IN THE

SUPREME COURT OF FLORIDA

JOSEPH BESARABA,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	CASE NO. 80,016
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

OTHER AUTHORITIES

FLORIDA RULES OF CRIMINAL PROCEDURE

PRELIMINARY STATEMENT

The following symbols will be used:

"R"	Record on Appeal
"2SR"	Supplemental Record (Pursuant to this Court's Order of Decemer 18, 1992 -- received February, 1993)
"AB"	Appellee's Answser Brief

Appellant will rely on his Initial Brief for argument on Points VIII, IX, XVIII, XX, XXI, XXII, XXIII and XXIV.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

In order for this aggravator to apply, the defendant must have had a "careful plan", Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992) (i.e. calculated), and the actions must have been due to a lack of passion. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (i.e. cold). Thus, this aggravator is usually reserved for those murders characterized as "executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982).

In its Answer Brief, Appellee argues that the state proved that Appellant arranged a "careful plan" in committing the killing. However, Appellee has not shown beyond a reasonable doubt that a "careful plan" was utilized. The trial court inferred a careful plan from the possible use of bus schedules and transfers. Appellee argues that "though concededly speculation, Appellant may have planned ..." (AB at 8) (emphasis added). In effect, Appellee has conceded this issue because the CCP aggravator must be proven beyond a reasonable doubt and a "suspicion" of the aggravator will not be sufficient. Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988) (although evidence

might have created "suspicion" of a contract killing, that fact was not established beyond a reasonable doubt). As explained in the Initial Brief, Appellant's actions were not so consistent with careful planning so as to say this aggravator was proven beyond a reasonable doubt. Appellee argues that a careful plan does not have to be flawless. However, Appellant's actions in this case are not merely flaws in a plan, but indicate a lack of a careful plan. For example, the trial court relied on the fact that Appellant purchased a bus transfer and went to Young Circle where he shot Mr. Granger. However, the transfer Appellant purchased could not be used to board Granger's bus to kill him -- instead, the purchase of the transfer merely shows the intent to board a bus other than Granger's. The transfer is inconsistent with a careful plan to kill Granger. Appellee further "speculates" that Appellant's "careful plan" would not include concealing his identity because "perhaps he thought he could escape and no one would find him" (AB at 8) (emphasis added). However, it is more consistent with a careful plan for one to conceal his or her identity so no one knows who to look for.

Appellee also notes that while Appellant was initially blocked in by stationary traffic, he did eventually extricate himself and drive away (AB at 8-9). The fact that Appellant did not get caught at the scene does not prove that he had carefully planned the killing. The fact that he had hastily selected a car boxed in by stationary traffic does show a lack of careful planning in his endeavor. It cannot be said beyond a reasonable doubt that these actions show a careful plan to kill Sidney Granger.[1]

[1] Appellee also claims that Appellant's not making any effort to conceal, or safely store, his personal belongings is consistent with a careful plan on the basis that the belongings left behind were of no

Appellee also claims that after an emotional confrontation which resulted in Appellant's being kicked off Granger's bus, Appellant ended up at Young Circle "waiting for Granger's bus to arrive" (AB at 9). However, there was no evidence presented that the purpose of Appellant's being at Young Circle was to meet Granger's bus in order to kill Granger. In fact, going to Young Circle is inconsistent with a careful plan to kill Granger. Appellant could have waited at the bus stop located in an isolated area (R1702-03) which Granger's bus would arrive at, but Appellant went to a crowded bus terminal which was the hub of activity for Broward County. The most likely reason to go to Young Circle would be to transfer to a bus on another route -- the very purpose of the bus transfer that Appellant had purchased.[2]

Appellee also makes reference to the fact that a witness testified that Appellant looked "very nervous" before the shooting which made the witness very uncomfortable (AB at 9). Appellant's nervousness before the shooting is inconsistent with the calm and cool reflection required for CCP. See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). A witness testified that after the shooting Appellant appeared to be calm. However, this does not necessarily mean that Appellant had previously acted with cool and calm reflection. First, this is an observation of Appellant after the killing and not prior to or during

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value. While the duffel bags, and their contents, might not be of any value to Appellee, they would be of value to a homeless person such as Appellant as evidenced by the testimony that these were the things that Appellant would never be without (R1784). In addition, it is inconsistent with a careful plan to leave two duffel bags of evidence identifying oneself to the crime. Leaving behind such evidence is more consistent with the lack of a plan and a hastily made decision.

