IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Appellant,

vs.

Case No. 78,031

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM A SENTENCE OF DEATH IMPOSED IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

We respond below to those arguments presented in the prosecution's Answer Brief ("PAB") which are not already fully rebutted by Appellant's Initial Brief ("AIB").[1] We also correct some of the prosecutor's more egregious misstatements of fact and law. Unfortunately, those misstatements permeate the State's brief to the extent that we submit that it cannot be relied upon to accurately describe either the record or the law. For example, the prosecutor cites a purported fact which is not only false and not only outside the record, but the falsity of which (when uttered by Stevens' trial attorney) was part of the basis for this Court's conclusion on Stevens' post-conviction appeal that he had been denied effective assistance of counsel. *See infra* at p. 7.

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[1] For ease of cross-reference to Appellant's Initial Brief (and to the prosecution's Answer Brief, which generally follows the structure of Appellant's Initial Brief), we will use the same point and subpoint headings (and the same numbering and lettering of the argument headings) as we used in our principal brief.

II. ARGUMENT

POINT ONE

THE SEVENTEEN MITIGATING FACTORS PROVED BY STEVENS OVERWHELMINGLY REQUIRED A LIFE SENTENCE, HAD THE *TEDDER* STANDARD BEEN APPLIED AND DUE DEFERENCE BEEN GIVEN TO THE JURY'S RECOMMENDATION OF LIFE

A. Introduction

The State's underlying premise that Stevens' "claims go to discretionary rulings that are not subject to review, or they rely upon jury argument rather than appellate principles" **(PAB 4)** certainly does not apply to a life override case such as this. In *Buford v. State,* **570 So. 2d 923, 924** (Fla. 1990), this Court stated that, upon the **appeal** of life override cases, it "will review all the evidence to determine if the record ... supports the override" (emphasis added) --- i.e., to determine whether there is no reasonable basis in the record to support the jury's life recommendation.

The *Tedder* rule has an evidentiary component, which is entirely unrecognized by the prosecution. **If** the jury recommended life **and** if a reasonable juror could have found mitigating circumstances to have been established, then both the trial court and this Court must consider those mitigating circumstances to have been established. **See** *Cheshire v. State, 568 So.* **2d** 908, 910-11 (Fla. 1990) ("If facts are evident on the record upon which a reasonable juror could rely to recommend life imprisonment, then the trial court **errs** in overriding the life recommendation."); *Holsworth v. Stute,* **522 So.** 2d **348, 354 (Fla. 1988)** (although trial judge expressly rejected **expert** testimony and gave little weight to other evidence in mitigation, "it is the jury's function, in the first instance, to determine the validity **and** weight of the evidence presented in aggravation **and** mitigation. ... When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than **a** difference of opinion **for** the judge to override that recommendation.").

The State's apparent position that this **Court** should give deference to the trial court's findings concerning the weight to be given the aggravating and mitigating circumstances **is**

contrary to **the** *Tedder* rule. When there is a jury recommendation of life, the issue is not whether the sentencing judge gave proper weight to the aggravating or mitigating factors, but rather whether there was a reasonable basis for the jury's recommendation. The presumption of correctness in life override cases lies with the jury's recommendation, which signifies that the jury found sufficient mitigation to recommend a life sentence.[2]

This Court therefore is required by its precedents to consider all the mitigating evidence in this record and to presume, pursuant to ***Tedder,*** that that mitigating evidence provided a reasonable basis for the jury's recommendation.

B. The *Tedder* Standard

In discussing the purported analysis to be applied by a sentencing court following a jury recommendation **of** life, the prosecutor ***sub*** *silentio* argues for the overruling of ***Tedder v. State***, 322 **So. 2d** 908 (Fla. 1975), and the entire body of decisional law concerning life recommendations handed down by this Court since ***Tedder*** **(PAB** 5-6). The essence of the prosecutor's argument --- which states what he wishes the law were rather than what it is --- is enunciated in the following sentence **(PAB** 6):

> Fla. **Stat.** 921.141 directs the trial judge, as actual sentencer, to weigh the aggravating and mitigating evidence and to sentence in accordance with the weight of the evidence notwithstanding any advisory sentence returned by the jury. (Emphasis in **original.)**

The prosecution's view **of** the law was rejected in (among other cases) *Cochran v.* ***State,*** **547** ***So.*** 2d 928, 933 (Fla. 1989), which directed trial judges to "'place less reliance on their independent weighing of aggravation and mitigation"' than on determining whether there was a reasonable basis for the jury's life recommendation.

