaturity and the crime ignores the fact that such mental abnormality must be considered mitigating. See Zant v. Stephens, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (citing Miller v. State, 373 So. 2d 882, 885-86 (Fla. 1979)).

487 So. 2d 8 (Fla. 1986) (override reversed in part because of drug abuse).[10]

In fact, nearly every case cited in the *Answer* holds that death had been inappropriate -- in direct contradiction to the theory Appellee propounds. See also Nibert v. State, 16 F.L.W. S3 (Fla. Dec. 13, 1990) (death sentence disproportionate); Campbell v. State, 571 So. 2d 415, 418-20 (Fla. 1990) (death sentence reversed). Cases decided by this Court subsequent to in Appellee's brief also support ratification of the jury's life sentence. See, e.g., Downs v. State, 16 F.L.W. S106 (Fla. Jan. 18, 1991) (override reversed based on mental disturbance, mental age of 13, drug & alcohol abuse, and schizoid personality); Hegwood v. State, 16 F.L.W. S5120 (Fla. Jan 17, 1991) (override reversed in triple murder case where one parent had abused Hegwood and testified for the prosecution, as in this case); Douglas v. State, ___ So. 2d ___, No. 67,603 (Fla. Jan. 15, 1991) (jury override reversed despite limited nonstatutory mitigating evidence).

Neither does Appellee's effort to discount all the defense evidence bear fruit, for it is fraught with contradiction. For example, remorse is a proper basis for imposition of a life sentence. See, e.g., Magill v. State, 386 So. 2d 1188, 1190 (Fla. 1980); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983); Campbell

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10. In some respects, Appellee's argument not only ignores precedent, but also ignores reality. When Appellee says that one crime was completed "well before" another, Appellee actually means a matter of a few seconds before. It is difficult to accept Appellee's fiction of a drug-crazed James Savage finishing a frenzied robbery and then becoming instantaneously calm prior to committing the homicide.

v. State, 15 F.L.W. S1, 2 n.4 (Fla. Dec. 13, 1990). This should be rejected, Appellee argues, because there "was no evidence of remorse presented, nor was such argued." *Answer, at 54.* In the very next sentence, Appellee admits that in fact there was evidence that Mr. Savage "looked remorseful during one of his confessions. . . ." *Id.* In addition, the prosecution argued to the trial court that the evidence of mental illness should carry no weight because Mr. Savage had expressed remorse for the crime in two media interviews, and taken all the blame upon himself. (R. 3066-67) Appellee simply cannot have it both ways.

Overall, Appellee argues that the trial court should review a jury verdict of life by adopting any dubious inference proposed by the prosecution, no matter how mutually contradictory the State's wishful thinking may become. This just is not the law. A judge must review the evidence for any reasonable interpretation which would support the jury's verdict. See Cheshire v. State, 568 So. 2d at 911; Amadeo v. Zant, 486 U.S. 124, 226, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988) ("[w]here there are two permissible views of the evidence, . . . [a] choice between them cannot be clearly erroneous"). There is ample support for the jury's conclusion in this case.

(iii) Appellee must be hoist on the petard of any argument that the trial court was prejudiced against Mr. Savage in this case.

Mr. Savage argued to this Court that the prosecution exhorted the trial judge to rely on inaccurate and illegitimate information in imposing sentence. See *Brief of Appellant, at 31-37.* Appellee

makes a very curious response to this allegation: The trial court did not consider this argument because, before the sentencing hearing began, "it is apparent that the trial court had already prepared its sentencing order. . . ." *Answer, at 59*; see also, *id.* ("the sentencing order was already prepared").

The sentencing hearing before the judge is a critical part of the trial where extensive argument, and often evidence, is presented.[11] If persuaded, the trial judge may decide to override a jury recommendation of death.[12] In spite of this, it is Appellee's position that the trial judge made up his mind prior to coming to the sentencing hearing in this case, and had already written up the order imposing death.[13]

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11. In this case no additional evidence was developed by the defense, although an argument was made. (R. 3074 *et seq.*) The prosecution did introduce new evidence which should have been considered in mitigation, referring to an interview with Channel 2 and Florida Today in which Mr. Savage was quoted as saying that he blamed only himself for the crime. (R. 3066-67) This remorse should have been considered in mitigation. See, e.g., Magill v. State, 386 So. 2d 1188, 1190 (Fla. 1980). The prosecution also argued that two life sentences should be imposed consecutive to a death sentence to preclude Mr. Savage's parole. (R. 3072) This reduced eligibility for parole should, similarly, have been considered in mitigation. See Jones v. State, 569 So. 2d 1234 (Fla. 1990) (jury should be allowed to consider limitation of parole stemming from consecutive sentences in mitigation).

12. While these cases are often not appealed, one author estimated some years ago that several such overrides to life have occurred. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. Davis L. Rev. 1409, 1413-14 (1985).

13. In this respect, Appellee is clearly correct, since the trial court read the sentencing order into the record. (Tr. 3094-102)

The argument that any error in the sentencing proceeding is harmless because the trial judge had prejudged the issue smacks of a *Catch-22*.[14] Indeed, Appellee proves too much, for the word "prejudge"[15] is itself inimical to a fair trial.

"Courts, like Caesar's wife, must be not only virtuous but above suspicion." U'ren v. Bagley, 118 Ore. 77, 245 P. 2d 1074, 1075 (1926).[16] It is absolutely critical that "justice satisfy the appearance of justice." In Re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1955) (emphasis supplied)). "Next to the importance of the duty of rendering a righteous judgment is that of doing it in such manner as will beget no suspicion of the fairness or integrity of the judge." Yazoo M.V.R. Co. v. Kirk, 102 Miss. 41, 58 So. 710, 712 (1912) (emphasis supplied).