[2] One would not purposely choose a crowded public area to commit murder when an isolated area is more accessible. Use of isolated areas has been recognized as an indication of planning. See Roulty v. State, 440 So. 2d 1257, 1265 (Fla. 1983); Smith v. State, 424 So. 2d 726 (Fla. 1982).

the killing. Second, due to Appellant's schizophrenia, it was recognized that there was a separation between what Appellant feels and what he displays to others (R2404). Thus, as Dr. Seligson testified, Appellant could have been in psychological shock after the shooting so as to appear cold and without emotion (R2395).

Appellee also points out that there was evidence that Appellant was drinking while he was sitting on the bench at Young Circle (AB at 9). This does not support the CCP aggravator. In fact, the trial court found that the crimes were committed while Appellant "was under the influence of great mental or emotional disturbance" (R3361-64). This fact is inconsistent with the requirements of CCP. See Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990).

In addition, Appellee summarily concludes that Appellant carefully and coldly planned to shoot Sidney Granger (AB at 10).[3] However, Appellee fails to address the fact that the shooting occurred shortly after an emotional confrontation between Appellant and Granger. See Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) (no CCP even though there was a hypothesis that the defendant planned the killing for 30 minutes after earlier confrontation). Even if a killing is calculated it must not have been the result of any emotion to qualify as CCP. Id. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (even though calculated, killing was not the result of "cool and calm reflection"). Also, Appellee ignores the fact that Appellant was found

[3] On page 10 of the Answer Brief, Appellee refers to a number of cases upholding a finding of the CCP aggravator. None of the cases deal with circumstances involved in this case. Unlike in this case, they all clearly involve carefully planning with the required heightened premeditation, and the killing was the result of cold and calm reflection as opposed to the result of an extreme mental or emotional disturbance.

to be under the influence of an extreme mental or emotional disturbance due to substance abuse. See White v. State, 616 So. 2d 21 (Fla. 1993).

Appellee fails to address pages 29-30 of Appellant's Initial Brief that there was a pretense of moral justification so that CCP does not apply to the particular facts present in this case.

Lastly, Appellee claims that the elimination of the CCP aggravator is harmless. However, with the elimination of CCP only one aggravator remains. As explained on pages 31-33 of the Initial Brief, there were mitigating factors present in this case. This court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In addition, the one remaining aggravator is due to the fact that there was a contemporaneous shooting and reflects an isolated out-of-character act rather than a propensity of violence as a prior violent felony would demonstrate. The error cannot be deemed harmless beyond a reasonable doubt.

POINT II

THE TRIAL COURT ERRED IN USING THE WRONG STANDARD AND IN FAILING TO FIND APPELLANT'S UNSTABLE AND DISADVANTAGED CHILDHOOD AS A MITIGATING CIRCUMSTANCE.

Appellee argues that the record supports the trial court's finding of no physical abuse by Appellant's parents. Appellee cites to portions of the record showing that Appellant's parents did the best they could during extraordinary circumstances of Appellant's

early childhood (AB at 14-15). Appellant agrees with these statements. However, it is improper to reject evidence of an unstable and disadvantaged childhood merely on the basis that Appellant was not abused by his parents. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in rejecting mental mitigation of being under extreme mental or emotional disturbance).

Appellee next claims that there is no evidence of a disadvantaged childhood other than the defense sentencing memo which Appellee claims is in conflict with the facts. However, there are no factual conflicts between the sentencing memo and the evidence presented at trial and at the penalty phase. The sentencing memo summarizes some of the evidence of Appellant's childhood that was presented. Pages 36 and 37 of Appellant's Initial Brief summarizes the phase two evidence presented which shows a disadvantaged childhood.[4] Appellee does not

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[4] The record evidence shows the following. During Appellant's formative years, food was scarce and that food was rationed so that one could stay alive (R2298). The family was harassed and abused by the Nazis (R2293-94,2300). The family traveled 80 miles on foot to escape across the Russian border (R2303-04). Farmers aided them past armed guards (R2305). Appellant suffered from malaria as an infant (R2378). They then lived in a displaced person's camp in post World War II Germany (R2306). They would go to the black market to get whatever they could to survive (R2302). They concentrated on the family's physical safety. Putting aside the reason for the necessary conditions Appellant lived under (i.e. World War II), there was testimony that a child would not be allowed to live under these conditions in Florida today (R2386). The child would be a ward of the state (R2386). Even when the family relocated to America, Mr. Besaraba had to work 12 hours a day, and 14 hours on Holidays, to keep the family together (R2309, 2337). When the family finally managed to save some money, the oldest daughter became sick and eventually died from a brain tumor (R2313-14). Appellant's mother then began gambling and the family lost its home (R2316). This is extremely stressful and certainly qualifies as an unstable and disadvantaged childhood. As Dr. Seligson testified, it was these conditions which would plant the seeds of paranoia in Appellant (R2385). It cannot be said that Appellant did not come from an unstable and deprived background.