That the prosecutor so egregiously attempts to distort black-letter law concerning the effect of a life recommendation (*see* **AIB 23-24** for a discussion of that black-letter law) demonstrates

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[2] **A life** recommendation eliminates any presumption that death is the appropriate penalty even if one or more aggravating factors are present. *Williams* ***v. State,*** **386 So. 2d 538, 543 (Fla. 1980).**

that little confidence can be placed in any of the arguments set forth in his brief.[3] Because the prosecutor "reject[s]" the *Tedder* standard (PAB 6), his entire attempt to justify Stevens' death sentence is wholly and irredeemably flawed.

C. Judge Weatherby's Sentencing Order

The prosecutor claims that "Judge Weatherby complied with the newly created writing requirements of *Campbell v. State*, 571 So. 2d 415 (Fla. 1990)" (PAB 7). In making that argument the prosecutor overlooks the fact that Judge Weatherby entirely ignored the mitigating factor of Stevens' current debilitated physical condition, most notably the blindness inflicted upon him in prison (see AIB 25 n.34).

Moreover, the prosecutor misstates the law when he claims that a contemporaneous objection must be raised to defects in a sentencing order. This Court has held that the contemporaneous objection rule does not apply to defects in sentencing orders and, in particular, a judge's failure to find mitigating circumstances in a capital case. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989); *State v. Rhoden*, 448 So. 2d 1013, 1015-16 (Fla. 1984).

D. The Overwhelming Support for the Jury's Recommendation of Life

1. Dearived childhood. Contrary to the prosecutor's contention that the evidence of Stevens' deprived childhood came solely from his biased "siblings" (PAB 8-9), some of the most powerful testimony on this subject came from his aunt, Elizabeth Netherly (PCT 181-95).[4]

In a paragraph beginning "We suspect that the truth is ..." (PAB 9), the prosecutor

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[3]The prosecutor's reliance on *Zeigler v. State*, 580 So. 2d 127, 130-31 (Fla. 1991) (the only case he cites in his discussion of the purported law), for the proposition that a sentencing court must consider the weight to be given mitigating factors even when a jury has recommended life is not inconsistent with the *Tedder* standard in fact enunciated by this Court. See AIB 23-24.

*Interestingly, the trial prosecutor also ignored Netherly's testimony in his summation, attacking only Stevens' brothers' testimony (T 603-06). Apparently neither prosecutor can find any "angle" for criticizing her testimony.

subjects this Court to rampant speculation rather than to discussion of the record. For instance, the prosecutor inaccurately speculates (**PAB** 9): "Aside from a misdemeanor by ... [a] sibling, Rufus' brothers and sisters are successful citizens." Although Stevens' evidence did not purport to **focus** on the "successfulness" of his siblings' lives, the record shows that among his eight siblings who lived past infancy, one had been jailed quite a few times, including for beating his wife; **a** second was an alcoholic receiving workmen's compensation; a third was totally disabled, unable to read or write, with criminal convictions for breaking **and** entering **(a** felony) **and** possession of marijuana; and a fourth was receiving public assistance (Netherly: **PCT** 186; R. Stevens: R **468,** 500-08, **524, 527;** C. Stevens: T 512, **533, 537-44).** Thus, the prosecutor's "theory" that Stevens is a "bad apple" and that his siblings are pillars of the community **is** absolutely contradicted by the small portion of the record which refers to his siblings' adult lives.

2. Physically/psychologically abused as a child. The prosecutor complains that the evidence presented concerning this mitigating circumstance was "redundant, exaggerated and largely unverifiable" **(PAB** 10). The "redundancy" apparently results from the tremendous volume of consistent evidence from five different witnesses as to the brutal nature of Stevens' childhood **(see AIB** 8-10). Since the prosecution is unable to identify even one exaggeration of the **abuse** suffered by Stevens, its factually-unsupported opinion is hardly persuasive. With respect to the claim that the abuse is "largely unverifiable," the State was specifically put on notice as to the abuse perpetrated against Stevens **as** early as seven **years** before he was resentenced --- i.e., when Stevens' motion for post-conviction relief was **filed** in 1984. Despite having seven **years** to investigate the claimed falsity of Stevens' evidence concerning the abuse he suffered as a child, the prosecution has not produced one scintilla of evidence which questions our proof on this point.