Although the "[p]rejudice of a judge is a delicate question to raise," State v. Revels, 113 So. 2d 218, 223 (Fla. 1st DCA, 1959), it is Appellee who has raised the specter of prejudgment in this

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14. "'That's some catch, that Catch-22,' [Yossarian] observed. 'It's the best there is,' Doc Daneeka agreed." Heller, *Catch-22, ch. 5 (1955).*

15. The word is defined as a "forejudgment; bias; preconceived opinion." BLACK'S LAW DICTIONARY, at 1061 (5th ed. 1979).

16. See also In re Neeley, 364 S.E. 2d 250, 254 (W. Va. 1987) (comparing the judge to Chaucer's priest in the *Prologue to the Canterbury Tales* ("That if gold ruste, what shal iren do? For if a preest be foul, on whom we truste, no wonder is a lewed man to ruste")); Williams v. State, 143 So. 2d 484, 488 (Fla. 1962) ("We canonize the courthouse as the temple of justice"); Crosby v. State, 97 So. 2d 181, 184 (Fla. 1957) ("a forum where the judicial ermine is everything that it typifies, purity and justice"); State v. Parks, 194 So. 613, 615 (Fla. 1939); Aulday v. State, 166 So. 826, 827 (Fla. 1936).

case. This does not impute ill to the trial court. However, "[t]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." United States v. Columbia Broadcasting, Inc., 497 F.2d 107, 109 (5th Cir. 1974); accord Rice v. McKenzie, 581 F.2d 1114, 1116-17 (4th Cir. 1978); Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983); Aetna Life & Casualty Co. v. Thorn, 319 So. 2d 82, 84 (Fla. 3d DCA, 1975).

For example, in Anderson v. State, 287 So. 2d 322 (Fla. 1st DCA, 1973), the Court considered an allegation that the trial judge was predisposed against the accused. In remanding for resentencing, the Court held that "[t]here must be no taint of any lack of objectiveness in all acts of a judge." Id. at 325. Similarly, in State ex rel. Aguiar v. Chappell, 344 So. 2d 925 (Fla. 3d DCA, 1977), the Court disapproved of the trial court sitting on a case where he had "aready formed an opinion. . . ." Id., at 926; State v. Steele, 348 So. 2d 398, 402 (Fla. 3d DCA 1977) (judge "clearly prejudged this case").

Far from curing the errors alleged by Mr. Savage, therefore, Appellee's response acknowledges an independent violation of "[t]he due process guarantee of a fair trial. . . ." State v. Steele, 348 So. 2d at 401.

(iv) Conclusion: This Court should ratify the Jury's Sentence of Life.

Mr. Savage has many other disagreements with Appellee's treatment of this issue. He sincerely hopes that the significant

matters are adequately addressed in his initial brief to this Court.

However, Mr. Savage does not disagree with Appellee's description, perhaps stated with undue cynicism, of the "high drama involved in this case. . . ." *Answer, at 46 n.11.* The sad and extraordinary course of Mr. Savage's life has been virtually unparalleled in recent capital cases. The jury was totally reasonable in its eleven-to-one recommendation of a life sentence on the basis what they heard. This Court would be correct to ratify their decision.

II. THE TRIAL COURT ERRED IN EXCLUDING CRITICAL EVIDENCE IN MITIGATION.

Appellee treats this issue with a curious literalism which does no justice to the history of terrible discrimination which greeted any Aboriginal child into the Australia of the 'Sixties. *Answer, at 62, et seq.*

(i) The exclusion of Justice Wooten's testimony.

Mr. Savage was born into a society where all Aboriginals faced crippling discrimination. Appellee argues that evidence of the discrimination is irrelevant because no proof was offered that Mr. Savage even knew he was adopted: "the five-year-old [Mr.] Savage [n]ever contemplated the 1928 [forcible adoption] law . . . ." *Id., at 62.* Thus, Appellee would have us believe that when a small Aboriginal boy looked at himself, the only "dark person" in the area (R. 2378), and then looked at the other children in the fami-

ly, he thought every child had been found under the same gooseberry bush.

Alternatively, Appellee justifies the exclusion of evidence as "harmless" because other witnesses said Mr. Savage had been well treated as a youngster, the jury knew about the effects of cross-racial adoptions, and had heard about his psychological problems. *Answer, at 63-64.*[17] Appellee ignores the fact that Justice Wooten testified very extensively as to many facets of the Aboriginal experience in Australia, both in the 'Sixties and today. (R. 2419-79) This included a detailed analysis of the institutional discrimination which the young James Savage would have encountered (R. 2456-57), as well as the Aboriginal support system which Mr. Savage lacked in the United States. (R. 2463-64, 2469)

Suffice it to say that this Court recently instructed that the effect on an accused of an "[a]bused or deprived childhood" should be considered as a "[v]alid nonstatutory mitigating circumstance[]. . . ." Campbell v. State, 571 So. 2d at 419 n.4. The jury should have been allowed to consider the evidence in this case, and the trial court should, in turn, have given the evidence weight in his sentencing assessment.[18]

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17. Appellee also argues that the exclusion of evidence in mitigation was harmless because "the jury returned a life recommendation. . . ." *Answer, at 65.* This is a rather extraordinary statement, since the trial court excluded the evidence, and therefore did not consider it either.

18. Appellee also makes a desperate stab at justifying the exclusion of this evidence because Justice Wooten was not an expert. *Answer, at 62-63.* Appellee omits to mention that the trial judge disagreed with this position, excluding the evidence on (continued...)

