IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,139

KENNETH WATSON,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CHALLENGES FOR CAUSE AGAINST JURORS WEBSTER, BENTON AND VENTO WHERE ALL THREE JURORS INDICATED THAT THEY COULD NOT FOLLOW THE LAW CONCERNING DEFENDANT'S RIGHT TO REMAIN SILENT AND NOT PRODUCE EVIDENCE.

Point I of defendant's brief raises the issue that the trial judge erred in refusing to strike three jurors for cause whose last response to questions concerning their views on a defendant's failure to produce evidence established a reasonable doubt concerning their ability to be a fair and impartial juror. Juror Webster's last response was, "I don't think I could accept the fact that he did not present any evidence." (ST. 164). Juror Benton's response was, "Where is the alibi or whatever." (ST. 164). Juror Vento stated he would have problems following the law concerning this issue. (ST. 169).

Initially, the state argues that there was no reason to excuse any juror for cause because, prior to the defense attorney asking questions, the judge, at the beginning of voir dire, explained to the jury that a defendant did not have to produce evidence and none of the jurors at that point indicated that they had problems with this concept.

On pages 23-26 of the state's brief, the state recites the speech that the judge gave the jury concerning reasonable doubt, burden of proof and the defendant's right to remain silent and not introduce evidence. From a review of the trial court's questions, it is apparent that the court was in essence lecturing the jury on

the law and was not really questioning any of the jurors. The trial judge himself recognized that none of the jurors were responding to his questions:

> THE COURT: Okay.
>
> Does anybody have any problem with that? A lot of times I go through that and I ask and everybody says they have no problem and then the attorney asks the same thing and all of a sudden they get a different answer, I don't know if it's the robe or that I'm up here, maybe I should come down. I heard this judge up in the northern part in the state I guess talk to the jurors, maybe I ought to get down there and get a different answer. (emphasis added)
>
> You can tell me, I mean there's nothing wrong if you have certain feelings for you to share them. I told you that once you're selected that you have to follow the law. At this point, at this stage we want to get your feelings about these questions (emphasis added).

(ST. 24).

As the trial court correctly anticipated, jurors Webster's, Benton's and Vento's concerns about the law concerning the defendant's right not to produce evidence were exposed during the court's initial questioning of the panel. However, this does not change the fact that when these jurors were questioned by defense counsel, they all unequivocally stated that they could not accept the fact that the defendant may not produce evidence.

Next, the state argues that the responses given by jurors Webster, Benton and Vento were the result of "nebulous" questions asked by defense counsel which were not correct statements of the law. This is incorrect; defense counsel's questions were proper

questions and the jurors' responses indicated they should have been excused.

Defense counsel initially asked the following question: "Who feels the same way as Ms. Mena, that it would concern them if we didn't prove anything by bringing witnesses or bringing evidence?" (ST. 163). This question is not a nebulous question and it is a correct statement concerning the legal principle that defendant did not have to call witnesses or produce evidence. In response to this direct question, juror Webster stated "that would concern her." (ST. 163). Defense counsel then asked Ms. Webster, Why this would concern her?" She responded that she did not think that the defendant would be fairly represented (ST. 164). Defense counsel then attempted to clarify whether juror Webster was concerned about defense counsel not doing his job or whether she expected the defendant to produce evidence. He then asked the following questions:

> [Defense Counsel]: Okay. Let's say that they present their evidence and they rest their case and then the judge says to us what evidence do you have to present and we say none, would that concern you, would you think that Mr. Watson's probably guilty because we did that?
>
> It's a hard question.
>
> MS. WEBSTER: It is.
>
> [Defense Counsel]: What do you think? The reason I'm asking you this is because there's a rule that says we're not required to do anything and if it would be difficult for you to follow the rule, as I said, the worst that happens is that you're not on the jury in this case. And if that rule is--

Juror Webster's response:

> MS. WEBSTER: I don't think I could accept the fact that he did not present any evidence.

(ST. 164-65). Therefore, juror Webster's response established that her concern was with defendant failing to produce evidence.

Juror Benton responded to the same proper questions by stating: "I believe if you didn't defend him you're not doing your job." (ST. 165). Defense counsel then asked juror Benton: "What about Mr. Watson, what would you be thinking if we did that with Mr. Watson. Juror Benton then gave the following answer: "Where is the alibi or whatever." (ST. 164-65).

Finally, the question asked juror Vento was the following:

> Well, what if we didn't present any witnesses, or didn't put on any evidence and the judge told you we don't have to, would you say well, the judge told me they don't have to but it bothers me and I'm thinking about it. You see, its tough to try to juggle those two things.

(ST. 169).

In response to this question, Juror Vento admitted that it would bother him and he would have a hard time following the law. (ST. 169-70).