dispute these facts,[5] but argues that Appellant was not disadvantaged because he was not physically abused (AB at 13). Appellee even concedes that Appellant's early childhood "atmosphere was oppressive" (AB at 14). Again, it is the legal standard that is in conflict; not the facts.

As to a few of the facts, Appellee has painted an incomplete picture of Appellant's childhood. For example, Appellee states that after the liberation, the Besarabas were able to stay with relatives.[6] What is not mentioned is that initially the Besarabas stayed in Germany for 6 months because they lived in fear of the communists (R2300). They were then ordered to leave Germany and to go to Poland (R2300). Mr. Besaraba, Sr. testified "it was a very difficult situation" in Poland with his family (R2302). It was here that Mr. Besaraba, Sr. had to go to the black market to keep his family alive (R2302). They had to leave because there was not enough room (R2301). Appellee notes that the living conditions in the barracks in the American zone were markedly improved. This is not because living conditions were good, rather, it shows how poor conditions were before this time. The Besarabas shared a barracks with 800 people (R2306).

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[5] With one minor exception, Appellee claims that when the Besarabas first immigrated there was no evidence that they lived in "an inner city impoverished area where it was still a struggle to survive." However, there is evidence from which this can be inferred. Obviously, the conditions were much better than those from which the Besarabas fled. However, there is still evidence that Mr. Besaraba had to work 12 hours a day, and 14 hours on holidays, to keep his family together upon arriving in America (R2337). Mrs. Besaraba worked also for the first two years (R2337).

[6] It should be noted that liberation came slowly to where the Besarabas were located because, as Mr. Besaraba, Sr. testified, the "German fanaticals" were still fighting in that area (R2300).

A wood partition of three by four separated each family (R2306).[7] Appellee fails to mention the last two years in Bremerhaven where the Besarabas waited with Holocaust survivors for a boat to the United States (R2308). Appellee argues that in America the family was stable as shown by the ability to save money and buy a house. What Appellee fails to mention is that during this time Appellant's father had to work 12 hours a day, 14 hours on holidays, to keep the family together (R2337), and that the family would lose their business and house for which they had saved (R2316).[8]

Appellee claims that Appellant's early childhood was anything but unstable. Clearly, it cannot be legitimately said that being born in a forced labor camp, being rationed food for survival during the formative years, living in a displaced persons' camp, etc., qualifies as a stable childhood. Appellee's true argument emerges from the following statement in its brief -- "As noted previously, the weight to be accorded aggravating and mitigating circumstances is within the trial court's discretion." AB at 16 (emphasis added). Appellant agrees that the trial court has discretion as to the quantity of weight to give to an aggravating or mitigating circumstance. However, the present claim does not deal with the amount of weight, whether it be large or small, given to a mitigating circumstance. Rather, it deals with the error of not finding a mitigating circumstance. The trial court must find and weigh a mitigating circumstance if its

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[7] Obviously, the Besarabas were still living in oppressive conditions. It is true that they were better off and were no longer being physically chased. But life was still far from normal.

[8] Apparently, this was due to the death of Appellant's sister and his mother's gambling (R2316).

existence is "apparent on the record." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Appellee also claims that an unstable and deprived childhood is not mitigating because it is remote to the crimes charged and Appellant's childhood has long since passed. However, assuming that the unstable childhood is to some degree remote from the offenses, this goes to the weight to give the mitigating circumstance but does not justify totally ignoring it. More importantly, Appellant's unstable childhood was related to his present condition. From the time Appellant was an infant during World War II, he was subjected to his family's being on the run (R2389). Mr. Besaraba, Sr. testified that during the first year of Appellant's life the area was under attack and the family ran to survive and was barely able to get food to stay alive (R2292-94,2301-02). They would later walk 80 miles on foot to the Russian border (R2303-04). Dr. Seligson testified that Appellant's early life helped plant the seed in Appellant's mind that people were out to get him (R2385). Throughout the years this would blossom into a full paranoid schizophrenia (R2378-90). Dr. Seligson testified that the anxiety level parents go through can relate back to the person diagnosed as schizophrenic (R2387). Dr. Seligson also recognized that Appellant's early environment in Germany ran the risk of causing lasting damage to him (R2387). In addition to the psychological effects of Appellant's early childhood, there are possible physical effects from the lack of proper nutrition, and rationing of food, during Appellant's infancy.