(ii) The ruling which resulted in the exclusion of other defense testimony.

Appellee argues that the defense waived the second part of this issue -- the exclusion of defense evidence as a direct result of the trial court's erroneous ruling that this would open the door to cross-examination regarding Mr. Savage's recent parole. *Answer, at 64.* This argument ignores the fuller context of the quotes cited by Appellee.

The precise quote from defense counsel was:

> MR. DELGADO: * * * If the only question is Mr. Healey, are you aware that there was a twenty-seven day lapse or gap period of time between his release from jail . . . and this murder . . . if that's the sole question, we can live with that without waiving any prior objections on the record, of course.

(R. 2620) (emphasis supplied) Were this the entire content of the discussions, it would be a close question. However, then the state represented that they would go further into the issues if there was any attempt to show Mr. Savage to be either "a non-aggressive personality" or to show "that he's got some emotional disturbance." (R. 2622) Addressing the scope of this cross-examination, the trial court then told the defense that he could not give them "any major assurances . . . ." (R. 2622)

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18. (...continued)
the basis of relevancy, not lack of expertise. (R. 2491) The cases cited by Appellee bear little relevance to this proposition. For example, in Russ v. Iswarin, 429 So. 2d 1237, 1241 (Fla. 2d DCA, 1983), the court upheld the exclusion of a police officer's evidence when the officer explicitly disclaimed any expertise. In contrast, the trial court found that Justice Wooten had "experience . . . primarily from the unique Australian experience with Aboriginals." (R. 2491)

It was at this point that the defense requested a brief recess, and returned with the following announcement:

> As a result of the rulings by the court and we understand why you made them and we don't agree with them of course and continue our objection, at this time we are not going to place good Doctor Read or Mr. Healey before the jury.

(R. 2625) (emphasis supplied)

Thus Appellee's argument is meritless. If this was not an objection, there is no such thing.

III. SINCE COUNSEL WITHDREW FROM PARTICIPATION IN THE DEFENSE BECAUSE THE PROSECUTION MADE UNFOUNDED THREATS AGAINST HIM REGARDING POTENTIAL PROSECUTION, THE STATE INTERFERED WITH MR. SAVAGE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL TO AN INTOLERABLE DEGREE.

To reprise, John Delgado took no part in most of the penalty phase because he had been threatened with felony prosecution by the State, for allegedly telling James Savage's father -- truthfully enough -- that his testimony for the State would be aimed at easing his son into the electric chair. Cf. Hegwood v. State, 16 F.L.W. 5120 (Fla. Jan. 17, 1991) (judge override rejected in part because a "great part of [Appellant's] ill-fated life appears to be attributable to his mother . . . who turned [him] in and testified against him").

Appellee responds by saying that the Assistant State Attorney Bausch was merely chatting pleasantly with defense counsel. *Answer, at 31.* There is no doubt that Mr. Bausch was not shouting from the hilltops in a hostile voice, but it was not quite the

innocently affable point of information Appellee would have this Court believe:

> MR. DELGADO: [ASA Bausch] told me that as a result of the statements made to him by Mr. Savage, that that may constitute . . . witness tampering which was a third degree felony of the State of Florida. Mr. Bausch did it in a pleasant personable way. He wasn't trying to get over on me.
>
> Nonetheless, he did say to me that there may be charges in fact at least investigated. When I heard third degree felony, that concerns me to no end.
>
> * * *
>
> For the State now to say this and I say this in protection of my client -- the State has interfered with the Defendant's right to counsel.

(R. 2651-52) (emphasis supplied)

Mr. Bausch stated that there was no "indication that any charges would be filed." (R. 2662) (emphasis supplied) However, neither did he indicate that they would not, or deny that Mr. Delgado was being investigated even as they discussed the matter.

Appellee is surely correct in suggesting that this would not have occurred absent the "frayed nerves and strained tempers" of a capital trial. *Answer, at 68*. However, if Appellee agrees now that the allegations against Mr. Delgado were just a "tempest in a teapot," *Answer, at 68*, one wonders why the State did not adopt a similarly reasonable approach during the trial. At least at that

point there would have been some chance of salvaging the situation.[19]

In stating that Mr. Savage has failed to allege instances of ineffectiveness against Mr. Delgado, Appellee ignores the fact that Mr. Delgado was not acting as counsel at all. However, Appellee misapprehends the law in thinking that the familiar two-prong Strickland test applies. *Answer, at 68* (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As Appellant has previously discussed in detail, actions are "legally presumed to result in prejudice" when there has been "state interference with counsel's assistance. . . ." Strickland v. Washington, 466 U.S. at 692 (emphasis supplied).

IV. THE ERRONEOUS SUBMISSION AND CONSIDERATION OF AGGRAVATING CIRCUMSTANCES REQUIRES THAT THE DEATH SENTENCE IMPOSED UPON JAMES SAVAGE BE REVERSED.

Most of Appellee's discussion of this issue focuses on the purported factual justification for the jury's findings. While Appellant has already disagreed that the facts of this case fit the glove of these circumstances, this misses the critical point: In

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19. Appellee represents that, even if the State agreed to drop the investigation, "[Mr.] Delgado refused to continue under any circumstances." *Answer, at 68 (emphasis supplied)*. This overstates Appellee's case. After the presentation of evidence had already begun, Mr. Delgado actually stated that he had been advised by Chan Muller that he needed assurances that "the State Attorney's office is willing to say now they won't do anything." (R. 2686) No such assurance was forthcoming, and by that time Mr. Delgado had been reduced to such a state by the threat of prosecution and bar charges that he did not "think he [could] do it. . . ." (Id.)

Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the United States Supreme Court,

> plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

Id., at 363 (emphasis supplied).[20]

SECTION 2: SINCE DOUBLE JEOPARDY BARS THE REIMPOSITION OF THE DEATH PENALTY IN THIS CASE, THIS COURT SHOULD REVERSE JAMES SAVAGE'S CONVICTION AND REMAND FOR RETRIAL ON THE QUESTION OF GUILT ONLY.

Turning to the conviction, Mr. Savage again asks that this Court provide guidance on the law of Double Jeopardy.

V. SINCE THE FIRST TRIAL CONCLUSIVELY SETTLED THE IMPROPRIETY OF SENTENCING JAMES SAVAGE TO DEATH, THE DOUBLE JEOPARDY CLAUSE PRECLUDES HIS EXPOSURE TO THE DEATH PENALTY AT A RETRIAL.

Appellee's argument on the Double Jeopardy Clause issue may be stated as follows: Because in "Florida, the *sole decisionmaker* is the [trial] judge," *Answer, at 76 (emphasis in original)*, there can be no "acquittal" of the death penalty unless the trial judge says so.

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20. Additionally, in Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1 (1990), the Supreme Court struck down an aggravating circumstance which was vaguely charged in the disjunctive -- "especially heinous, atrocious or cruel." Justice Marshall explained that such a circumstance will only survive review if all of the elements are met in the given case. Id., 112 L. Ed. 2d at 4-5 (Marshall, J., concurring). It cannot be said that this drug-induced crime was cold and calculated and premeditated, or it was heinous and atrocious and cruel.

This is erroneous on all bases: First, the trial judge is not the sole decisionmaker. Within the close confines of the Tedder rule, the trial judge is effectively bound by the recommendation of the jury. Second, this Court is very much a decisionmaker -- what does Appellee think this Court has been doing throughout its history if not making decisions, including frequent decisions on the propriety of a sentence of life or death?

Double jeopardy attaches on the basis of an appellate decision, just as with a trial court decision: A Double Jeopardy bar arises "whenever a jury agrees or an appellate court decides that the prosecution has not proved the case." Poland v. Arizona, 476 U.S. 147, 152, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (emphasis supplied) (quoting Bullington v. Missouri, 451 U.S. at 443). Appellee does not -- and cannot -- argue that when the litigant prevails in post-conviction proceedings, after this Court has ordered a life sentence but affirmed the conviction on direct appeal, the death penalty may again be imposed in the resulting retrial.

However, Appellee does argue that if the direct appeal challenge to the conviction is successful, the death penalty may be an option. Reducing Appellee's rule to basics, the distinction between life and death in this case would be as follows: The State presents perjured testimony at trial regarding Mr. Savage's purported probationary status. If Mr. Savage discovers it in time to challenge it now -- as he has -- he may be executed after a retrial. If, however, the perjured testimony does not come to

light until after affirmance of the conviction, he may secure a retrial in post-conviction proceedings without being exposed to the death penalty anew.

This is not a sensible rule. This Court should sensibly reject it, holding that if death was inappropriate in the first trial, the prosecution should not be allowed to seek the death penalty at a retrial.

VI. SINCE THE STATE WITNESS MISLED THE TRIAL COURT WITH TESTIMONY WHICH HAS NOW PROVEN TO BE UNTRUE, THIS COURT CANNOT RATIFY THE LOWER COURT'S FINDING THAT EVIDENCE WAS PROPERLY SEIZED UPON MR. SAVAGE'S ILLEGAL DETENTION AND ARREST.

This Court will remember that the State's witnesses misled the trial court regarding Mr. Savage's purported probationary status at the time of his arrest. The trial court has now found as fact that Mr. Savage's "probationary terms expired while he was in confinement. . . ." *Order on Motion to Vacate, at 4* (attached as *Exhibit A*).

In capsule form, Appellee's position may be stated as follows: Agents of the State lied, but because their lies denied Mr. Savage a forum in which to litigate the issue, any claim related to Mr. Savage's "probationary status must be found to be waived and procedurally defaulted." *Answer, at 79.*

This dubious proposition has been explicitly rejected by the United States Supreme Court in Amadeo v. Zant, 486 U.S. 214, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988):

> Where the state's effort to conceal its misconduct cause an issue to be ignored at

> trial, the state should not be allowed to rely on its procedural default rules to preclude . . . review.

Id. at 221.

The State's second position is equally tenuous: this Court should now ratify the perjury of the State's witnesses without any hearing by misconstruing the trial court's order. At trial, the prosecution sought to prove that Mr. Savage was not arrested until his probation officer came -- since the witnesses conceded that there was no probable cause to arrest for murder. Now, Appellee has to deal with the fact that there was no probation violation. Appellee therefore changes tack and argues that Mr. Savage was actually under arrest for murder all along. It will take more than Appellee's *ipse dixit* to make this so.

At trial, the court ultimately upheld the admission of evidence with the following order:

> The seizure of clothing was either a voluntary relinquishment by the Defendant at a time when he was either cooperatively present at the police station or lawfully detained for the purpose of further investigation.
>
> The pivotal factor is what had occurred prior to the Defendant being advised of his Miranda rights for the first time.
>
> Had there been a failure to advise the Defendant of his rights after, one, the contradictory statements to Detective Sarver by Wiggy, Christina and Speedy Gartland; and two, the positive test for blood on the Defendant's clothing, the results would have been different.

