IN THE SUPREME COURT OF FLORIDA

THOMAS A. WYATT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,666

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. VOIR DIRE OF VENIRE

The state's hyper-technical arguments of procedural default[1] ignore that the defense timely raised its objections in the trial court and that the trial court denied them. Indeed, the trial court actively discouraged defense argument and sua sponte interposed objections to the defense in the presence of the jury. While it is understood that the court may to some small extent assist pro se litigants in order to facilitate adjudication on the merits, the court may not undertake the role of raising objections or arguments against one party or the order, or signal one party when to object or make argument. See, e.g., Paulson v. Evander, 19 Fla. L. Weekly D546 (Fla. 5th DCA March 11, 1994). One may safely say that, unlike the pro se litigant, the State of Florida, represented at trial by the State Attorney and an energetic assistant, could make its own objections.

The state's hyper-technical argument of non-preservation looks silly against the backdrop of its having acquiesced in, and benefitted from, the trial court's repeated refusals to hear argument, and cutting off of argument and questioning. The purpose

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[1] Florida did not apply its procedural default rule consistently during the time of Mr. Wyatt's trial. E.g. Occhicone v. State, 618 So. 2d 730 (Fla. 1993) ("We could have, and probably should have, also said [in the 1990 direct appeal decision] that the claim was procedurally barred because of no objection at the trial court level."); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993) ("We summarily found the issue meritless [in the original opinion], but we should have held it procedurally barred because Hodges did not preserve it for review by objecting at trial."). Hence it would be unconstitutional to apply it to this appeal. Ford v. Georgia, 111 S.Ct. 850 (1991), James v. Kentucky, 466 U.S. 341 (1984), Smith v. Black, 970 F.2d 1383 (5th Cir. 1992), Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992).

of the contemporaneous objection rule is to afford the trial court an opportunity to correct errors after hearing argument. Here the trial court made sua sponte objections and forbade or cut off argument. A man's life cannot be forfeit because his court-appointed attorney did not engage in futile efforts to dissuade the court. Hunt v. State, 613 So. 2d 893, 898, n.2 (Fla. 1992), Spurlock v. State, 420 So. 2d 875 (Fla. 1982), Simpson v. State, 418 So. 2d 984 (Fla. 1982), Thomas v. State, 419 So. 2d 634 (Fla. 1982).

A. The state's remarks about jurors Hadley, Burton, Bobbitt, and McConnell are beside the point, which is that the trial court, during the examination of these persons, made erroneous rulings relevant to the entire voir dire. The state writes its argument as though the court had ruled that the defense could questions other jurors but not those three. The Court should reject the state's specious re-characterization of the issue. Further, the state argues that the defense questions were misleading. One is hard pressed to see how a question can be misleading.

Implicit in the state's argument is the notion that voir dire questioning is solely limited to development of cause challenges.[2] The state ignores that an essential purpose of voir dire is to elicit sufficient information to let the parties intelligently exercise peremptory challenges. The state has never argued (and

[2] Thus the state's brief asserts at page 9: "Whether a juror feels that society could be protected by a life sentence, is irrelevant to whether a juror could be impartial and recommend a sentence based on the facts."

hence has waived any argument)[3] that the defense questioning was not aimed at this legitimate end.

B. The state says at page 10 of its brief that Mr. Wyatt has not pointed "to any juror who was not able to understand and apply the concept of reasonable doubt." The state ignores that the trial court sua sponte forbade questioning on the ability of jurors not to submit to the majority view of the evidence. R 676-78.

C. Ms. Ryden stated under oath that she had several problems which affected her service as a juror. While, as the state says at page 11 of its brief, she said that she would follow the law even if she did not agree with it, she immediately qualified that assurance as discussed below. Further, abstract assurances that a juror will follow the law are not dispositive. Hamilton v. State, 547 So. 2d 630, 632-33 (Fla. 1989); Morgan v. Illinois, 112 S.Ct. 2222 (1992).