The prosecutor claims that the abuse (of which there was "redundant" evidence) "obviously did not influence the other nine Stevens children" **(PAB** 10). Apparently he missed testimony such **as** that Stevens' brother Robert tried to hang himself at the age of seven or eight because he could not **stand** the beatings he received (R. Stevens: R 475-76).

It is interesting to note that the State attacks these first two mitigating factors concerning Stevens' childhood even though Judge Weatherby found them to be persuasive (R **307)** --- albeit not persuasive enough "to outweigh the aggravating circumstances" (R **307).**[5]

3. Learning disabled/lack of education, The prosecutor misrepresents the record by claiming that "Stevens was extremely bright, with above average IQ" **(PAB** 10). On the very **page** of the record cited by the prosecutor, Dr. Levin characterized Stevens **as** having "average intellectual ability" and "average" intelligence **(T 429).** The evidence (see **AIB** 10) that Stevens did not successfully complete grade school and that he **was** often rejected for jobs **as** an adult because of **his** poor reading ability stands uncontradicted.

4. Good worker/held jobs, Continuing his blatant distortion of the record, the prosecutor claims that Stevens' sole evidence concerning his employment history related to the years before **1972.** In fact, there was copious evidence concerning Stevens' **post-1972** employment. Thomas Ward, who found Stevens to be **a** "very dependable" worker, employed Stevens seasonally from 1972 through 1976 or 1977 **(Ward: R 623, 626, 627).** William White, Stevens' foreman, testified concerning Stevens' promotion to assistant foreman and his generally being **a** good worker in 1977 **and** 1978 (White: R **594-97).** Sandra Cobb knew Stevens to be a "**hard** worker" from before he married his wife (in **1972)** until he moved to Florida (in 1978) (Cobb: R **633-34).**

No **less** than five witnesses testified that Stevens worked **as a** maintenance **man,** and later **as a** maintenance supervisor, at **a** Best Western Motel in Orange **Park** throughout the year (1978-79) he was in Florida **prior** to his arrest. Included among those witnesses were Hamilton, the **State's** chief witness, **and** Parmenter, its chief detective, who testified that Stevens was well-regarded by his boss (Hamilton: TT 586-87; Parmenter: **TT'** 948; Netherly: PCT **203;** Stevens: **PCT 904-05;** R. Stevens: R **493-94).**

5. Military service, The prosecutor incorrectly states that the **PSI** says that Stevens'

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[5]**As** discussed at **AIB 25-27,** had Judge Weatherby been applying the ***Tedder*** standard enunciated by this **Court, his** findings concerning Stevens' childhood, in and of themselves, provided **a** reasonable basis for the **jury's** recommendation and thus mandated a sentence of life imprisonment.

second period of military service "apparently ended with his incarceration at Fort Knox stockade for going AWOL" (PAB 10-11). The PSI considered by Judge Weatherby does not say that either explicitly or "apparently."

Particularly outrageously, the prosecutor refers to trial counsel's statement in his penalty-phase summation that Stevens was dishonorably discharged from the Army (PAB 11). The prosecutor makes this statement, despite the fact that that portion of the trial transcript upon which he relies was explicitly agreed by the parties and ruled by Judge Weatherby to be outside the record for the resentencing (T 5-6; R 312-318), and the further fact that trial counsel's statement --- which was in fact false --- was one of many manifestations of constitutional ineffectiveness cited by this Court in overturning Stevens' original death sentence. *Stevens v. State, 552 So. 2d* 1082, 1087 (Fla. 1989).[6]

6. Good parent/family member. The prosecutor attempts to minimize the evidence proffered concerning this factor as being presented solely by biased "family members" (PAB 11). In doing so, he ignores the testimony concerning Stevens' good qualities as a husband and father given by three non-family witnesses (Evans: R 580-81; Cobb: R 634, 636; Allen: PCT 217-18).