(R. 1916-17) (emphasis supplied)

The key to this order is the trial court's recognition of the need for *Miranda*[21] warnings. As Appellee recognizes, Mr. Savage had to be in custody in order for there to be a need for *Miranda* warnings. *Answer, at 80.* Yet we know that Mr. Savage was only arrested on the basis of the purported parole violation (R. 1699), and that prior to the appearance of Mr. Savage's probation officer at ten p.m. the police had agreed that had Appellant "chosen to leave . . . [he] would have been free to do so." (R. 1696)

The trial court viewed the suppression issue as a close one, and, in recently finding that the State witnesses perjured themselves, was

> not unmindful of the potential legal ramifications of its ruling in pending civil and criminal cases. If Mr. Savage was not legally on probation . . . many reverberations may be felt. In spite of this concern, this Court is required to adjudicate and not anticipate.

Order, at 3 (Exhibit A). Since Mr. Savage was only in custody for what has now been shown to be a non-existent probation violation, the illegally-obtained fruits of this custody will have to be suppressed.

VII. THE FRUITS OF A STATEMENT TAKEN WITHOUT MIRANDA WARNINGS SHOULD HAVE BEEN SUPPRESSED.

Mr. Savage has only one comment to add to his initial presentation. Again, Appellee resorts to form over substance, arguing that Mr. Savage "waived any involuntariness claim by proceeding on a theory that he was totally cooperative with the police. . . ."

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21. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Answer, at 84. Appellee omits to point out that Mr. Savage proceeded on this theory before the jury, after his motion had been denied. Indeed, during the trial Mr. Savage explicitly "object[ed] to the introduction of the confessions/admissions, which were decided by the Court in the pre-trial motions." (R. 1270) In contrast, the Court noted that the record was "adequately preserved." (R. 1271)

VIII. THE PERVASIVE PRE-TRIAL PUBLICITY CREATED A REQUIREMENT THAT VOIR DIRE BE INDIVIDUAL AND SEQUESTERED IN THIS CASE.

The one complaint made in Appellee's *Answer* which has merit pertains to this issue. Appellee has reviewed the record and asserted that most of the instances of prejudice identified by Appellant during voir dire occurred when there was only one juror present. Appellant must candidly concede that he had understood the procedure -- "bring[ing] approximately thirteen to fifteen jurors over in a group, and [going] through what the attorneys and I have talked about as being Phase One" (R. 22) -- to involve individual questioning of jurors in a group.

Upon further review, however, it would seem that when the trial court mentioned that they had "some chairs set up around the corner" (R. 30) for the other jurors, this was not within the courtroom. Mr. Savage therefore agrees with Appellee that this

portion of the voir dire regarding prejudicial pre-trial publicity was conducted individually.

IX. THE LOWER COURT SHOULD NOT HAVE ALLOWED THE JURY TO HEAR A HIGHLY PREJUDICIAL YET TOTALLY IRRELEVANT ADMISSION MADE BY JAMES SAVAGE.

This issue concerns the introduction of a statement, allegedly made by Mr. Savage to the effect that he had "been standing around before when people have been murdered and [hadn't] been arrested." Appellee makes a two-fold defense against this issue: First, a challenge to the statement's prejudicial impact is procedurally barred because counsel only challenged its voluntariness at trial. *Answer, at 88.*

That this position is vaporous may be illustrated by the following quote, which Appellee redacted:

> MR. TURNER: Your Honor, we would still maintain the objection going back to our pre-trial motions that it was not voluntary.
>
> And also, you know, honestly the Court brought out an important aspect of the prejudicial issue, and we do feel it would be extremely prejudicial to our client, especially since this is a first degree murder case.
>
> And our client's looking at death here, for that type of statement to be introduced to a Jury, who may easily misconstrue what was meant by it.
>
> * * *
>
> MR. DELGADO: Simply again just for purposes of the appellate review that may be necessary to that matter, that those objections are made pursuant to the 8th and 14th Amendment[s] of the Constitution.

(R. 1266-67)

Appellee's second defense merely waves a red flag at further perjury by the State's witnesses. Appellee now finds it "clear that the purpose of presenting the statement was to show [Mr.] Savage's consciousness of guilt, since nobody had told him about the murder investigation. . . ." *Answer, at 90.* However, this argument was never presented to the trial court at the suppression hearing, and no evidence was adduced at that time in support of such a theory.

It is important to understand the sequence of events. At the hearing held prior to trial, there was testimony that Mr. Savage was taken to the police station at approximately six o'clock. (R. 1654, 1689) On direct examination, in response to A.S.A. Bausch's questions, Officer Fernez testified as follows:

> Q. Now, after Mr. Savage made the statement that I've been standing around before when people got killed and never been arrested, what did you do at that point?
>
> A. At that point, myself and Detective Nichols exited the room.
>
> Q. And against we're talking somewhere in the neighborhood of seven forty-five, eight o'clock, somewhere in that neighborhood?
>
> A. That's correct, sir.

(R. 1757) The witness made no mention that Mr. Savage had not been told what the investigation was all about. Indeed, since Mr. Savage had been held under interrogation for two hours, the notion that nobody had told him what it was all about would be highly questionable.

Then came the defense motion to exclude the statement at trial. Officer Fernez again recited the statement outside the presence of the jury. Again he did not testify that Mr. Savage was unaware of what the investigation was about. (R. 1262) The defense objection was predicated on voluntariness and relevance. (R. 1263-66) In response, the prosecution mentioned nothing about relevance, only voluntariness. The trial court then admitted the statement, although there was absolutely no evidence to show relevance.