The state fails to mention that: Ms. Ryden testified that she ran a bookkeeping service and needed to prepare important IRS and payroll documents for her clients, which would be a major problem respecting her service as a juror -- she could not put the problem

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[3] See Hayes v. State, 581 So. 2d 121 (Fla. 1991).
It is worthwhile to point out that rules of procedural default must apply with yet stronger force against the state:
The role of counsel for the government is to seek a fair adjudication on the merits, not to throw up procedural obstacles.
Unlike indigent defendants like Mr. Wyatt, the state is free to pick its lawyers. Hence, it would be unfair not to apply procedural defaults to the state at least as stringently as to indigent death row inmates.
Further, the state has no due process rights implicated in criminal proceedings: the Due Process Clause protects "persons" from unjust loss of life, liberty, or property at the hands of the state. The state is not a "person" for the purposes of the Clause, South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966). Its life, liberty, or property is not at stake in a criminal trial.

out of her mind. R 105-106 (questioning by state).[4] See also R 123.

The defense questioned her further about this problem with this result (R 202-203):

> Q ... Let me ask you again, as Mr. Colton said, we will try to make every consideration that we can, that we are able to.
>
> In the event that you had to serve, can you honestly tell me that you are not going to be up there worrying about what is going on, that you are going to be able to pay attention to the trial?
>
> A No, I couldn't honestly tell you that.
>
> Q You could not do that?
>
> A No.
>
> Q Do you feel like if your personal problems were such -- you know, because of your business are such that you don't feel like the defendant would be able to receive a fair trial, a fair shake from you; is that correct, you would not?
>
> A I would not.

She further testified that the use of gruesome photographs would prevent her from being able to give her full attention to the case. R 147 (questioning by state). She stated without qualification that her feeling was that the death penalty must be imposed in every case of first degree murder. R 169-70 (same). She told the prosecutor that she would have "very much difficulty" following instructions that she must weigh sentencing circumstances. R 170-71. She added: "I think that if someone is charged with first

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[4] In fact, the prosecutor said to her about this problem: "We will try to do something." R 106. That "something" turned out to be opposing the defense's legitimate cause challenge.

degree murder, those mitigating circumstances are already decided. It's either first or second or third degree murder. If someone is charged with a first degree murder, it's aggravated murder. And this is my opinion, but I would recommend death for that if they were found guilty." R 171. See also her response to defense questioning at R 220-21, and 293-94. Asked if she could set aside sympathy and base her verdict on the law and the evidence, she said: "I think so." R 258-59 (defense questioning). She added: "Certainly there is hesitation." R 259. While telling the prosecutor that she would follow the law, she also said that she could never put aside her personal beliefs and that: "Without knowing those [sentencing] factors, I would say, yes, that I would recommend the death penalty." R 331.

When the defense brought these matters to the court's attention,[5] the state did not dispute them, saying only: "Judge,

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[5] Judge, I have one other. The juror in seat number eight, Ms. Ryden. Although Mr. Colton, I think, attempted to rehabilitate her, she stated several times she would have great difficulty in following the law, that she was very firmly -- had a very strong opinion that the death penalty ought to be given on any case of first degree murder.

Once she did state that she would follow the law, but then followed it up immediately with, "This would be very difficult."

And not only that, she said at least on two different occasions she could not give either side a fair trial because of the situation she has got, you know with her business. Apparently, she was quite adamant about that and it seems to me, in light of both of those factors, that she should be excused for cause.

R 347.

we would object to her being excused for cause." R 347. Given the foregoing, there was plenty reason to doubt Ms. Ryden's qualification, and the trial court erred in denying the cause challenge. The state has not even addressed (and hence has waived) the juror's inability to serve because of her business problems.

Respecting Mr. Haughey, page 11 of the state's brief asserts that the defense challenged him solely because he had been the victim of a robbery. In fact, the defense also argued that his answers showed prejudice, and that he had read about another murder committed by Mr. Wyatt. R 867-69, 890-92. The trial court cut defense counsel off in mid-argument. R 892.[6]

D. In saying that the defense did not object to the judge's conduct, the state overlooks that defense counsel unsuccessfully objected to the trial court's attitude and sought a mistrial. The trial court's response was to demand an apology and demand that the defense not move for a mistrial. The judge said his voice was raised "because I don't appreciate your attitude." He continued to rebuke defense counsel. R 825-28.