7. Mental/psychological **problems.** Instead of focusing on the evidence concerning Stevens' seriously delusional mental state, the prosecutor launches a broadside attack on Dr. Levin, who testified based upon his testing and interviews of Stevens, as well as upon years of Stevens' prison mental health records. Not surprisingly, the prosecutor completely ignores those prison mental health records (DRE3), which are entirely consistent with Dr. Levin's testimony (see AIB 13), and the six affidavits (DRE7A-F) which describe Stevens' bizarre and delusional behavior over the last few years.

Not only were Dr. Levin's findings thoroughly corroborated by extrinsic evidence but the trial prosecutor was obviously persuaded enough of Stevens' delusional state of mind that he never

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[6]Frankly, we are appalled by the prosecutor's reliance on this outside-the-record allegation which has already been found by this Court to be false. We submit that this portion of the prosecutor's brief should be stricken.

sought to have Stevens, or even Dr. Levin's testing results, examined by his own expert, much less calling a doctor to give contradictory testimony. It ill-behooves the State to complain about our evidence of Stevens' delusional mental condition when it essentially capitulated on this issue in the trial court.

The appellate prosecutor twists the record by claiming that Dr. Levin told Stevens that "he had been retained by Stevens to help construct a defense to get Stevens off death row" (PAB 12) (emphasis added). In fact, Dr. Levin was retained by defense counsel and defense counsel was trying to get Stevens off death row. Not satisfied with the facts, the prosecutor insinuates that Stevens was encouraged to manufacture evidence. Dr. Levin testified, however, that the results of his testing and Stevens' denials of delusional symptoms strongly convinced him that Stevens was not malingering or exaggerating (T 437-38, 439-40). Moreover, Dr. Levin found that the prison medical records, which (among other things) documented delusional behavior and a suicide attempt,[7] were strongly corroborative of his conclusions (T 440-41).

8. Drinking or intoxicated at the time of the crime. Although the undisputed evidence shows that Stevens was drinking heavily for hours before the crimes were committed, the prosecutor relies (PAB 14) upon this Court's finding on Stevens' first direct appeal that the statutory mitigating circumstance that the "capacity of the defendant ... was substantially impaired" --- §921.141(6)(f), Fla. Stat. (1985) --- was not established. *Stevens v. State,* 419 So. 2d 1058, 1064 (Fla. 1982), *cert. denied,* 459 U.S. 1228 (1983).

Trial counsel, who also handled Stevens' original direct appeal, never sought, however, to prove the existence of any non-statutory mitigation in either the Circuit or this Court. Former counsel never argued that the undisputed evidence of Stevens' heavy drinking established a non-statutory mitigating circumstance, even if the Court did not find sufficient intoxication to establish the statutory mitigating factor. See *Cheshire v. State, supra, 568 So.* 2d at 912. We submit that, at a minimum, the undisputed proof establishes the non-statutory mitigating factor that Stevens

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[7] A second suicide attempt occurred after Dr. Levin testified (see R 669-93).

was drinking heavily or was intoxicated at the time of the crime.

9. History of alcohol problems. The prosecutor claims that the strong evidence of Stevens' longstanding alcohol problem "is irrelevant" because Stevens was not shown to be "so brain damaged by alcoholism as to have been 'insane' or not responsible for his conduct" **(PAB 14).** The prosecutor thereby tries to set a far stricter standard of proof for this mitigating factor than has been required by this Court. Stevens' proof more than adequately meets the actual degree of proof required. *See,* e.g., *Downs v. State,* 574 So. 2d 1095, 1099 (Fla. 1991); *Nibert v. State*, 574 So. 2d 1059, 1062-63 (Fla. 1990).

10. Question of which participant committed the homicide. The prosecutor is unwilling to accept the fact that the undisputed evidence shows that Engle, acting alone and out of the presence of Stevens, killed Tolin. He instead improperly speculates that the "truth is that Engle, Stevens, or both, ... strangled and stabbed Kathy Tolin to death" **(PAB** 15). Notwithstanding the prosecutor's improper speculation, this Court is bound by the record which implicates only Engle in the actual killing.

11. Premeditated murder not proven (although defendant convicted of felony murder). As this Court stated in *Van Poyck v. State, 564 So.* 2d 1066, 1069 (Fla. 1990), conviction of felony murder and not of premeditated murder "is a factor that should be considered in determining the appropriate sentence."