Officer Fernez' third, and least believable, story -- that Mr. Savage had been held and interrogated for two hours without having any idea what the investigation was about -- was given to the jury. However, because the State defaulted on the proof, it is not necessary for this Court to determine the falsity of this tale.

On other issues Appellee frequently asserts "procedural default," and demands that the trial court's ruling be considered in light of the evidence before him, and the arguments made to him. The old adage must apply: "What's sauce for the goose is sauce for the gander." Alcerte v. McGinnis, 898 F.2d 69, 72 (7th Cir. 1990). Appellee must also suffer procedural default.

"[T]he Due Process Clause . . . forbids enforcement of . . . rules unless reciprocal rights are given to criminal defendants." Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). For this reason, procedural rules have been applied

with equal force against the prosecution as against the defense.[22] This is only fair -- when the accused loses by default, he or she dies; when the prosecution loses by default, the consequence is not even comparable.

The State failed to provide the trial court with any proof of relevance at the time the suppression issue was decided. Therefore this Court should rule that the prosecution waived their opportunity to prove and argue to the Court that the evidence was relevant:

> [The] rules apply to the government as well as to defendants. [The State] has forfeited what would have been its best argument. If as a result a violent offender goes free, the [state prosecutor] must understand where the responsibility lies -- with his own staff.

Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990); accord Alerte v. McGinnis, 898 F.2d at 72 ("the state has only itself to blame for the defect that has undone this appeal").

X. THE FAILURE TO GIVE AN INSTRUCTION ON INTOXICATION DEPRIVED JAMES SAVAGE OF THE ENTIRE DEFENSE THEORY.

Citing Gardner v. State, 480 So. 2d 91 (Fla. 1985), Appellee argues that there was no need to instruct the jury on intoxication

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22. See, e.g., Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); Barrera v. Young, 794 F.2d 1264, 1267-68 (7th Cir. 1986); Merlo v. Bolden, 801 F.2d 252, 255 (6th Cir. 1986); Cole v. Young, 817 F.2d 412, 415 (7th Cir. 1987); Russell v. Rolfs, 893 F.2d 1033, 1038 (9th Cir. 1990); Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990); Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990); Alcerte v. McGinnis, 898 F.2d at 71-72; see also Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) (waiver of harmless error by failing to raise it).

in this case. *Answer, at 92.* Of course, Gardner actually held that an intoxication instruction should have been given, and is difficult to distinguish from this case.[23] Appellee contends that Mr. Savage's statement that he committed the crime because he was "smoking rocks" (crack cocaine) and ran out, does not sufficiently show intoxication. *Answer, at 92.*

Appellee makes no mention of the fact that the jury came back with the following, specific request:

> [JUROR] GLADDEN: We have an additional request, Your Honor.
>
> THE COURT: Okay.
>
> MR. GLADDEN: Concerning testimony relating to Mr. Savage's drug use and the police description of the addi[c]tive nature of the drug, and possibly even the request concern[s] what someone addicted to this drug is liable to do it that's the correct term.

(R. 1577) The jury was then read the following testimony, which they had previously heard in the course of the trial:

> QUESTION: Officer [Fernez], you have several years on a Police Department, Melbourne PD?
>
> ANSWER: That's correct, sir.

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23. Appellee also cites to Linehan v. State, 476 So. 2d 1262 (Fla. 1985), for the proposition that "[e]vidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of a jury instruction. . . ." *Answer, at 92.* This is true, but very misleading -- Linehan held that such an instruction need not be given in a general intent crime, since intoxication is not a defense. In addition to the distinctions which appear from Appellee's brief, *Answer, at 94*, Bertolotti v. State, 534 So. 2d 386 (Fla. 1988), is hardly dispositive since the issue was counsel's alleged ineffectiveness for failing to raise the issue. Id., at 387. The question is then whether counsel's strategic decision not to raise the defense was incontrovertibly incompetent. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

QUESTION: Fifteen, sixteen years?

ANSWER: Thirteen.

QUESTION: Thirteen years, and you're experienced to an extent of drugs, correct?

ANSWER: Yes, sir.

QUESTION: You heard that initial . . . part of the confession on the tape where he said smoking of rock?

ANSWER: That's correct.

QUESTION: Isn't that street lingo [for] smoking rock cocaine?

ANSWER: That's correct, sir.

QUESTION: In your training, isn't rock cocaine extremely addicting?

ANSWER: That's correct, sir.

QUESTION: It gives you an intense high initially?

ANSWER: That's correct.

QUESTION: Gives you an immense craving for more rock cocaine?

ANSWER: That's correct, sir.

(R. 1309; see also 1578-79)[24] Surely if the jury was sufficiently attuned to ask a question about this -- without having been instructed -- Appellee cannot argue that it was not an issue.

Appellee makes another insupportable argument to the following effect: If one makes the dubious assumption that the trial court could direct a verdict on the question of whether Mr. Savage had

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24. Officer Fernez also agreed that Mr. Savage had said "prior to the crime, he and others had smoked rock cocaine," and "immediately after the death, he went and . . . got drunk and used rock cocaine." (R. 1311, 1580)

specific intent to commit a robbery, "intoxication would not provide a defense to felony murder." *Answer, at 94*. However, the jury was instructed on both premeditated murder and felony murder. (R. 1520) The jury came back with a general verdict of "first degree murder." (R. 1600)

It is axiomatic that this Court may not speculate on which form of murder -- premeditated or felony -- the jury found. The Supreme Court explained this in O'Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969):

> It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.

Id. at 31-32; see also Bachelar v. Maryland, 397 U.S. 564, 569-71, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970) (condemning *post hoc* speculation as to which alternative ground informed the jury verdict).