The state does not deny (and hence waives any argument) that the tribute to juror Roberts was improper. At most its brief

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[6] This was shortly after the trial court had once again berated defense counsel and urged him to make no further legal arguments. R 825-29. During this episode the court said, among other things: "... I don't like to have to repeat what I said a half hour ago. Now, I don't like having to reprimand an attorney twice." R 826. "When I admonish a lawyer, I expect that that admonition will be followed. Now, if you're unhappy with that admonition, the appellate court is right down the road and you can take whatever steps, and I will aid you in taking whatever steps you find necessary, but don't repeat it and don't think that I don't understand." R 828. Having taken advantage below of the judge's actions, the state cannot now argue that the defense should have made further argument.

claims at page 13 that other jurors received like treatment, pointing to juror Bobbitt and to record pages 460 and 462. The record shows that Ms. Bobbitt was excused because of personal hardship. R 309-10. She did not pretend to have any expertise in the field of criminal law and, unlike Ms. Roberts, did not make a speech to the effect that the judicial system is rigged to free the guilty and did not announce that the state would "love" to have her on the jury. R 468-70. While the judge promptly said he would "love" to have Ms. Roberts on the jury because of her "expertise", R 474, he only told Ms. Bobbitt that he thought she would be a good juror. R 373.[7]

2. DENIAL OF MOTIONS TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS

Mr. Wyatt relies on his initial brief.

3. DNA EVIDENCE

The state has not disputed (and hence has waived any argument) that the it failed to show that the population statistics used by Dr. McElfresh were so variable as to make his statistical testimony unreliable.

Without denying that it was wrong for Dr. McElfresh to rely on findings of others in reaching his 1 in 32,700,000,000[8] statistic, the state's brief says at page 18: "Although Dr. McElfresh's results were in part dependent upon findings of others, he himself

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[7] The state's brief also refers to record pages 460 (where the judge wished Ms. Renfrew well on an operation) and 462 (where the judge expressed sympathy for Mr. Greenbaum, whose mother had been killed). These matters bear no relation to the judge's remarks to Ms. Roberts.

[8] R 3196.

rechecked those findings before relying upon them, they were properly admitted. (R 3171-3173, 3177, 3193, 3194)."

Examination of the record shows that the state's argument is disingenuous:

> Q But the sizings themselves are very technical, done with a computer-assisted instrument, in order to give you an exact as possible number as far as your sizings goes, so that your statistics that you generate as a result of those have some validity?
>
> A Yes. That's correct. The sizing is done and then the statistics are generated based on the sizings given. Certainly.
>
> Q Okay. So in order for your statistics to have any validity, those sizings have to be pretty darn accurate in order for you to do things. Otherwise, you don't fall in the criteria that Life Codes has for generating your frequency of occurrence data.
>
> A Certainly.
>
> Q Okay. So what you're doing, in effect, is you look at the records that someone else made as far as sizing and then you generate your statistics based upon what they had written down?
>
> A That's correct. And my own affirmation that what they had written down was correct.
>
> Q Okay. But you didn't size them yourself?
>
> A No, sir, with one exception.
>
> Q If they say the measurements, for instance, were 3.87 KB and 1.88 KB, you would eyeball it and say, "Yes, that appears to be the general range that they are in," but you cannot testify that those are exact measurements?
>
> A No, but that's fine. I mean, that checks the fact that their work was done correctly, it was sized twice, both numbers agreed, and when the statistics were done and matches were checked mathematically, all those numbers were.

> Q But you're basing you opinion, as far as the statistical data you generated as a result of the work performed by those other people, that you didn't participate in at all. Is that a fair statement?
>
> A Certainly.