13. Remorse. The evidence of Stevens' remorse comes mainly from his statements to Parmenter (see **AIB** 15) and are thus not "hearsay" as claimed by the prosecutor **(PAB 16).**[8] We also point out that the connection Dr. Levin drew between Stevens' remorse and his psychotic condition (see **AIB** 15) has been found to be mitigating. *Copeland v. Dugger,* 565 *So.* 2d 1348, 1349 (Fla. 1990).

16. Physical condition. The prosecutor misleadingly states that "Dr. Halpern could not be certain whether Stevens was exaggerating his visual impairment" **(PAB** 16). In fact, despite

[8]The prosecutor refers to "Stevens' continued denial of guilt" (PAB 16). The prosecutor provides no record reference for this supposed fact which is found nowhere in the record.

the considerable efforts of the trial prosecutor to suggest that Stevens was malingering: Dr. Halpern's physical examination of Stevens' retinas left no doubt that Stevens' vision was impaired to the point of legal blindness, without the slightest reliance on Stevens' statements as to what he could and could not see during a vision test (Halpern: T 313-14, 315-16). Moreover, Dr. Halpern testified that his findings concerning Stevens' vision were consistent with the 1986 reports of Stevens' treating doctor at Shands Teaching Hospital (Halpem: T 312; see DRE1, DRE2).

17. Charitable/humanitarian deeds. The prosecutor inaccurately states that the considerable evidence of Stevens' good deeds and concern for his fellow human beings was "hearsay" (PAB 17). With the possible exception of Leonard's testimony about the help Rufus gave his wife's grandmother, who was in a nursing home, all of the considerable evidence presented in support of this factor was personally known to and witnessed by the person who testified to it (see AIB 17-20).

E. Conclusion

The prosecutor is neither accurate nor fair in his discussion of both the strong mitigating evidence and the *Tedder* standard. He also never refers to, much less tries to show the inapplicability of, Justices McDonald's and Overton's still-valid dissent on the original direct appeal as to the override of the jury's life recommendation. That dissent, which stated that the jury could have determined that "Engle was the sole perpetrator of the homicide," concluded that that factor alone was sufficient to support the jury's life recommendation. *See Stevens v. State*, *supra*, 419 So. 2d at 1065.

An accurate and fair consideration of the evidence and application of the *Tedder* standard necessarily leads to the conclusion that there are numerous reasonable bases in the record to support the jury's recommendation. This Court therefore should vacate the death sentence and direct the trial court to impose a sentence of life imprisonment.

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[9]Of course, the State did not have its own expert examine Stevens, which it surely would have done, had it had any genuine doubt about this evidence.

POINT TWO

THE SENTENCE OF DEATH WAS DISPROPORTIONAL TO REVERSALS OF LIFE OVERRIDES BY THIS COURT IN LIGHT OF THE FACTS THAT STEVENS WAS NOT THE ACTUAL KILLER, WAS INTOXICATED AND HAD A HISTORY OF ALCOHOL ABUSE, *AND* WAS THE VICTIM OF A SEVERELY DEPRIVED CHILDHOOD

The prosecutor persists in claiming that Stevens took part in actually killing Tolin **(PAB** 17-18), despite the fact that the prosecution's own proof shows that Engle alone committed the actual homicide. The prosecutor's argument that Stevens' sentence **is** proportional is thus **based** upon a fundamental distortion of **the** factual record.

The prosecutor misses --- or deliberately ignores --- a central component of Stevens' proportionality analysis. **As** recently stated in ***Watts v. State,*** ___ ***So.*** 2d ___ (Fla. No. **74,766,** Jan. 2, 1992, p. 14), this Court **is** required to analyze life **override** cases by a "wholly different legal principle" than that applicable to cases where the jury recommended death. We therefore restricted our proportionality analysis **(AIB 37-40)** to life override cases. Apparently having no basis to refute the valid proportionality argument we made, the prosecutor instead relies on **six** cases involving a death recommendation.[10] Because of the "wholly different legal principle" involved in determining the validity of the sentences in those death-recommendation cases, they are irrelevant, **and** in no **way** contrary, to our claim of disproportionality. See ***Watts v. State, supra.***

