IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,493

RAYMOND PADILLA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

ARGUMENT
I

THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE AT TRIAL AGAINST PROSPECTIVE JURORS WALLEN AND NEGRON, WHERE A REASONABLE DOUBT WAS ESTABLISHED CONCERNING THE JURORS' ABILITY TO RENDER AN IMPARTIAL VERDICT BASED SOLELY ON THE EVIDENCE, THEREBY DENYING THE DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

In his initial brief, the Defendant contended that the trial court had erred when it denied the Defendant's motions to strike for cause, two jurors whose views prevented them from being impartial. Both juror Wallen and juror Negron expressed strong concerns about their ability to be fair if the Defendant exercised his right to not testify at trial. (R. 513-520, 524-526). Juror Negron was removed by the Defendant upon the exercise of a peremptory challenge. The Defendant exhausted his remaining peremptory challenges and his request for additional challenges was denied by the court. (R. 542, 543, 550, 551). Juror Wallen remained on the jury and ultimately was one of the jurors who rendered the verdict in this case.

On these facts, the State primarily contends that the Defendant has not properly preserved for appeal the trial court's erroneous denials of the Defendant's motions to strike Wallen and Negron for cause. (Brief of Appellee, p.35, 36). The state relies on this Court's recent opinion in *Trotter* v. *State*, 576 So.2d 691 (Fla.1990) for this proposition.

A careful reading of *Trotter* together with a review of the prevailing case law in this area, plainly reveals that the Defendant has properly preserved for appeal the denial of his

challenges of Wallen and Negron for cause.

In Florida, it is incumbent upon the court, upon the motion of a party or upon its own motion, to excuse for cause a prospective juror, where there is a reasonable doubt about the juror's ability to render an impartial verdict based solely on the evidence and the law announced at trial. ***Singer*** v. ***State***, **109 So.2d 7 (Fla. 1959)**; ***Moore v. State***, *525* **So.2d** *870* (Fla. **1988)** and ***Price*** v. ***State***, **538 So.2d 486** (Fla. 3d DCA **1989).** As a corollary to the trial court's responsibility to excuse objectionable jurors from the jury, Florida courts have also recognized that it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, since it has the effect of abridging the right to exercise peremptory challenges. ***Leon*** v. ***State***, 396 So.2d 203, 205 (Fla. **3d** DCA **1981).**

This Court has recognized that such an error becomes harmful, necessitating a new trial, when, as a result of the court's failure to strike the objectionable juror for cause, the Defendant must accept an objectionable juror' on his jury. Trotter v. ***State***, ***supra; Pentecost*** v. ***State***, **545** So.2d **861, 863** n. 1 (Fla. **1989).** Reversible error is therefore demonstrated, if the Defendant has exhausted his peremptory challenges and an objectionable juror, that was challenged by the Defendant for cause, was permitted by

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'An objectionable juror in this context, was defined by this Court in the Trotter case, as an individual who actually sat on the jury and whom the Defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

the court to remain on the jury panel that rendered the verdict being appealed. *Trotter* v. ***State, supra,*** at 693; ***Hamilton*** v. ***State***, 547 So.2d *630* (Fla. 1989); and *Leon* v. ***State, supra.*** Reversible error may also be demonstrated, even if the Defendant used a peremptory challenge to remove the objectionable juror, if the Defendant has exhausted his remaining peremptory challenges and **the** court fails to provide **the** Defendant with additional challenges to remove other jurors that remain on the panel that are objectionable to the Defendant. Trotter v. ***State, supra.***

In this case, reversible error was demonstrated and preserved when the court failed to excuse juror Wallen and juror Negron, after both had been properly challenged by the Defendant for cause. The Defendant exhausted his peremptory challenges after excusing juror Negron with a peremptory challenge. Since the Defendant was wrongfully required to expend a peremptory challenge on Negron, he was without a peremptory challenge to remove Wallen, an additional objectionable juror who remained on the panel and had been previously challenged for cause by the Defendant. Consequently, the court committed reversible error in failing to remove Wallen for cause and compounded the error when the court refused to provide the Defendant with additional peremptory challenges, after improperly forcing the Defendant to peremptorily challenge Negron, another juror who should have been excused for cause. As stated in his initial brief, the Defendant has clearly met the preservation requirements of the Trotter case and its predecessors.