R 3177-79 (cross-examination of Dr. McElfresh). The actual laboratory work and testing was largely done by Dr. Baird and Melinda Keel. Dr. McElfresh did not say how these people did the testing or what errors they may have made or what steps they took to avoid sources of error. Hence the state could hardly show (and did not show) that there is general scientific acceptance for their procedures or that they were sufficiently accurate to justify Dr. McElfresh's 1 in 32,700,000,000 figure.[9] Lifecodes' laboratory procedures have been found wanting before. People v. Keene, 591 N.Y.S.2d 733 (Sup. 1992) (citing to National Research Counsel work cited at footnote 9 above), State v. Houser, 490 N.W.2d 168, 181-84 (Neb. 1992).

4. EVIDENCE OF MR. WYATT'S PRIOR IMPRISONMENT

Mr. Wyatt relies on his initial brief.

5. COLLATERAL CRIME AND CHARACTER EVIDENCE

Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988) refutes the state's arguments. There, as here, the defendant may have fled

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[9] Laboratory error is a very likely source of error in DNA testing. National Research Council, DNA TECHNOLOGY IN FORENSIC SCIENCE, 3-17 (prepublication copy). "Especially for a technology with high discriminatory power, such as DNA typing, laboratory error rates must be continually estimated in blind proficiency testing and must be disclosed to juries." Id. "The DNA evidence should not be admissible if the proper procedures were not followed. Moreover, even if a court finds DNA evidence admissible because improper procedures were followed, the probative force of the evidence will depend on the quality of the laboratory work." Id. 6-4.

to avoid a murder prosecution or may have fled because of other crimes. This Court wrote:

> Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges. The court compounded the error by instructing the jury that an attempt to avoid prosecution through flight is a circumstance which may be considered in determining guilt. We cannot say beyond a reasonable doubt that these errors did not affect the jury's verdict. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986).

Here, of course, it was the state which introduced the improper evidence. Given the pervasive nature of the collateral crime evidence the error was not harmless.

6. SHACKLING OF DEFENDANT

Page 26 of the state's brief asserts that "the jury was not aware of the shackles as appellant's legs could not be seen at the defense table. (R 3-6)." This assertion is disingenuous at best: it refers to the situation in the courtroom. The defense separately objected to his being shackled during individual voir dire in the judge's chambers. R 303. Hence Robinson v. State, 610 So. 2d 1288, 1290 (Fla. 1992) is beside the point. The record shows that the trial judge merely deferred to the jailers, and left it at that, contrary to the teachings of Bello v. State, 547 So. 2d 914 (Fla. 1989).

7. REFUSAL TO HEAR PROFFER

In its brief, the state places principal reliance on Gunsby v. State, 574 So. 2d 1085 (Fla. 1991). Gunsby says nothing

relevant to the issue at bar. The record shows that the defense was prepared to show that the fingerprints were obtained by someone not authorized to obtain them. R 1832. It shows that the state disputed this fact. Id. Hence there was a significant factual issue to be resolved by an evidentiary hearing. The court refused to hear any proffer on the subject. Reversal is required under the cases cited in the initial brief.[10]

8. SPECULATIVE TESTIMONY OF MEDICAL EXAMINER

Mr. Wyatt relies on his initial brief.

9. JURY INSTRUCTIONS

1. Flight.

Merritt, 523 So. 2d at 574 (Fla. 1988) again refutes the state's arguments that "[a]t the time of appellant's trial a flight instruction was permissible" and that the error was harmless because of "overwhelming evidence of guilt". There, as at bar, the defendant may have fled to avoid the murder charge or may have fled because of other misdeeds. In an opinion issued several years before Mr. Wyatt's trial this Court wrote:

> Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges. The court compounded the error by instructing the jury that an attempt to avoid prosecution through flight is a circumstance which may be considered in determining guilt. We cannot say beyond a reasonable doubt that these

[10] The state's bald assertion (apparently based on its own view of the facts) that "Regardless of the testimony the fingerprints were admissible" does not hold water. That determination can only be made after hearing the evidence.

> errors did not affect the jury's verdict. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986).

See also Young v. State, 601 So. 2d 636 (Fla. 4th DCA 1992) (improper to instruct on flight where defendant may have been fleeing from separate offense) and Keys v. State, 606 So. 2d 669, 673-74 (Fla. 1st DCA 1992) (same).