POINT THREE

EACH OF THE FOUR AGGRAVATING CIRCUMSTANCES RELIED UPON WAS INSUFFICIENTLY PROVEN AND/OR WAS CONSTITUTIONALLY DEFECTIVE

A. Introduction

The prosecution suggests that this Court's findings on the original direct appeal concerning

[10]The prosecutor asserts (PAB 18): "Stevens' case compares favorably with *Copeland v. State,*" That **assertion is** somewhat ironic since, upon remand from this **Court** for resentencing, the State recently consented to Copeland being sentenced to life imprisonment.

the sufficiency of the four aggravating circumstances found --- *Stevens v. State, supra,* 419 So. 2d at 1064 --- are conclusive on this appeal (PAB 18, 20, 23). Contrary to the prosecutor's suggestion, findings of aggravating and mitigating circumstances in prior sentencing proceedings do not constitute the law of the case. *King v. Dugger*, 555 So. 2d 355, 358-59 (Fla. 1990); *Huff v. State*, 495 So. 2d 145, 152 (Fla. 1986). It should be noted, moreover, that not a single argument now raised by Stevens was made on the original direct appeal and that our challenges to the sufficiency of the aggravating circumstances are based principally upon law which did not exist at the time the original direct appeal was decided.

B. THE AVOIDING ARREST AGGRAVATING FACTOR WAS NOT SUFFICIENTLY PROVEN BECAUSE THE EVIDENCE DID NOT SHOW THAT THE DOMINANT OR ONLY MOTIVE FOR THE MURDER WAS THE ELIMINATION OF A WITNESS

The prosecutor not only ignores our argument that the avoiding arrest aggravating circumstance did not apply in this case because Engle was the sole homicidal actor (AIB 42), but he also contradicts the record by claiming that Stevens did the actual killing (PAB 2). Knowing that the actual facts would not support the finding of this aggravating factor, the prosecutor apparently felt compelled to misrepresent the record.

The prosecutor also ignores the law that there must be evidence beyond a reasonable doubt that the conscious purpose of the murder was to eliminate a witness or otherwise to avoid arrest. See AIB 41. It is not enough that the murder merely incidentally eliminates the victim as a witness, without evidence beyond a reasonable doubt of an intent to do so, since all murders by definition achieve this. The State's proof of such an intent did not exist, much less having been proven beyond a reasonable doubt.[11]

[11] It should also be noted that the prosecutor does not argue that witness elimination was "the dominant or only motive for the murder" (emphasis added), as required by *Menendez v. State*, 368 So, 2d 1278, 1282 (Fla. 1979), but rather that it was "a dominant motive" (PAB 19) (emphasis added). The prosecutor thus implicitly concedes that he cannot meet the more rigorous standard enunciated in *Menendez*.

C. THE PECUNIARY GAIN AGGRAVATING FACTOR WAS NOT SUFFICIENTLY PROVEN, IN THAT THE HOMICIDE DID NOT FURTHER THE FINANCIAL GAIN

The prosecutor's sole argument concerning this issue is to refute an argument we never made: i.e., "that if 'pecuniary gain' is a 'dominant' motive then 'witness elimination' cannot apply (or vice versa)" (PAB 19). The argument the prosecutor makes --- refuting a claim we do not make --- is totally irrelevant. The argument we do make --- that the pecuniary gain factor was not sufficiently proven, in that the homicide did not further the financial gain --- is not opposed by the prosecution and should therefore be granted on default.

E. CONSIDERATION OF §921.141(5)(e) AND (f) WAS PRECLUDED BY THE LAW OF THE CASE DOCTRINE AND THIS STATE'S TRIPARTITE SENTENCING SCHEME

The State tries to defeat our law of the case argument (AIB 47-50) by inaccurately claiming that our argument was that the trial prosecutor's intentional waiver of reliance upon the aggravating circumstances set forth in §921.141(5)(e) and (f), Fla. Stat. (Supp. 1992), constituted the "law of the case." As we made very clear in our brief, the law of the case was this Court's implicit holding that consideration by the trial court of those two deliberately-waived aggravating circumstances was improper. See *Stevens v. State, 552 So.* 2d 1082, 1087 (1989).