On the merits of the trial court's failure to excuse Wallen

and Negron for cause, the State argues that the court's decision rested within its discretion and should not be disturbed. (Brief of Appellee, p. 36-38).

The Defendant does not dispute that a court's ruling on the question of whether to excuse a prospective juror for cause is one that normally rests within the discretion of the court. That discretion, however, is tempered by the Defendant's constitutional right to have his case determined by impartial jurors who are not burdened by preconceived opinions that prevent a prospective juror from being fair. Hamilton v. State, ***supra*** **at 633**. ***Price*** v. ***State***, supra. In fact, Florida courts have expressed a preference for resolving close cases in favor of excusing the juror rather than leaving doubt as to his or her impartially. ***Club*** West v. ***Tropigas*** of ***Florida***, Inc., 514 So.2d **426** (Fla. **3d DCA 1987**); ***Sydelman*** v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985).

In this case, the answers of both Negron and Wallen during voir dire questioning clearly demonstrated that their ability to be impartial was questionable.

After initially expressing a doubt about **his** ability to be fair, juror Wallen twice unequivocally informed the court that if the Defendant did not take the stand, it would bother him. (R. **524-526**). Wallen explained that an innocent person would want to tell everyone his story and that he saw no reason for the Defendant not to tell his side of the story. (R. 524-526). If the Defendant did not testify, Wallen felt "very strongly" that the Defendant **was** "trying to trick" the jury. (R. **524**, 525).

Negron expressed sentiments that were similar to those of Wallen. On four occasions, she indicated that she would be troubled if she did not hear from the Defendant. Negron felt strongly that if someone was not guilty, he should be expected to take the stand in his own defense because he should have nothing to hide. Ms. Negron's convictions in this area were so strong that she conceded that if she possessed **a** doubt about the Defendant's guilt **after** hearing the State's case, she would resolve that doubt and "**probably** would think that he [the Defendant] was guilty" if the Defendant did not speak. Ms. Negron held to her beliefs even though she understood that she was not following the law. (R. 513-**519).**

Based upon the foregoing, it was incumbent upon the trial court to excuse Wallen and Negron for cause. ***Singer*** V. *State*, ***supra; Hamilton v. State, supra;*** *Leon* V. *State*, supra: and Gibson V. *State*, 534 So.2d **1231** (Fla. 3d DCA **1988).** The trial court's failure to do so **was** error that warrants a reversal of the Defendant's convictions and a remand for a new trial.

II

THE TRIAL COURT **ERRED** IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL MADE IN RESPONSE TO THE STATE'S INTRODUCTION OF EVIDENCE OF COLLATERAL CRIMINAL ACTIVITY, NAMELY, THE FIRING OF SHOTS INTO THE FORMER APARTMENT OF MARICELLA DAVILA, WHERE THE STATE FAILED TO ESTABLISH THE RELEVANCE OF THAT EVIDENCE BY **FAILING** TO PROVE THAT THE DEFENDANT WAS **THE** PERSON WHO HAD FIRED THE SHOTS, THEREBY DEPRIVING THE DEFENDANT OF THE FAIR TRIAL GUARANTEED TO HIM UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In its answer brief, the State contends that it was proper for the court to deny the Defendant's motion for mistrial, made when the state introduced evidence of shots fired into the former apartment of Maricella Davila, because said evidence was "inseparable" from and therefore relevant to the crime charged. (Brief of Appellee, p. 38-40). In making this contention, the State fails to address the principal feature of the Defendant's claim in his initial brief.