The state argues that this court should ignore the jurors' direct responses to defense counsel's questions and instead rely on their silence to the judge's preliminary questions, since the judge's questions were correct statements of the law and defense counsel's were not. However, the trial court asked the same questions as defense counsel, and the questions of both reflected correct statements of the law. Not only did the trial judge tell

the jury that a defendant did not have to prove anything, the court also told the jury that defense counsel did not have to do anything:

> THE COURT: All right, well, the attorneys don't have to do anything either, they could sit there and do cross word puzzles and if the State doesn't meet the burden of proof, proving the defendant guilty beyond and to the exclusion of every reasonable doubt, the fact that the attorneys didn't do anything cannot play a part, cannot say well, they didn't do anything so he must be guilty. I anticipate that they will do something, ask questions during the trial and they're going to present arguments to you during the trial. Is that what you're looking for? (emphasis added).

(ST. 25).

Defense counsel asked proper questions to the jurors. Jurors Webster, Benton and Vento all unequivocally stated that they expected the defendant to produce evidence. If the prosecutor or the judge felt that juror Webster's, Benton's and Vento's answers were equivocal responses to nebulous questions, it was their responsibility to attempt to rehabilitate these jurors. In *Bryant v. State,* 601 So. 2d 529, 532 (Fla. 1992) this court held:

> We hold that it is not defense counsel's obligation to rehabilitate a juror who has responded to questions in a manner that would sustain a challenge for cause. The appropriate procedure, when the record preliminarily establishes that a juror's views could prevent or substantially impair his or her duties, is for either the prosecutor or the judge to make sure the prospective juror can be an impartial member of the jury. Here, this type of rehabilitation did not occur and, as stated in *Singer,* there was a basis for a reasonable doubt as to whether these jurors possessed a state of mind which would enable them to render impartial verdicts (emphasis added).

After these jurors indicated that they could not accept the law that did not require a defendant to produce evidence, neither the judge nor the prosecutor attempted to rehabilitate them. Therefore, the state's argument that the jurors' responses were "honest, but confusing responses to the absurd and limitless questions posed by defense counsel" is without merit.[1]

Next, the state argues that defendant failed to properly object to juror Vento and therefore he cannot complain about this juror on appeal. As argued in the initial brief in footnote 7, defense counsel had previously attempted to excuse jurors Webster and Benton on the basis that they expected the defendant to produce evidence. The trial judge made it very clear when he denied those challenges that he was not going to accept this reason (ST. 242). Therefore, it would have been fruitless for defense counsel to attempt to excuse juror Vento for the same reason. See *Brown v. State*, 206 So. 2d 377 (Fla. 1968)(objection not required if it would be futile).

More importantly, however, even if this court concludes that defendant has waived his objection to juror Vento, he is still entitled to a new trial. The state does not argue that defendant did not properly challenge jurors Webster and Benton. (ST. 243).

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[1] In an attempt to justify the trial court's error, the state in its brief argues that the questions by defense counsel "may reasonably be interpreted as what would they do once the state met its burden of proof and no defense or reasonable doubt was presented to refute their case in chief." This interpretation of defense counsel's questions is groundless. Defense counsel never asked the jurors what they would do if no reasonable doubt was presented. Instead, all that defense counsel asked was how they would feel if no evidence was presented.

The court only gave defendant one additional peremptory challenge when the law required that he give defense counsel two challenges. Therefore, a new trial is warranted even if this court concludes that defense counsel did not properly object to juror Vento.

The final argument made by the state is that defense counsel has waived this issue since, when he asked for additional peremptory challenges to strike two objectionable jurors (jurors Ochoa and Arbenoff), he failed to prove that these two jurors were objectionable. This court in *Trotter v. State,* 576 So. 2d 691, 693 (Fla. 1991) recognized that:

> where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have stricken peremptorily. This juror must be 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.

Therefore, contrary to the state's assertion, the law does <u>not</u> require defense counsel to state <u>why</u> he would have excused the additional jurors. See *Henry v. State,* 586 So. 2d 1335 (Fla. 3d DCA 1991)(defendant need not demonstrate that a biased juror was seated; it is sufficient that he attempted to use a peremptory challenge to excuse an objectionable juror who served on the jury).

Since defendant objected to jurors Abernott and Ochoa and they both served on the jury, the state's argument must be rejected, and the defendant afforded a new trial.

II.

DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY WHEN, AFTER OPENING STATEMENTS, ONE OF THE JURORS CALLED HER PLACE OF WORK AND STATED THAT SHE WAS SELECTED TO BE ON A JURY IN AN "OPEN AND SHUT CASE."