The prosecutor *makes* no arguments against the law of the case claim we did make, except to say that the State's waiver of the two aggravating circumstances did not prejudice Stevens. That prosecutorial argument has already been implicitly rejected by this Court. *Ibid.* Were there not prejudice from the trial court's finding of these two circumstances following the prosecutor's disclaimer of reliance upon them, this Court would not have found trial counsel ineffective for failing to object to the prosecutor's later reliance upon these circumstances (see AIB 48-49).

POINT FOUR

MUCH OF THE PROSECUTION'S EVIDENCE SUPPORTING AGGRAVATION WAS CONSTITUTIONALLY INADMISSIBLE AND SHOULD HAVE BEEN SUPPRESSED

A. Introduction

The prosecutor's contentions that Stevens' suppression issues are not properly before this Court because "Stevens is guilty," because "sentencing is qualitatively different from a trial" and because this case "was remanded for resentencing, not retrial" are all erroneous. When this Court ordered a resentencing for Stevens, it ordered "a completely new proceeding, separate and distinct from his first sentencing." *King v. Dugger, supra, 555 So.* 2d at 358. The State chose to use the trial transcript as virtually all of its proof at the resentencing proceeding. Stevens consented, subject to his motions to suppress on constitutional grounds, to that resource-saving method of presenting the prosecution's evidence to Judge Weatherby.

Section 921.141(1), Fla. Stat. (1985), unambiguously prohibits the receipt of unconstitutional evidence in capital sentencing proceedings. Stevens appropriately relied upon that provision to seek the suppression of the substantial unconstitutional evidence offered by the State.

B. THE CONSIDERATION OF STEVENS' POST-ARREST STATEMENTS VIOLATED HIS RIGHTS UNDER THE SEARCH *AND* SEIZURE AND SELF-INCRIMINATION PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS

2. The Relevant Facts

The prosecutor claims that "no deals or threats were made" with or to Hamilton by the police (PAB 24). Hamilton, the State's chief witness, contradicts those assertions. He testified that he had been arrested on weapons and drug charges before Parmenter questioned him and that, after he implicated Stevens and Engle, the charges were dropped (T 484, 486-87). Hamilton also testified without contradiction that he did not reveal any information to the police until after they had threatened to arrest him for withholding information and to press the charges for which he

was under arrest (T 484, 486-87).

The prosecutor incorrectly states that "it is undisputed tha Stevens ... gave a free and voluntary statement to the police" (PAB 24) (emphasis in original). Stevens specifically disputes that contention (see AIB 78-80).

3. STEVENS' POST-ARREST STATEMENTS SHOULD NOT HAVE BEEN CONSIDERED BECAUSE THEY WERE THE FRUIT OF AN UNCONSTITUTIONAL WARRANTLESS ARREST IN THE HOME

The State's principal argument in opposition to our contention --- that Stevens' statements should have been suppressed pursuant to Article I, $12 of the Florida Constitution (1968) because they were the fruit of an unconstitutional warrantless arrest of Stevens in his home (see AIB 62-70) --- is that the application of the pre-1983 version of Article I, §12 generally resulted in no dichotomy with decisions applying the Fourth Amendment and that the greater protection afforded under the Florida Constitution in *Odom v. State,* 403 *So.* 2d 936 (Fla. 1981), *cert. denied,* 456 U.S. *925* (1982), and *State v. Samziento,* 397 *So.* 2d 643 (Fla. 1981), was "based ... on specific provisions of Art. 1, §12 relating to communications appearing in our constitution but not the federal constitution" (PAB 26-27).

We do not dispute the proposition that the application of Article I, $12 generally yielded the same result as the application of the Fourth Amendment. In certain circumstances, however, such as those in this cause, the pre-1983 provision of this State's Constitution provided more protection from governmental intrusion than did the Fourth Amendment (*see* AIB 67-69).

The prosecutor reads the cases we cite at AIB 67-69 far too narrowly. In *Odom* v. *State, supra* at 940, this Court held:

> Evidence obtained in violation of article I. section 12 is inadmissible in Florida courts. ... This constitutional principle applies regardless of whether the evidence in question was obtained in violation of the Fourth Amendment, and regardless of the scope of the Fourth Amendment exclusionary rule. (Emphasis added.)

That holding is equally applicable to the circumstances of this case.