At trial, the Defendant sought to have the court exclude evidence of the shots fired into the apartment because it was not relevant to the crime charged against the Defendant. (R. 589-591). The Defendant primarily maintained that the evidence was not relevant, because the State would not be able to establish by clear and convincing proof that the Defendant was the one who had fired the shots. (R. 589-592). Without evidence to tie the Defendant to that collateral criminal act, (the prior "inseparable crime", as the State would prefer to label it), evidence of the shots fired into the apartment would not be relevant to any issue at trial.

The evidence introduced by the State to tie the Defendant to the shooting at the former Davila apartment, established that the shots were fired sometime between 5:00 p.m. on the date of the shooting, and the early evening hours of the following day. (R. 833, 886). The projectiles recovered at the scene of the apartment were not identified as being fired by the same gun that fired the shots at the homicide scene. (R. 939-40). In fact, the State's firearm examiner could only say that the bullets were similar

because they were lead and round. (R. 951). Finally, the State advanced the testimony of Louis Rodriguez, who stated that the Defendant had been to his house on the day of the shooting and had asked for additional bullets for his gun because the Defendant had **"wasted"** them. (R. 613).

This evidence **was** not used by the prosecutor because it was necessary to present an intelligent account of the entire criminal episode, the justification now advanced by the State on appeal. Instead, the evidence of the shooting at the former apartment of Maricella Davila **was** used to establish the Defendant's premeditation in killing Paul Gomez. (R. 1059, 1063). The prosecutor's use of that evidence would arguably have been justified because evidence of collateral crimes or acts committed by the Defendant can be admissible, **"if** it casts light upon the character of the act under investigation by showing motive, intent, mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried." Williams v. ***State,*** 110 So.2d 654, 662 (Fla. 1959). However, before evidence of the collateral crimes may be admitted to prove intent, **as** the State sought to do in this case, the State must establish by clear and convincing proof that the Defendant was the perpetrator of the collateral crimes or acts. ***State v.*** *Norris,* 168 So.2d 541 (Fla. 1964). Without proof that reaches that stringent standard, this Court recognized that the Defendant's right to a fair trial could easily be lost in favor of

the introduction o highly prejudicial evidence supporte(by mere suspicion and innuendo.

In *Tumulty* ***v. State,*** **489** So.2d 150 (Fla. 4th DCA 1986), the lead case relied **upon** by the State, the prosecution sought to introduce evidence of prior drug transactions engaged in by the Defendant with several other associates, including the victim of the murder for which the Defendant was being prosecuted. The victim was a pilot for the Defendant during these transactions. After performing his services for the Defendant, the victim kept the plane belonging to one of the Defendant's associates, because he had not been paid for his services. At trial, the State theorized that the victim had been murdered for his refusal to return the airplane. The Fourth District held that the evidence of the prior drug transactions were relevant to show the relationship between the Defendant, the victim and the Defendant's associates, and that the transactions laid the foundation for the Defendant's motive to kill the victim.

Unlike the overwhelming factual underpinning for the admission of collateral crimes evidence in *Tumulty,* the evidence in this record fails to connect the Defendant by clear and convincing proof with any prior criminal act that would shed light on **the** Defendant's motivation or intent to shoot Paul Gomez. Despite this lack of proof, the State was improperly permitted to argue to the jury that the shots fired into the former apartment of Maricella Davila established the Defendant's premeditation to kill Paul Gomez. (R. 1059, 1063). In view of the fact that the Defendant's

defense at trial was that he had acted without premeditation, the admission of this irrelevant and highly prejudicial collateral crimes evidence served to deny the Defendant a fair trial.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED DEFENSE COUNSEL'S REQUEST TO INSTRUCT THE JURY ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE.

The State simply contends in its answer brief that the trial court was not required to read to the jury the limiting instruction for collateral crimes evidence required by ***Section*** **90.404** ***(2)*****(b)** 2, Florida Statutes, because the evidence of the shots fired in the former apartment of Maricella Davila was not collateral crimes evidence. In response, the Defendant would rely on the argument advanced in Point II of this reply brief, and the argument made previously in Point III of his initial brief.