XI. TO INSTRUCT THE JURY THAT A CONVICTION FOR SECOND DEGREE MURDER MAY RESULT IN PROBATION SERVED ONLY TO ENCOURAGE THE JURY TO REJECT JAMES SAVAGE'S SOLE DEFENSE TO FIRST DEGREE MURDER.

Appellee's efforts to distinguish Craig v. State, 510 So. 2d 857 (Fla. 1987), are unconvincing. See *Answer, at 96*. Appellant has nothing further to add on the merits.

Neither is Appellee's procedural argument persuasive. Appellee argues that any error is harmless because the convictions on the underlying felonies of robbery and sexual battery prove that

the jury would have reached a verdict of guilty of felony murder. *Answer, at 97.*

Appellee's argument is seductive, but easily exposed as a chimera. The hypothesis behind this claim is that a terrible crime has occurred, but the deliberating jury is not certain that the accused is guilty of first-degree murder under any theory. However, the jurors are worried that the alternative to a conviction for first-degree murder is probation on all counts, whatever they may be. The jury is then encouraged to convict for first degree murder as well as the other crimes, not because the jury is convinced the accused is guilty of murder or necessarily some of the other offenses, but because this is the only assurance that he or she will be locked up.

Once an unacceptable likelihood of prejudice is found, then, this is by definition the kind of error which cannot be considered harmless. For example, in Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), the Supreme Court held that the refusal to give a lesser-included offense created an untenable danger that the jury would vote for capital murder rather than the only alternative -- acquittal. Appellee's notion of a "harmless Beck violation" is a contradiction in terms -- either there is a Beck violation, or there is none. Once the danger exists that the jury reached a verdict for the wrong reason, there is no way to say that it is "harmless."[25]

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25. Appellee also churns out the old chestnut that jurors are presumed to follow the law. *Answer, at 97.* This does not apply, (continued...)

XII. THE FAILURE TO ALLOW JAMES SAVAGE, AN INDIGENT ACCUSED, TO SEEK FUNDS FOR EXPERT ASSISTANCE ON AN EX PARTE BASIS DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS.

Appellee represents to this Court that there was no error denying funds for an expert on drug and alcohol abuse because the "motion itself demonstrates that the experts were requested for the penalty phase." *Answer, at 98* (citing R. 3451-52). This "fact" prompts Appellee to find it "ironic that Savage can even raise such claim. . . ." *Answer, at 99*. If any "irony" is to be found, it is perhaps that the page cited by Appellee demonstrates precisely the opposite:

> to obtain the services of psychiatric, psychological and other related experts in order to examine him, consult with defense counsel, and testify in relation to mental health issues relative to guilt-innocence, competency to stand trial, competency to waive rights, and potential mitigating circumstances for a possible penalty phase of this case.

(R. 3451) (emphasis supplied)[26] In this motion, the defense detailed Mr. Savage's "drinking habit of a case and a half of beer per day. . . ." (R. 3459) Counsel told the Court that Mr. Savage "had been smoking cocaine and marijuana [at the time of the crime] . . . [and] was up two-three days when this event happened." (Id.) Counsel stated that it was "mandatory that an addictionologist . .

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25. (...continued)
of course, when the jury receives conflicting instructions. See Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985). For what reason, according to Appellee, were the jurors to think they were instructed on probation? To ignore it?

26. See also, R. 3463 ("essential to his case in mitigation of death as well as a potential defense to the charge of first degree murder").

. be retained to determine if and how the Defendant's significant history or polysubstance abuse affected his behavior at the time of the offense . . . ." (R. 3466) Counsel specifically noted that the expert would provide "testimony in the guilt-innocence and mitigational stage of the trial." (R. 3476) (emphasis supplied)[27]

It is also perhaps "ironic" that Appellee tells this Court that expert assistance in drug abuse would not have been significant to the defense. *Answer, at 98-99.* Just pages earlier, Appellee was arguing that no intoxication instruction should have been allowed because the defense did not introduce sufficient evidence to rquire it. Although the jury actually asked for guidance on "what someone addicted to this drug is liable to do" (R. 1577), Appellee argues that such evidence would not have been relevant to the defense.

Appellee's argument against Mr. Savage's right to proceed *ex parte* on these applications for funds could also be characterized as "ironic." Appellee argues that when the accused applies for funds Florida law allows the trial court no discretion, "and requires it to appoint an expert solely on the basis of defense counsel's representations." *Answer, at 100.* If this is true,[28]

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27. Counsel went on to say that this expert "could also . . . [assess] disabilities that would constitute a mitigating circumstance for presentation . . . in mitigation of sentence." (R. 3466) (emphasis supplied)

28. Appellee cites *Fla. R. Crim. Pro. § 3.210* and Oats v. State, 472 So. 2d 1143 (Fla. 1985), for this proposition. The rules discussed in Oats apply to experts who would testify to (continued...)

Appellee must be wrong in arguing that the trial court correctly denied funds in this case.