State v. DiGuilio disposes of the state's harmless error argument. To show that an error was harmless, the state cannot merely say that there was "overwhelming evidence of guilt." This court wrote at page 1139 of that case (emphasis supplied):

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.

See also Ciccarelli v. State, 531 So. 2d 129, 132 (Fla. 1988) ("The court must determine not if there is overwhelming evidence of guilt, but if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error."). The state has not made a proper argument under State v. DiGuilio and has therefore waived any claim of harmless error.

2. Premeditated design to kill.

Mr. Wyatt relies on his initial brief.

3. Reasonable doubt.

Mr. Wyatt relies on his initial brief.

10. THE PROSECUTION'S FINAL ARGUMENT AS TO GUILT

The nub of the state's position is that it may engage in

improper argument so long as it is termed "rebuttal."[11] U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) refutes such argument. The state does not present, it cannot present, any case standing for the proposition that it was proper for it to vouch for witnesses, comment on the defendant's failure to present evidence, claim that it could have presented additional evidence, attack counsel, and otherwise violate settled law governing argument. Even now, as in Kojayan, the government sees no error in its improper argument. Further, the state is in no position to claim that the jury did not hearken to its improper arguments. See James v. State, 615 So. 2d 668 (Fla. 1993), DeMarco v. U.S., 928 F.2d 1074 (11th Cir. 1991), Clemons v. Mississippi, 110 S.Ct. 1441, 1451 (1990).

11. CONDUCT OF SENTENCING HEARING

A. Page 36 of the state's brief says in a footnote: "Appellant argues that the state withheld his own mother's condition from the defense. There is no record support for this absurd allegation, furthermore, how is the state in any position to conceal any information regarding appellant's own family. The state has spoken to the mother with appellant's knowledge. (R 3600). The state was aware of appellant's mother's condition as was appellant himself. (R 3603-3604)." Review of the cited pages reveals that the state has not accurately portrayed the situation: the prosecutors knew

[11] In denying any impropriety in its argument, and in not showing (or even arguing) how rebuke or retraction could remove its taint, the state has effectively conceded the issue. Since it thinks it did nothing wrong, there could be no likelihood of retraction or rebuke.

for months that the mother was not going to testify,[12] and did not inform counsel or the court; defense counsel had only recently learned of it and immediately notified the court.[13] Thus the record shows that the state did know of her condition and did not tell the defense. Mr. Wyatt was in close confinement, and hence was dependent on counsel for information about the witnesses. The defense may have known that the prosecution investigator talked to the mother, but the record refutes any suggestion that it knew what the mother told the state investigator. The state has offered no

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[12] Responding to the defense statement that it had just learned of the mother's worsened condition and needed time to investigate, the State Attorney replied (R 3603-3604):

> In talking to our investigator, who attempted to interview his mother months ago, she indicated back then -- And we're in a position to put him on the stand to say so, that she indicated months ago that she was in no condition to give any testimony about her son. Isn't that right? Her mental condition then, she said, prevented her from doing that. So this -- I don't know how waiting is going to help that situation. How many months ago was it?
>
> A VOICE [apparently the state's investigator]: December.
>
> MR. COLTON: If in December she wasn't able to say anything, I don't know if we waited another few days or weeks what that's going to do if she's apparently worsening.

[13] "Ms. McDaniel's worsened condition, I can tell the Court, I notified the Court first thing on Monday when I found out about that myself, that's something that I just became aware of or we just became aware of over the weekend, and I'm still attempting to get additional information." R 3600 (defense counsel Sidaway).

explanation for its tactics in this regard.[14]

Given the foregoing, the state is ill-placed to assert, as it does in its brief, that the defense should have brought the matter up earlier: it was the prosecutor who was sitting silent with foreknowledge of the problem.