IV

THE TRIAL COURT ERRED DURING THE PENALTY PHASE BY PERMITTING THE STATE TO INTRODUCE EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES OF THE DEFENDANT'S PRIOR CONDUCT WHICH NEVER RESULTED IN A CHARGE OR CONVICTION.

The State argues that the introduction of burglary, robbery, theft and dealing in stolen property acts was statutory aggravating evidence or was simply evidence of the circumstances surrounding Defendant's prior manslaughter conviction. (Brief of Appellee, **p.** 42-43) *Florida* ***Statute*** **921.141(5)** specifically limits aggravating circumstances to ***inter alia*** (b) the Defendant was previously convicted of another capital felony or of a felony involving the

use or threat of violence to the person. The Defendant's only prior conviction was for manslaughter.

This Court's rule permitting testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person has strict limitations. First, acts must have resulted in a conviction. ***Rhodes v. State,*** **547 So.2d 1201, 1204** (Fla. **1989).** Second, probative value must outweigh the danger of unfair prejudice ***Florida Statute*** 921.141**(1),** 90.403. **Rhodes,** at 1205.

As the Appellee states on Page 43 of their **brief,** citing ***Rhodes,*** this testimony of burglary, robbery, theft and dealing in stolen property was to **"assist[s]** the jury in evaluating the character of the Defendant..." This evidence did not directly relate to the crime for which Defendant was on trial, but instead, described the physical trauma and suffering of a victim of a totally collateral crime committed by the Defendant. ***Rhodes,*** at **1205.**

The Appellee submits that the Defendant was not prejudiced by the prosecutor's statement before the jury: "and you're aware of the fact that you brother, Raymond Padilla, beat his wife?" **(R.1254)** (Appellee's brief at, p.45) There was no good faith basis for asking this question and only served to prejudice the jury as bad character evidence. The appellee's cites ***Duest*** v. ***State,*** **462 So.2d 446** (Fla. **1985)** to support their claim that the Defendant's objection and subsequent motion for mistrial were inadequate to preserve the record. However, in ***Duest,*** the prosecutor insulted

the Defendant's attorney and the Court determined that the insult was not so bad as to vitiate the entire trial. In the instant case, the prosecutor told the jury that it was a fact that the Defendant beat his wife.

The State cannot claim that all of the above nonstatutory aggravating factors did not prejudice the jury.

V

THE TRIAL COURT ERRED BY FAILING TO FIND AS A MITIGATING CIRCUMSTANCE THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED WHEN THIS CIRCUMSTANCE WAS ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE.

The trial court erred by failing to find this mitigating circumstance because the record does support that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. See §921.141(6)(e). The court found the Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime. (R. 237-238).

The Defendant presented a large quantum of mitigating evidence. There was evidence of the Defendant's disadvantaged childhood, his abusive parents, lack of education, his admissions into mental hospitals, chronic substance abuse, and that he suffered from a personality disorder which rendered Defendant unable to conform his conduct to the requirements of the law. (R.1260). At a minimum, the trial court should have considered Dr. Toomer's testimony as nonstatutory mitigating circumstances.

Instead, the trial court merged all of the Defendant's mitigation into one circumstance. (R. **237,238).** The Defendant's history of child abuse should have been considered a nonstatutory mitigating circumstance. ***Nibert*** v. ***State*, 574 So.2d 1059, 1062** (Fla. **1990).** **The** trial court's sentencing order states:

> the court has received the entire record, including the testimony and evidence in the trial and sentencing proceedings to determine whether there might possibly exist anything else, whatsoever, of a non-statutory mitigating nature, that could be considered by this court in mitigation of this sentence.
>
> **(R. 288,239)**

The Court failed to address each non-statutory mitigating circumstance. Campbell v. ***State*, 571** So.2d **415, 419** (Fla. **1990)** As this Court recently stated:

> The United States Supreme Court, however, requires that a sentencing court consider a5 a mitigating circumstance "any aspect of a Defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Lockett* ***v.*** Ohio, **438 U.S. 586, 604 (1978).** Once established, a mitigating circumstance may not be given no weight at all. ***Eddings*** v. Oklahoma, **455 U.S. 104, 114-15 (1982).**

***Dailey v. State*, 16 FLW** S740**, 742** (Fla. November **14,** 1991)

V I

THE TRIAL COURT ERRED IN FINDING THE HOMICIDE WAS COMMITTED IN **A** COLD, CALCULATED, **AND** PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The State submits the Defendant acted in a calculated manner and with the heightened premeditation described in the statute.