Point II of defendant's brief argues that the trial court erred in refusing to excuse a juror for cause when after opening statement but before hearing any evidence the jury called her place of work and stated she was a juror on "an open and shut case." (T. 875). The state argues that there was no reasonable doubt about Juror Abernott's ability to be fair and impartial because she stated that all she meant by "open and shut" was that the case was going to be short. In making this argument the state ignores the fact that juror Abernott only stated what "open and shut" meant to her after she was given the following admonishment by the trial judge:

> "one of the things I instructed you on is that you shouldn't form any definite or fixed opinion until you have heard all the evidence, argument of counsel and my instructions. Now, I hope, if you did form an opinion, that it was not a definite or fixed opinion because you haven't heard all the evidence yet or argument of counsel or any instructions" (T. 877).

After the court gave the juror this admonishment he then asked the juror "Have you formed any definite or fixed opinion." In response to both the admonishment and the leading question the juror stated that when she used the term "open and shut" all she meant was the case was going to be a short case (T. 877).

When the judge discovered Juror Abernott violated his court

order and told a co-worker that she was a juror on an "open and shut case" the court should either have excused the juror immediately or if he intended to find out what the juror meant by "open and shut case" the judge should have asked her without first telling her that he specifically told her not to predetermine the case and that he *"hoped"* she had not done this.

By admonishing her and then asking the juror leading questions, the court gave juror Abernott no choice but to say that she had not predetermined the case. In *Price v. State,* 538 So. 2d 486 (Fla. 3d DCA 1989) the Third District Court of Appeal recognized:

> We have no doubt but that a juror who is being asked leading questions is more likely to "please" the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented.

Obviously, juror Abernott's statement that "open and shut" meant the case was going to be short was an attempt to "please" the trial judge and give the rather obvious answers indicated by the leading question. As such her alleged definition of "open and shut" was not determinative of her ability to be impartial. When a juror states that the case is "open and shut" before hearing <u>any</u> evidence, a reasonable doubt exists concerning this juror's ability to be impartial trial.

The state's reliance on the case of *Doyle v. State,* 460 So. 2d 353 (Fla. 1984) is misplaced. In *Doyle, supra,* a juror after hearing all of the state's evidence approached defense counsel and

stated "Good Luck, you'll need it." Although the trial court denied a motion for mistrial, the judge did give a curative cautionary instruction to the jury which the attorney, without relinquishing his demand for mistrial, conceded was satisfactory.

The Doyle case is distinguishable on several grounds. In Doyle the juror told the defense attorney that he will need good luck. This comment does not suggest that the juror felt the state's case was "open and shut." Secondly, in *Doyle, supra,* the comment was made at the conclusion of the state's evidence. Therefore, even if the comment could be construed as a comment on the strength of the evidence at least the juror in *Doyle* heard all the evidence. In this case the juror concluded that the case was "open and shut" without hearing <u>any</u> evidence. Finally, in *Doyle* unlike this case the defense lawyer at trial conceded that the cautionary instruction was satisfactory.

Since juror Abernott's comment that the case was "open and shut" established a reasonable doubt concerning her ability to be a fair juror, the trial court erred in allowing her to remain on the jury.

III.

THE TRIAL COURT DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY BY FAILING TO STRIKE THE PANEL WHEN A JUROR INFORMED THE ENTIRE PANEL THAT, BASED UPON A NEWSPAPER ARTICLE, HE FELT THE HOMICIDE WAS HEINOUS AND THE ONLY APPROPRIATE PENALTY WAS DEATH.

Point III raises the issue that the trial court erred in failing to strike the jury panel when juror Moss ignored the trial court's admonishment and informed the jury panel that he had extrajudicial information concerning the violent and heinous nature of the crime.[2] Initially, the state argues that defense counsel invited this error by the questions he asked Juror Moss. Defense counsel asked the jury whether they felt that if "the crime of first degree murder is proven and someone's convicted, that the death penalty is the only penalty." (ST. 205-206). Counsel's question concerning whether the juror felt the death penalty was the only appropriate penalty in a first degree murder case in no way invited Juror Moss to reveal information to the jury panel concerning what he had read in the newspaper. Since the question asked by defense counsel did not invite Juror Moss to ignore the trial court's previous instructions this court should reject the state's argument that the error was invited error.

Next, the state argues that defendant has not properly preserved this issue for appellate review since defendant did not request a mistrial. Despite the state's representation to the

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[2] Earlier in the voir dire Juror Moss had informed the court that he had read about the case in the newspaper. The trial court specifically instructed the juror not to reveal this information to the jury. (ST. 68-69).

contrary, defense counsel requested that the trial judge strike the jury panel. (ST. 210-11). Defense counsel use of the words "strike the panel" rather than "move for mistrial" obviously has no legal significance. The proper remedy was to strike the panel and that's exactly what defense counsel requested.