B. The state's brief asserts at page 39: "The record is clear that appellant waived presentation of mitigating evidence before the jury and the judge. (R 3637-3639, 3921-3936)." The cited pages do not support the claim that Mr. Wyatt waived presentation of mitigation to the judge.[15] Indeed, they do not show that Mr. Wyatt was aware of the right to present mitigation to the judge. Further, the record affirmatively shows that the judge did not want to consider additional mitigation after the jury's penalty verdict: he refused a PSI and mental evaluation, he came to the next hearing with an already-drafted sentencing order, and he cut Mr. Wyatt off in the middle of his personal allocution statement.

12. THE PREMEDITATION AND HEINOUSNESS CIRCUMSTANCES

The state's brief says at page 43: "After a thirty minute crime spree, (R 1040-1041, 1054), which included two armed rob-

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[14] The record suggests that the prosecutors were pretty far gone into the school of "hard-bitten litigation tactics ... unbecoming of a prosecutor". See U.S. v. Kojayan, 8 F.3d at 1323.

[15] Pages 3637-39 involve waiver of mitigation at the jury sentencing phase and show that Mr. Wyatt was unaware that the state would be allowed to present hearsay evidence. Hence he did not want presentation of hearsay or other non-live testimony on his behalf. Pages 3921-36 (and specifically pages 3925-27) confirm that Mr. Wyatt's main concern was that he wanted presentation of live testimony from his mother and sister. They do not contain a waiver of presentation of mitigation to the judge. The defense request for a PSI and for a mental evaluation demonstrates that there was no waiver of mitigation.

beries, three kidnapping, and one sexual battery, all three victims were herded into a small bathroom and executed." It says at page 42: "All three victims were subjected to the thirty minute ordeal involving their kidnapping, sexual battery and robbery, and undoubtedly anguished over their impending death." The cited pages do no support the state's attempt to enlarge the length of the criminal episode. Pages 1040-41 show that things were not amiss at Domino's as of "shortly after 11:00" p.m. Page 1054 shows that the Cadillac was at Domino's around 11:45 p.m. Further reading in the record shows that the Cadillac was gone when Daniel Lawing arrived at about 11:45 p.m. R 1076-77.[16] The record does not show the "thirty minute ordeal" claimed by the state. The state's argument is based on the sort of speculation forbidden by Robertson v. State, 611 So. 2d 1228 (Fla. 1993) ("[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984).").

1. Cold, calculated, and premeditated.

The state's argument is based almost entirely on the claim that the robbery was planned in advance. Such argument does not support the circumstance. Rogers v. State, 511 So. 2d 526 (Fla. 1987)

2. Especially heinous, atrocious, or cruel.

Without analysis the state cites Chandler v. State, 534 So.

[16] Mr. Lawing testified that he received no answer when he telephoned Domino's around 11:35, R 1076, and that he went there about ten minutes later. R 1077.

2d 701 (Fla. 1988), Smith v. State, 424 So. 2d 726 (Fla. 1983), and White v. State, 403 So. 2d 331 (Fla. 1981) as supporting application of this circumstance. In Chandler, the defendant removed an elderly couple from their home and repeatedly stabbed them and beat them with a baseball bat.[17] In Smith a group of men kidnapped a store clerk, took her to a motel, raped her, then took her to the woods and shot her. In White a group of men entered a home, tied a woman up and taunted her for hours, tied up other persons as they entered the home over several hours, and eventually shot all of them.

The state's cases do not authorize use of the circumstance in the shooting deaths here. This Court treats non-shooting death such as those at bar differently, so Chandler does not apply. The other two cases involve periods of torment much longer than the case at bar. Further, Smith explicitly[18] and White by implication use the since-abandoned application of the circumstance to "execution-style" murders. Of course it is the confused state of prior law (especially involving "execution-style" murders) which has rendered the circumstance unconstitutional in shooting cases. See Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992).[19] In Vaught v.

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[17] An earlier opinion in the same case more fully details the facts. Chandler v. State, 442 So.2d 171, 171-72 (Fla.1988) (affirming convictions but reversing for resentencing).

[18] 424 So.2d at 733 (referring to "ultimate execution-style killing and citing to Knight v. State, 338 So.2d 201 (Fla.1976).