Finally, Appellee claims that the error of not finding an unstable childhood as mitigating was harmless because, as to sentencing, this was not a close case. The jury recommendation belies

Appellee's position. Five jurors believed that the mitigators outweighed the aggravators. As discussed above, the present mitigator could be deemed important. It cannot be said beyond a reasonable doubt that the improper elimination of this mitigation from the weighing process could not have influenced the sentencing decision.

POINT III

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee's whole analysis of this issue is based on the two aggravating circumstances found by the trial court. As previously explained, the CCP aggravator is not legitimately applicable in this case. Thus, only one aggravator remains -- prior violent felony (the contemporaneous shooting). The death sentence will be affirmed in cases supported by one aggravating factor only where there is nothing or virtually nothing in mitigation. E.g. McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). It cannot be said that there was nothing, or virtually nothing, in mitigation in this case. The trial court found two of the important statutory mitigating circumstances ("no significant history of prior criminal activity" and the crimes were committed while "under the influence of great mental or emotional disturbance") and a number of non-statutory mitigating circumstances.[9]

Also, Appellee argues that assuming CCP was properly found death would be proportional because "the facts should control" in determin-

[9] These include that Appellant had a history of drug and alcohol abuse; Appellant had physical and emotional problems; Appellant's good character and reliable work record; Appellant's conduct and adjustment to prison (R3366-69). In addition, Appellant's unstable and deprived childhood should be considered in mitigation. See Point II, supra.

ing whether a death sentence is proportionally warranted. AB at 18.[10] If this is true, there are other crimes much more aggravated where the death sentence was found to be disproportional. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (death not proportionally warranted despite the existence of five aggravating circumstances where the defendant took hostages and stated that he would shoot the police, when the police arrived the defendant killed two officers). The present case is not one of the most aggravated for which the death penalty is reserved. In addition, as previously mentioned there was significant mitigation found by the trial court (including two statutory mitigators and a number of non-statutory mitigators) plus other mitigation (See Point II). It cannot be said that this is one of the least mitigated cases for which the death penalty is reserved.

Finally, Appellee relies on a number of cases to support proportionality of the death sentence in this case. None of those cases even remotely deals with the instant situation. First, all the cases Appellee cites have basically no mitigation -- whereas there is considerable mitigation present in this case. Moreover, the facts in each case are more egregious than in the present. For example, in Gunsby v. State, 574 So. 2d 1085 (Fla. 1991), there were three aggravators, including under sentence of imprisonment, and the killing was racially motivated.[11] In Asay v. State, 580 So. 2d 610 (Fla.

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[10] Appellee makes this claim without the support of any authority. In fact, within its own argument, Appellee repudiates this claim by impliedly conceding that in cases with more egregious facts the death penalty has been deemed disproportional -- but that these cases can be distinguished on the basis of the existence of other mitigating evidence. The attempt to distinguish these cases in this manner is without merit. Here, the trial court found two statutory mitigating circumstances and a number of non-statutory mitigating circumstances.

[11] Gunsby threatened to hurt the victim prior to the incident stating that he was "tired of those Iranians messing with the black."

1991), the case dealt with two separate episodes involving two separate and distinct murders.[12] In Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991), there were 6 aggravating factors where the defendant used a woman and child to set up a roadside ambush). In Cruse v. State, 588 So. 2d 983 (Fla. 1991), there were 6 murders and 4 aggravating factors. Clearly, the instant case is far different from the cases Appellee relies on. The instant case simply is not one of the most aggravated and least mitigated for which the unique punishment of death is reserved.

POINT IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES REQUIRING "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT.

Appellee relies on Foster v. State, 614 So. 2d 455 (Fla. 1992) to claim that in the instant case the jury was adequately informed that they could consider as mitigating emotional and mental disturbances and impairment which does not rise to the level of "extreme" and "substantial." Reliance on Foster is misplaced. The defendant in Foster was allowed jury instructions on the non-statutory mitigator less than an "extreme" disturbance,[13] and because of these instructions

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[12] Contrary to Appellee's claim, in Asay there was no argument, rather the defendant killed the black transvestite because he felt he was cheated out of $10.00.