The state also argues that Juror Moss's comment was an isolated comment about the sentencing which was merely duplicitous evidence presented during the trial and any prejudice could have been cured by an instruction. Juror Moss' revelation to the jury that he had read that the crime was violent and heinous was not evidence that was presented to the jury during the trial. Juror Moss' statement revealed to the jury that some newspaper reporter who was not called as a witness and, therefore, not subject to cross examination, concluded that the crime was heinous and violent. This statement was prejudicial as to both the guilt-innocence phase and the penalty phase and the only appropriate remedy was to strike the jury panel.[3]

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[3] This court has recognized that a defendant need not request a curative instruction if the error could not be cured by the instruction. *Czubak v. State,* 570 So. 2d 925 (Fla. 1990). Since a curative instruction would not have cured the error no waiver has occurred by failing to request an instruction.

IV.

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS BY ALLOWING THE JURORS TO BECOME ADVOCATES RATHER THAN FACT FINDERS WHEN THE COURT ALLOWED THE JURORS TO QUESTION WITNESSES.

Point IV raises the issue that the trial court erred in allowing the jurors to ask questions during the trial. The state in its brief relies on this court's previous opinions in *Shoultz v. State,* 106 So. 2d 424 (Fla. 1958) and *Ferrara v. State,* 101 So. 2d 797 (Fla. 1958) to support their position that there is nothing wrong with jurors asking questions to witnesses. Defendant in his initial brief conceded that this court over thirty years ago in dictum with no citations to any authority stated that it was permissible for jurors to submit questions to witnesses. It is defendant's position that this court should reconsider this issue and hold that it is a violation of a defendant's right to a fair and impartial jury when the jurors are allowed to ask questions.

In *Morrison v. State,* 845 S.W.2d 882 (Tex.Cr.App. 1993) the defendant was charged with murder. The trial judge similar to the trial judge in this case allowed the jurors to ask the witnesses questions. An en banc Court of Criminal Appeals of Texas reversed the defendant's conviction on the grounds that it was error to allow the jury to ask questions of the witnesses. In reaching this conclusion the court held that in order to preserve the adversary system it was necessary to assure that the jurors remained neutral detached fact finders. The Texas court recognized the importance of the jurors remaining neutral when the court held:

> Establishment of the jury as a neutral and passive fact-finder in the adversary process paralleled the movement to safeguard individual rights against governmental oppression. [FN9] *Duncan,* 391 U.S. at 156, 88 S.Ct. at 1451. The desire for the jury to stand as a body independent of governmental influence led to defined roles among participants in the system. The adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute. Stephan Landsman, The Adversary System, a Description and Defense (1984). Party responsibility for the production of evidence insulates the jury, to the greatest extent possible, from the contest. Id.

The Texas court recognized that allowing jurors to ask questions during the trial leads to a communication between jurors and the parties which calls into question the integrity of the adversary system. Juror questions encourages jurors to depart from their role as passive listeners and assume an active adversarial or inquisitorial stance. Such participation inevitably leads the jurors to draw conclusions or settle on a given legal theory before the parties have completed their presentations, and before the court has instructed the jury on the law of the case.

In prohibiting jurors from asking questions the court also recognized that any slight advantage to allowing jurors to ask questions is totally outweighed by the constitutional and procedural problems created by allowing the jurors to ask questions.[4]

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[4] The Texas court recognized the following procedural problems that will arise with juror questions:

(1) What is the permissible scope of the juror questions?
(2) Should jurors be told why some questions

The state contends that even if allowing jurors to ask questions is improper, defendant failed to preserve this issue since defendant never objected to the procedure of allowing juror questions. The state's argument is totally refuted by the record. After jury selection, defense counsel made the following objection to the court:

> "And we'd also object to them asking questions, there's no rule provision to provide for jurors to be allowed to ask questions of any witness."

(ST. 266).

The state also argues that defendant failed to object to the competency or substance of any questions and therefore has failed to preserve this issue. The mere procedure of allowing the jury to ask questions is objectionable and the harmless error doctrine should not apply to this error. By allowing the jury to ask questions the judge deprived defendant his right to an impartial jury and it is impossible to try to apply a harmless error test to this error. In *Morrison v. State, supra,* the Texas court correctly recognized:

> The State contends that the practice of juror questioning in the instant case was "of negligible value" and therefore error, if any, was harmless. Where the role of the jury as a neutral fact-finding body is significantly

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cannot be asked?
(3) Should a witness be recalled if a juror wants to ask a question?
(4) If a juror's question indicate juror may be impartial should the court declare a mistrial?
(5) Should the jurors be allowed to question a defendant who takes the witness stand?

> modified, the underpinnings of our system, designed to ensure trial by a fair and impartial jury are likewise compromised. A determination of harm in this context is virtually impossible. Accordingly, we hold that the practice of permitting jurors to become active participants in the solicitation of evidence by questioning witnesses is not subject to a harm analysis. We affirm the judgment of the court of appeals (emphasis added).