[19]

> Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial

State, 410 So. 2d 147, 151 (Fla. 1982), this Court disapproved use of the narrowing State v. Dixon[20] definitions in an execution-style shooting, and in Pope v. State, 441 So. 2d 1073, 1077 (Fla. 1984) this Court completely abandoned the State v. Dixon definitions. See Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases, 64 N.C.L.REV. 941, 974 (1986) (discussing "execution-style" murders).

13. PENALTY PHASE EVIDENCE OF CRIMINAL ACTIVITY

Page 45 of the state's brief says: "Evidence of appellant's character is a proper consideration during the penalty phase. The standard for admissibility is different at the penalty phase given that the focus is on the defendant's character. Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988)." The state overlooks that Hildwin held that the state may not admit evidence of uncharged criminal activity at penalty in its case-in-chief. There the defendant had introduced evidence of non-violence, and the state introduced evidence of an uncharged sexual battery as rebuttal.

> court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. See, e.g., Porter v. State, 564 So.2d 1060 (Fla.1990), cert. denied, 498 U.S. __ (1991); Cherry v. State, 544 So.2d 184, 187 (Fla.1989), cert. denied, 494 U.S. 1090 (1990-); Lucas v. State, 376 So.2d 1149, 1153 (Fla.-1979).

The Court went on to note that this Court had consistently applied to circumstance in strangulation cases.

[20] 283 So. 2d 1 (Fla. 1973).

The state's claim of harmless error fails in view of its argument in the trial court that the evidence was "certainly relevant to the aggravating circumstances." R 3665.

14. PENALTY PHASE EVIDENCE REGARDING PRIOR VIOLENT FELONY

Again, the state's claim of harmless error is directly contrary to its argument in the trial court, where it countered defense argument on this point by saying: "Absolutely it's prejudicial." R 3686. And: "I can agree that the intent is to prejudice the jury against the defendant." R 3679. Instructive is U.S. v. Kattar, 840 F.2d 118, 127 (1st Cir. 1988), where the court wrote in a somewhat different context:

> ... It is one thing for private counsel to characterize events in contrasting ways in two separate litigations, because the counsel there is required under our adversary system to defend its clients in the most vigorous fair manner possible -- counsel is expected to put the best possible gloss on a client's case. The function of the United States Attorney's Office, however, is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.

Cf. also Russell v. United States, 369 U.S. 749, 768 (1962) (prosecution may not "shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."), and U.S. v. Kojayan, 8 F.3d at 1324 (citing U.S. v. Kattar).

15. CONFRONTATION CLAUSE AT SENTENCING

The state misrepresents appellant's argument, saying at page 48 of its brief that "Appellant concedes that such evidence is admissible." Of course the opposite is true. Appellant contends that the evidence violated the Confrontation Clause.

16. IMPROPER PENALTY ARGUMENT

The state argues that it was proper for it to argue that, unlike the defendant, the decedents did not receive a trial before their deaths. This proposition is completely insupportable under Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) and Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985) (en banc) ("Similarly, it is wrong to imply that the system coddles criminals by providing them with more procedural protections than their victims."), vacated on other grounds, 478 U.S. 1016 (1986). See also Hodges v. State, 595 So.2d 929 (Fla.) (citing cases), vacated on other grounds 113 S.Ct. 33 (1992); Taylor v. State, 583 So. 2d 323 (Fla.1991), Jackson v. State, 522 So. 2d 802 (Fla. 1988), White v. State, 616 So. 2d 21 (Fla. 1993). Cf. Pait v. State, 112 So. 2d 380 (Fla. 1959) (argument that unlike defendant, state had no right to appeal).

This improper argument was not an isolated remark in an otherwise proper argument. The state's argument, taken as a whole, was filled with improper arguments: the state attorney improperly argued that the jury should consider absence of remorse in aggravation, should disregard mitigation, made personal comments regarding the evidence, and commented on the defendant's demeanor at the counsel table. Reversal is required.

17. CONSTITUTIONALITY OF SECTION 921.141

Mr. Wyatt relies on his initial brief.

CONCLUSION

This Court should reverse the convictions and sentences and order a new trial or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Cecelia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this 6TH day of April, 1994.

Of Counsel