(Appellee's Brief at, p.49) This shooting arose fromthe Defendant ending a relationship with Paul Gomez' aunt, Mariella. Paul Gomez and "Fat Boy" were in the intimidation business and they obviously succeeded in scaring the Defendant to such a degree to where he stated "a man has got to do what a man has got to do" (R. 612). This same Defendant suffered from a personality disorder which leaves little tolerance for frustration, vulnerable to stress, and where opposition is usually met by aggression. (R. 1273) In light of the Defendant's mental illness along with the trial court's finding that at the time of the shooting the Defendant was under the influence of extreme mental or emotional disturbance the Appellee is hard pressed to claim this shooting was carefully calculated from a deliberate plan formed through calm and cool reflection.

The fact that the shooting arose from a domestic dispute tends to negate this aggravating circumstance. *Douglas v. State*, 575 So.2d 165 (Fla. 1991).

This case is similar to *Santos* v. *State*, 16 FLW 5633 (Fla. September 26, 1991) and is entirely consistent with a crime of irrational, heated passion brought on by a domestic dispute" and "it is equally reasonable to conclude that [Defendant's] acts constitute a crime of heated passion as it is to conclude that they exhibited cold, calculated premeditation." *Santos*, at 5634.

In the instant case, the Defendant truly believed that he was justified in the shooting. The Defendant did not set out to kill for gain but rather possessed a pretense of moral or legal

justification.

VII

THE TRIAL COURT ERRED BY FAILING TO EXPRESSLY EVALUATE IN ITS WRITTEN SENTENCING ORDER EACH MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENDANT

The State contends that the trial "judge instructed the jury on all mitigating circumstances to be considered, thus we can presume that he followed his own instructions in the consideration of nonstatutory mitigating evidence." (Appellee's Brief at, p.50). However, the trial court failed to consider two statutory mitigating circumstances and did not consider any nonstatutory mitigating circumstances.

There was ample evidence to prove that the Defendant lived in an abusive environment as a child, which is clearly a valid nonstatutory mitigating factor. *Santos* v. *State, id.* at 8634; *Campbell v. State,* 571 So.2d 415, 419 (Fla. 1990).

The trial court failed to consider the Defendant's long standing and extensive history of chronic drug and alcohol abuse. (R.1453-1457). Moreover, the trial court did not consider that the Defendant committed the instant crime while under the influence of cocaine and alcohol. (R.1456) Ross v. *State,* 474 So.2d 1170, 1174 (Fla. 1985). The trial court's failure to find any nonstatutory mitigating factors based on this record is simply error.

VIII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT FOR ATTEMPTED FIRST DEGREE MURDER ABOVE THE PERMITTED GUIDELINE RANGE WITHOUT ARTICULATING OR DELINEATING THE REASON(S) FOR THE DEPARTURE IN VIOLATION OF RULE 3.701

(d)(11), FLORIDA RULES OF CRIMINAL PROCEDURE

The trial court did not express any reasons for a guideline departure. In addition, the sentence reflects that count two shall run consecutive to count one (R. 233,234). It is unclear whether the trial court intended to sentence the Defendant to a consecutive sentence. It appears that only the three year firearm minimum mandatory is to run consecutive. (R.1483,1484) Thus, the written sentence should conform to the trial court's oral pronouncement.

CONCLUBION

Based on the foregoing, defendant requests this Court to reverse the judgment of the trial court and the sentence of death, and to remand with directions to afford the defendant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the Attorney General, 401 N.W. 2nd Ave, Suite N921, Miami, Florida 33125 this 27th day of November, 1991.

SCOTT W. SAKIN, ESQ.