Therefore, the trial court's decision to experiment and allow jurors to ask questions requires reversal.

V.

> THE TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT WHEREIN THE STATE IMPROPERLY APPEALED TO THE SYMPATHY OF THE JURY.

Point V raises the issue that the state's opening statement contained so many improper inflammatory arguments that a new trial is warranted. The state argues that some of the comments made by the state in its opening argument were relevant. However, the state does not even attempt to argue that comments such as "she was known affectionately by her good friends as Sister Ella" (ST. 274); and "think about what Ella had gone through"; and "Mr. Hickman's whole life was shattered" (ST. 281) were relevant to any issue in this trial. Instead, the state wrongfully argues that *Payne v. Tennessee,* 111 S.Ct. 2597 (1991) allows this type of argument in both phases of a death penalty trial, and that defendant's failure to accept a curative instruction resulted in a waiver.

Chapter 92-81 (Florida's victim impact statute which was enacted in response to Payne) only permits victim impact evidence at the penalty phase. It does not change existing Florida law

prohibiting victim impact evidence from being introduced or argued at the guilt phase of the trial. Florida law has consistently held that evidence designed to create sympathy for the deceased is inadmissible in the guilt-innocence phase. This court has recently reaffirmed this line of cases in *Jones v. State,* 569 So. 2d 1234 (Fla. 1990). Therefore, the prosecutor's improper argument asking the jury to think how the victim felt while she was being stabbed and telling the jury that her husband's life was shattered was clearly impermissible and prejudicial.[5]

The prosecutor's argument that this issue has been waived since defense counsel refused a curative instruction is also without merit. In *Czubak v. State,* 570 So. 2d 925 (Fla. 1990) this court rejected a similar argument made by the state where this court held "we reject the state's argument that Czubak was required to ask for a curative instruction. A curative instruction would not have overcome the error here." Similarly, in this case a curative instruction would not have overcome the error. A review of the prosecutor's opening statement reveals that despite several warnings from the judge the state continued to make improper prejudicial arguments. (ST. 274-278, 280, 281, 282). If the improper argument was an isolated comment, maybe a curative instruction would have cured the harm. But where, as in this case, the entire opening statement was designed to prejudice the jury no curative instruction would have worked and therefore reversal is

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[5] Furthermore, the Florida Victim impact statute does not apply to this case since it was passed after the crime was committed.

required.[6]

VI.

THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE RICHARDSON HEARING REQUIRES REVERSAL.

Point VI raises the issue that the trial court erred in failing to conduct a Richardson hearing to determine the procedural prejudice that resulted from the state's failure to disclose an oral report given to them by an expert witness. The state initially argues that an oral report of an expert is not discoverable under Rule 3.220(b)(1)J). To support this contention the state argues that an oral report of an expert is not discoverable because "it is not a written or recorded statement within the purview of Rule 3.220(b)(1)(J)". (Page 47, state's brief).

Florida Rules of Criminal Procedure 3.220(b)(1)(J) states that the following must be given to the defense:

> Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons (emphasis added).

Therefore, the state's assertion that Rule 3.220(b)(i)(J) only requires written or recorded statements is a misrepresentation of the rule. The rule requires the state to turn over expert's reports and it does not limit the discovery to written or recorded reports. If the rule intended this limitation it would have been included. A review of Rule 3.220 reveals that when the rule is

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[6] Counsel would rely on his argument in the initial brief as to why the error was not harmless.

meant to apply only to written or recorded statements the rule specifically states such. The case of *Johnson v. State,* 545 So. 2d 411 (Fla. 3d DCA 1989), a case relied upon by the State supports this position. In *Johnson, supra,* the court concluded that Rule 3.220(a)(1)(ii) does not require the state to reveal oral statements made by witnesses since this rule specifically defines statements as written or recorded statement.

This same definition of statements is not included in the section dealing with expert opinions for good reasons. If the state receives an oral report from an expert this report is just as important to the defense as a written report. For this reason, the courts have interpreted Rule 3.220(b)(1)(J) to require the state to disclose both oral and written reports of experts. See *Alfaro v. State,* 471 So. 2d 1345 (Fla. 4th DCA 1985).

The state next argues that since they listed Dr. Haber as a witness no discovery violation occurred. Rule 3.220(b)(1)(J) requires the state to turn over reports from experts. This requirement is not alleviated by merely listing an expert as a witness. In *Brey v. State,* 382 So. 2d 395 (Fla. 4th DCA 1980) the court stated:

> Under the Florida Rules of Criminal Procedure, the state is required to disclose all known oral or written statements along with the identity of any persons witnessing such statement. Fla.R.Crim.P. 3.220(a)(1)(iii). Compliance with the rules requires more than the mere inclusion of such a person's name in a list of witnesses who may have information about the crime. *Boynton v. State,* 378 So. 2d 1309 (Fla. 1st DCA 1978); *Lavigne vs. State,* 349 So. 2d 178 (Fla. 1st DCA 1977). (emphasis added)

Therefore, the fact that the state listed Dr. Haber as a rebuttal witness did not change the fact that a discovery violation occurred in this case.