Whether a trial court is required to award funds or not, however, the applications must still be made *ex parte*. The notion that *ex parte* applications by indigent defendants would allow "trial by ambush," *Answer, at 101*, is simply silly. In discovery, "the defense counsel shall furnish to the prosecution a written list of all witnesses whom the defense counsel expects to call as witnesses at the trial or hearing." *Fla. R. Crim. Pro. § 3.220 (b)(3)*. Thus, the prosecution will receive the names of those who will be called as witnesses, and be permitted to depose them.[29]

Appellee also ignores the discrimination against the indigent accused when he or she is denied the right to proceed *ex parte*: No

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28. (...continued)
insanity and competency to stand trial. Oats, 472 So. 2d at 1444 ("Rules 3.210 and 3.216 clearly remove all discretion from the trial court and require it to rely upon representations of defense counsel, without more"). The addictionologist requested by Mr. Savage should fall into this category, since a drug-induced psychosis could be the successful predicate to an insanity defense. With respect to other experts, prior to 1985 the statute was permissive, and their "appointment . . . [wa]s discretionary." Martin v. State, 455 So. 2d 370, 372 (Fla. 1984) (citing *Fla. Stat. § 914.06 (1983)*). Appellee would seem to be correct in believing that the discretion was removed when the statute was amended in 1985 in light of Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Instead of using permissive language, the new rule provides that when "an indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to the expert witness. . . ." *Fla. Stat. § 914.06 (Supp. 1990) (emphasis supplied)*.

29. The defense must also disclose reports of experts. *Id. § 3.220(b)(4)(ii)*.

defendant of means has to invite the State into the process of selecting experts.

Next, Appellee ignores the provisions in our statutes. For example, while Appellee states that the state "is essentially privy to [defense trial strategy] through discovery rules," *Answer, at 101*, the discovery rule explicitly forbids the forcible revelation of work product, such as is found in Mr. Savage's motions. See *Fla. R. Crim. Pro. § 3.220(c)(1)*.[30]

While Appellee concedes that generally "the State's interest in its fisc must yield" to the defendant's constitutional rights, *Answer, at 101*, for reasons which are not clear, this is not so in Florida -- even though Appellee argues that the trial court must appoint the experts the accused has requested. Stripped of rhetoric, the State's insistence on the prosecution being present at any defense presentation should offend the trial bench: Does Appellee consider trial judges incapable of making decisions without the presence of both parties? If so, shall the defense insist on being present whenever a warrant is issued?

Equally, it is apparent that the State secured many experts in this case, yet they did not invite the defense to have a voice in the selection of these experts. The statute applies to applications for funds by "the state or an indigent defendant. . . ." *Fla. Stat. § 914.06 (Supp. 1990)*. If the State hires all their experts on an *ex parte* basis, once again "[w]hat's sauce for the

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30. The very rule cited by Appellee emphasizes that the defense shall not be required to make disclosures which "invade the lawyer-client privilege. . . ." *Id., § 3.210(b)(1)*.

goose is sauce for the gander." Alcerte v. McGinnis, 898 F.2d 69, 72 (7th Cir. 1990).

XIII. THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE MEANING OF REASONABLE DOUBT, NOR THAT THEY MUST CONVICT ABSENT SUCH A DOUBT.

Appellant agrees that no objection was made to the instruction which defined reasonable doubt. (R. 1458) However, it was given before the United States Supreme Court decided Cage v. Louisiana, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 339 (1990), which condemned an analogous instruction. Appellant respectfully suggests to this Court that much future litigation will be averted if the lower courts are apprised that the unnecessary definition should not be given. Id. at 342 n.* ("attempts to define reasonable doubt have been widely criticized").

XIV. THE INTRODUCTION OF A PLETHORA OF GRUESOME PHOTOGRAPHS DENIED JAMES SAVAGE HIS RIGHT TO A FAIR TRIAL.

This issue has been adequately addressed in Mr. Savage's initial *Brief*. However, Mr. Savage does invite this Court to review of various pictures to which he made "strenuous and multiple objections" (R. 1121), including a photograph selected to show the victim's "death stare" (id.), and a picture tainted by ants which removed skin after death. (R. 1104)

XV. THE TRIAL COURT *ERRONEOUSLY RULED* THAT DNA "FINGERPRINT" EVIDENCE PURPORTING TO LINK JAMES SAVAGE TO THE CRIME SHOULD BE ADMITTED.

Appellant does not agree that, by definition, he waived his right to challenge this issue by stipulating to the admission of

the evidence. He filed a motion to challenge the reliability of the evidence prior to trial (R. 3399), and the trial court overruled his motion after a hearing. (R. 1980-2053) If he may reserve his rights to object to the seizure of the evidence, he surely can reserve his right to challenge its legal admissibility.

In any event, the testing in this case was performed by the same organization, in the same incompetent manner, as that rejected in People v. Castro, 545 N.Y.S.2d 643 (Sup. Ct. 1989). This issue of first impression in this Court is too important to be decided on a record such as this, with no defense evidence at all.

XVI. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

This issue has been adequately addressed in Mr. Savage's initial brief.[31]

CONCLUSION

For these reasons, as well as those set forth in his initial brief, and those which appear to this Court, Mr. Savage respectfully moves that this Court reverse his conviction and remand his

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31. With respect to the allegation that no support is offered for one issue, Mr. Savage would point out that it was specifically predicated on the authority of the constitution. *Brief of Appellant, at 16.* It is interesting to note, however, that many of Appellee's arguments are not based on any legal authority. See, e.g., *Answer, at 47-49; 51-54; 58; 59; 64-65; 65-67.* Once again, Appellee must be defaulted, since "[w]hat's sauce for the goose is sauce for the gander." Alcerte v. McGinnis, 898 F.2d at 72.

case for retrial, with a stipulation that the death penalty may not be imposed.[32]

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document upon the following:

Kellie A. Nielan
Assistant Attorney General
210 N. Palmetto Avenue, Suite 447
Daytona Beach, Florida 32114.

This the 25th day of February, 1991.

32. In case it has not been emphasized sufficiently above, Mr. Savage notes that every allegation of error in his case is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as on the Constitution of this State, and the law set forth in the briefs.