The State also claims that there was "no causal connection" between Stevens' arrest and the statements he gave the police beginning only three hours after that arrest. Assuming, *arguendo*, that such a causal connection is required under pre-1983 Article I, §12, it was surely established. See *Taylor v. Alabama*, 457 U.S. 687 (1982); AIB 69-70.[12]

4. PARMENTER'S VIOLATION OF THE "KNOCK *AND* ANNOUNCE" STATUTE ALSO REQUIRED THAT STEVENS' POST-ARREST STATEMENTS BE SUPPRESSED

The State's argument in opposition to our contention --- that the violation of $901.19, Fla. Stat. (1985), the "knock and announce" statute, required the suppression of Stevens' post-arrest statements --- is founded upon the propositions that "the police had consent to enter" from Guy Custer[13] and that, even "[i]f Parmenter did not have consent, it has never been shown that he knew it" (PAB 25). The State's argument, which was never advanced in the court below, is based entirely upon a misreading of the undisputed facts. Parmenter explicitly testified that he entered Stevens' trailer at the point of a drawn gun without seeking permission to enter (T 131-32). The State's own proof therefore is that Parmenter effected a forcible entry of Stevens' home without the consent of its occupants and that Parmenter knew full well that he did not have such consent.

Since the State's argument is absolutely refuted by the record, the suppression of Stevens' statements, which were obtained as a result of the violation of §901.19(1), should be suppressed (see AIB 70-74).

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[12]The prosecutor also claims that the police had consent to enter Stevens' home (PAB 27). Because the prosecutor's principal allegations of consent concern the next issue, we deal with that newly-made allegation in the next subpoint of this brief.

[13]Since no reading of the record supports the prosecution's claim of consent, we need do no more than mention that, as a guest, Custer could not effectively consent to the entry into Stevens' home, See *United States v. Harris*, 534 F.2d 95 (7th Cir. 1976); see generally, *Ferguson v. State*, 417 So. 2d 631, 634 (Fla. 1982).

It is critical to note that the prosecutor concedes that Dr. Floro's Stevens and Engle trial testimony is materially inaccurate, either because of Dr. Floro's, or the court reporter's, errors **(PAB 28).** In light of that admission, the State has conceded that false testimony --- i.e., Dr. Floro's Stevens and Engle trial testimony relating to the vaginal injury --- was knowingly presented to Judge Weatherby in violation of Stevens' constitutional rights to due process of law. *See* ***United States v. Agurs,*** 427 **U.S.** 97, 103-04 (1976); *Giglio* ***v. United States,*** **405 U.S.** 150, 153 (1972); **AIB** 87-88.

D. THE STATEMENTS MADE BY ENGLE, WHO COULD NOT BE CROSS-EXAMINED, VIOLATED THE *BRUTON* RULE AND SHOULD HAVE BEEN SUPPRESSED

As is his wont, the prosecutor opposes a contention we never advanced --- in this instance, that we are seeking "a new trial" because original defense counsel purportedly let Engle's constitutionally-violative statements into evidence "as a matter of trial strategy" **(PAB** 29). In fact, what Stevens sought was to keep clearly unconstitutional evidence out of his resentencing proceeding, pursuant to §921.141(1), Fla Stat. (1985). Because a resentencing is a "completely new proceeding" --- ***King v. Dugger, supra, 555 So.*** **2d** at 358 --- Stevens was not bound by prior counsel's "strategy" (or ineffectiveness). See ***United States v. Shotwell Manufacturing Co., 355 US.*** 233, 243 (1957); ***Huff v. State, supra,*** 495 ***So.*** 2d at 152 ("at a new trial the parties may present new evidence or use different theories than were presented in the first trial").

POINT FIVE

THE TRIAL PROSECUTOR'S MISCONDUCT --- INCLUDING KNOWINGLY PRESENTING FALSE TESTIMONY, SUPPRESSING FAVORABLE EVIDENCE, DELIBERATELY VIOLATING EVIDENTIARY RULES AND GIVING UNSWORN TESTIMONY — DEPRIVED STEVENS OF A FAIR SENTENCING PROCEEDING

Other than incorrectly stating that this issue "is not properly before the Court" **(PAB** 29), the State offers no opposition to our claims of prosecutorial misconduct. The relief sought should