Next, the state argues that even if there was a discovery violation the trial court conducted an adequate Richardson hearing *after* Dr. Haber had testified and was excused. In order for there to be a full and proper Richardson hearing the court must at a minimum make the following inquiries:

(1) was the violation inadvertent or willful;

(2) was the violation trivial or substantial; and

(3) did the violation affect the defendant's ability to prepare for trial.

Smith v. State, 500 So. 2d 125 (Fla. 1986); *Cumbie v. State,* 345 So. 2d 1061 (Fla. 1977); *Richardson v. State,* 246 So. 2d 771 (Fla. 1971).

The courts have consistently recognized that an inquiry labeled as a "Richardson hearing" is insufficient if the court fails to make the above-mentioned inquiries. See *Lee v. State,* 534 So. 2d 1226 (Fla. 1st DCA 1988)(although trial court did conduct an inquiry it was insufficient since the court failed to investigate procedural prejudice); *Brown v. State* (trial court's inquiry did not comply with Richardson therefore a new trial was required); *Ricci v. State,* 550 So. 2d 34 (Fla. 2d DCA 1989)(trial court's bench conferences concerning discovery violation did not meet requirements of Richardson). *Waters v. State,* 369 So. 2d 974 (Fla. 3d DCA 1979) (hearing wherein trial court wrongfully concluded that there was no discovery violation was not adequate

Richardson hearing).

In the instant case, before Dr. Haber testified, defense counsel argued that the state's failure to inform him that Dr. Haber had given them an oral expert report was a discovery violation. (T. 1853). The court concluded that the state was not required to reveal oral reports from experts and therefore concluded that there was no discovery violation and no Richardson hearing was held. (T. 1856). During Dr. Haber's testimony counsel renewed his objection to the state's discovery violation. The court stated "For the record, we'll have a Richardson hearing when we excuse the jury after we're through with this witness." (T. 1897).[7]

When Dr. Haber was excused the court "for the record" then conducted the alleged Richardson hearing. During this hearing, Dr. Haber admitted that he gave an oral report to the state. (T. 1899). The court asked the doctor if he filed a written report and the doctors stated no. (T. 1847). The court then concluded that no discovery violation occurred since oral reports were not discoverable and defense counsel should have taken the deposition of the doctor. (T. 1908).

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[7] The court's decision to conduct the alleged "Richardson" hearing after Dr. Haber had testified and been excused highlights the fact that no Richardson hearing was actually conducted. The purpose of a Richardson hearing is to determine what procedural prejudice has occurred and what steps can be taken to remedy the prejudice. To have a Richardson hearing after the witness has testified and been excused is no different than a post trial Richardson which clearly is inadequate. See *Smith v. State*, 372 So. 2d 86 (Fla. 1979) and *Williams v. State*, 513 So. 2d 684 (Fla. 3d DCA 1987).

Because the court wrongfully concluded that there was no discovery violation the court never inquired as to the procedural prejudice that occurred as the result of the state's failure to reveal to the defense the expert report they had received that was going to directly contradict the findings of the defense expert. If the court had conducted a proper Richardson hearing he would have inquired into how defendant was prejudiced by the state's discovery violation and what remedies were available to rectify the prejudice. If the state had supplied defense counsel with the Doctor's reports defense counsel may have (1) deposed Dr. Haber (2) hired another expert to review Dr. Haber's report or (3) refrain from calling Dr. Toomer as a witness. By failing to conduct a Richardson hearing, the court never analyzed the above-mentioned prejudice to defendant and therefore never considered potential remedies available to defendant.

The facts in this case are similar to the facts in *Brey v. State,* 382 So. 2d 345 (Fla. 4th DCA 1980) and *Raffone v. State,* 483 So. 2d 761 (Fla. 4th DCA 1986). In *Brey v. State, supra,* the state failed to reveal an oral statement made by the defendant. Similar to this case, the trial court wrongfully concluded that since the defendant failed to depose the witness who took the statement no discovery violation occurred. The Fourth District held that "since the inquiry was focused on the legal admissibility of the evidence and the fact that the name of the police officer had been contained in the state's list of witnesses no adequate Richardson hearing was conducted."

Similarly, in *Raffone v. State, supra,* after the defendant objected to a discovery violation an exchange took place with the trial court. In ruling that the exchange was an insufficient Richardson hearing the appellate court concluded:

> The sole thrust of the discussion centered on whether there had been a discovery violation. After hearing respective counsel, the trial court ruled that the drugs had been available for testing for a substantial period of time and, therefore, the court said there was no prejudice. In other words, finding no violation the court saw no need to conduct a Richardson inquiry (emphasis added).

The judge in this case similar to the judges in *Brey* and *Ruffone* conducted a hearing wherein he concluded that there was no discovery violation. Therefore, the court failed to make the necessary inquiries concerning procedurally prejudice. A new sentencing hearing is therefore required.[8]

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[8] The state's final argument that the error that occurred was harmless is also without merit. This court has consistently held that an improper Richardson hearing is *per se* reversible error and not subject to a harmless error analysis. *Smith v. State,* 500 So. 2d 125 (Fla. 1986). Furthermore, the discovery violation in this case was extremely prejudicial to defendant. Dr. Haber's testimony was presented to the jury that recommended the death penalty. Therefore the fact that the trial court may not have relied on Dr. Haber's testimony and report is irrelevant since the jury may have.

VII.

A NEW SENTENCING HEARING IS REQUIRED BECAUSE THE JURY INSTRUCTIONS FAILED TO PROPERLY DEFINE AND LIMIT WHEN THE DEATH PENALTY IS REQUIRED.

Point VII raises the issue that the jury instructions given at the penalty phase were inadequate and that pursuant to *Espinosa v. Florida,* 112 S.Ct. 2926 (1992) a new sentencing hearing is required. At the charge conference defense counsel specifically informed the court that failure to give a limiting instruction on "doubling" would result in the instructions being unconstitutional. (T. 1914). In *Castro v. State,* 597 So. 2d 259 (Fla. 1992) this court held that when requested, a limiting instruction must be given. Therefore, since the court failed to give a limiting instruction on "doubling" aggravators a new sentencing hearing before a jury is required.

The state initially argues that defendant has waived this issue since he failed to give a written requested jury instruction and failed to object to the instructions at the conclusion of the court giving the instructions to the jury. This court in *State v. Heathcoat,* 442 So. 2d 955 (Fla. 1983) recognized that a jury instruction issue is properly preserved for appellate review if "... the record shows clearly and unambiguously that a request was made for a specific instruction and that the trial court clearly understood the request and just as clearly denied the request."

In the instant case defense counsel specifically informed the court that the jury instructions would be unconstitutional if the court failed to give a limiting instruction on "doubling" aggrava-

tors (T. 1914). Therefore, the record shows clearly and unambiguously that a request was made for a specific instruction, and that the trial court clearly understood the request and denied it.

Furthermore, the fact that the request was not put in writing does not result in a waiver of this issue. If a defendant verbally requests a jury instruction and the judge understands the request and then denies it, a written request is not necessary. *Williams v. State,* 395 So. 2d 1236 (Fla. 4th DCA 1981)(if a jury instruction is requested and the basis for the request verbalized to the court, and made a part of the record, failure to object to rejection of instruction does not result in waiver); *Brown v. State,* 206 So. 2d 377 (Fla. 1918)(if judge has no intention of giving instruction failure to submit written instructions not a waiver); see also *Wilson v. State,* 344 So. 2d 1315 (Fla. 2d DCA 1977).

Finally, the state's argument that defense counsel's failure to renew his objection at the conclusion of the court's reading the jury instruction resulted in a waiver is also without merit. In *State v. Heathcoat, supra,* this court recognized that it is not necessary to renew an objection to jury instructions at the conclusion of the instructions if the court at a previous time denied defendant's requested instruction. This court adopted the following holding of the First District Court of Appeal in *Hubbard v. State,* 411 So. 2d 1312 (Fla. 1st DCA 1981):

> [t]he primary thrust of the rule is to insure that the trial judge is made aware that an objection is being made and that the grounds therefore are enunciated. We do not believe

> that the rule was intended to approve or disapprove a special word formula; we will not exalt form over substance by requiring that counsel use the magic words, "I object," so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that the judge was given a clear opportunity to rule upon the objection.

The trial judge in this case knew that defendant wanted an instruction limiting the application of doubling aggravating circumstances and decided to deny this request. Therefore, this issue has been properly preserved for appellate review.

Next, the state argues that failure to give the "doubling" jury instruction was harmless error since the trial court expressly stated in his sentencing order that separate weight was not being given to the aggravating circumstance of pecuniary gain. The state's argument totally ignores the United States Supreme Court opinion in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992). In *Espinosa, supra,* the court recognized that a jury recommendation in Florida carries great weight and therefore an improper jury instruction does not become harmless if the judge at sentencing properly applies the law.

The fact that the judge did not weigh the pecuniary aggravator in his decision does not mean that the jury did not weigh this aggravator. If the jury had felt there were three aggravators proved rather than four they may not have recommended the death penalty. Therefore, the trial court's refusal to follow this court's decision in *Castro, supra,* and give a limiting instruction on doubling aggravators requires a new sentencing hearing before

a jury.

Point VII also raises the issue that the court's instruction on heinous, atrocious, and cruel was vague and that the court failed to give a jury instruction on non-statutory mitigating circumstances. Counsel recognizes that this court has rejected these arguments but would ask the court to reconsider its decision.[9]

VIII.

THE IMPROPER VICTIM IMPACT ARGUMENT MADE DURING THE STATE'S OPENING ARGUMENT IN THE GUILT PHASE DENIED DEFENDANT A FAIR SENTENCING HEARING.

Point VIII raises the issue that the improper victim impact argument made by the state in opening statement in the guilt phase denied defendant a fair sentencing hearing. Initially, the state argues that the opening statement was proper. Counsel would rely on its previous arguments in both the initial and reply briefs concerning the improper opening statement.

The state next argues that defendant did not raise this claim regarding an unfair sentencing hearing below and therefore did not properly preserve this issue for appellate review. During the state's opening statement defense counsel continuously objected to

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[9] Counsel disagrees with the state's argument that counsel has waived these issues on appeal. As to the heinous, atrocious and cruel instruction counsel specifically objected to this instruction and therefore has not waived this issue. Counsel also specifically requested an instruction on non-statutory mitigating factors. The trial court relying on opinions from this court denied the request. Therefore, defendant has not waived his objection to these jury instruction issues.

the improper victim impact argument and specifically objected to the fact that the jury was not allowed to consider this type of evidence at the sentencing phase when he made the following objection:

> "Florida has not adopted as part of aggravating circumstances anything about victim impact evidence as long as its not part of the aggravating.
>
> It's certainly not relevant to prove that she was murdered and who murdered her. It's certainly not relevant."

(ST. 276).

Therefore this issue has been preserved and since the jury was exposed to improper victim impact evidence a new sentencing hearing is required.[10]

IX.

> THE TRIAL JUDGE FAILED TO CONSIDER AND PROPERLY WEIGH ALL THE MITIGATING CIRCUMSTANCES INTRODUCED DURING THE PENALTY PHASE, IN VIOLATION OF KENNETH WATSON'S RIGHTS UNDER FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its brief the state claims the trial court properly considered and weighed all the mitigating circumstances in the sentencing order. To support this position the state relies on the fact that the trial court discussed all the mitigating factors in the sentencing order.

Under Florida law there is a difference between a judge recognizing mitigating factors and weighing those factors as

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[10]As previously argued in the initial brief, Florida's Victim Impact Statute was not applicable to this case since the crime was committed prior to the passage of the statute.

compared to recognizing the mitigating factors and then discussing them without weighing them against the aggravating factors. *Wickman v. State,* 593 So. 2d 191 (Fla. 1991). It is clearly error for a trial judge to give valid mitigating factors no weight. *Campbell v. State,* 571 So. 2d 415-420 (Fla. 1990).

The trial judge in this case along with the attorney general in their brief recognized the existence of several non statutory mitigating factors (borderline retardation, illiteracy, drug abuse, and poverty).[11] Despite this fact the trial court stated the following in his sentencing order:

> "The court finds that the state proved three aggravating circumstances beyond a reasonable doubt and no mitigating circumstances have been shown by a preponderance of the evidence." (R. 318).

Therefore, it is undisputable that the trial court erroneously concluded that no mitigating evidence was presented. The fact that there was evidence that Kenneth Watson was "street smart" and that there was no evidence that he was under the influence of drugs at the time of the murder may have "diminished" the forcefulness of the mitigating evidence however it did not justify the judge's decision to ignore the mitigating evidence in the ultimate weighing process.

The state cannot pretend the judge properly found and weighed the mitigating evidence when the judge expressly stated three aggravating circumstances existed and "no mitigating circumstances

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[11] The state does not dispute the fact that defendant was illiterate, borderline retarded, raised in poverty and had a drug problem. (Page 57 of the state's brief).

have been shown by a preponderance of the evidence. The trial judge's failure to properly consider and weigh all the mitigating circumstances requires reversal of Kenneth Watson's death sentence.

CONCLUSION

Based upon the foregoing, the defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and new sentencing or, in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing before the judge.

Respectfully submitted,

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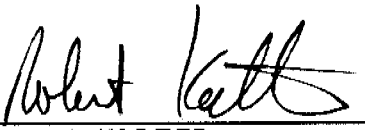
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, FARIBA KOMEILY, 401 N.W. Second Avenue, Criminal Division, Post Office Box 013241, Miami, Florida 33101 this 11th day of June, 1993.

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