[13] The special instructions on mitigators included the following which were less than extreme emotional disturbance:

> Among the mitigating circumstances which you may consider are the following ...
>
> Fifth, the physical illness of the defendant ...
>
> Seventh, any alcohol or drug addiction of the defendant ...

the defense attorney argued that the defendant was under an emotional disturbance even if it did not meet the level required by statute. In the instant case, there was not an instruction without the modifiers "extreme" and "substantial." The use of modifiers restricts consideration of non-statutory mitigating evidence. Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

Appellee also claims because defense counsel was able to argue to the jury regarding the non-statutory mitigating circumstances in closing, the trial court was not required to instruct the jury properly. However, an attorney's argument to the jury is not a substitute for an adequate jury instruction. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). As explained in the Initial Brief, the instruction with modifiers would be understood by the jury to limit these types of mitigating circumstances to extreme mental or emotional disturbance and to substantial impairment.

POINT V

THE TRIAL COURT ERRED IN GIVING A FLIGHT INSTRUCTION OVER APPELLANT'S OBJECTION.

Appellee first claims that the issue cannot be reviewed because the trial court was not made aware of the specific grounds as to why a flight instruction was improper. However, Appellant's motion for new trial specifically informed the trial court of Fenelon v. State, 594 So. 2d 292 (Fla. 1992):

> ... 1) The Court erred in commenting on the evidence by giving the Flight instruction.

> Eighth, a troubled personal life including depression and frustration ...
>
> Twelfth, the learning disability suffered by the defendant ...

614 So. 2d at 461.

(Fenelon v. State, ___ So.2d ___, 17 F.L.W. S101 (Fla. February 13, 1992).

(R2366A).

Appellee next argues that Fenelon was at issue after the jury verdict and thus the trial court never had an opportunity to correct is error under Taylor v. State, 630 So. 2d 1038 (Fla. 1993). However, the trial court was notified that giving the flight instruction was error based on Fenelon at the motion for new trial. Thus, the trial court was given the opportunity to remedy the error. The motion for new trial was after Fenelon was decided and therefore application of Fenelon to this case is not a retroactive application which is prohibited in Taylor.[14]

Finally, Appellee claims that the error is harmless because there was overwhelming evidence that Appellant was the person who fired the shots. Appellee's claim lacks merit where the issue before the jury was never whether Appellant was the person who fired the shots. Rather, the issue was whether Appellant's state of mind was one of premeditation before the shooting. The error is not harmless where the prosecutor told the jury that the judge would tell them to look at flight and that flight was evidence of Appellant's state of mind showing premeditation (R1966). The instruction was a judicial comment on flight's value as a circumstance of guilt. It improperly endorsed the state's use of flight toward proving premeditation. The instruction could have tipped the scales toward the jury accepting the state's argument thus finding Appellant guilty of the crimes charged rather than of lesser included offenses.

[14] It should also be noted that the objection to the flight instruction at trial was identical to the objection that was made in Fenelon.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OFFICER JARA'S STATE OF MIND OVER APPELLANT'S OBJECTION.

Appellee's first claim is that the issue is not preserved. Such a claim is specious where Appellant objected to the evidence regarding the admissibility of Jara's state of mind and the trial court ruled on the objection. Prior to the introduction of this evidence, defense counsel objected to evidence of the attempted murder in Nebraska and the prosecutor explained that the only evidence as to that would be Jara's state of mind belief as to Appellant's intentions and that evidence wasn't needed:

> MR. MORTON: I remember from the testimony and the hearing that I believe it was Sergeant Joseph Jara who said at one point when he was struggling over the gun he realized -- he said why am I being so nice. Mr. Besaraba, if I recall, he said that that was the thinking in his head. He was struggling for the gun. Why am I being so nice. This man is trying to kill us, kill me....
>
> He doesn't necessarily have to get that statement in evidence. I just want him to describe what happened, what he did no order to get the gun out of his hand....
>
> That's the only testimony that I recall concerning murder, is when he said that. In my mind, that's what I thought he was trying to do. It's a conclusion on his part.

(R1200-01). The trial court indicated that the statement, and other details, would be admissible under Section 90.402 of the Florida Statutes -- that is, as relevant evidence. Defense counsel stated that the evidence was not admissible as relevant evidence under 90.402 (R1203). Any possible doubt as to whether Appellant had preserved the issue is removed when Appellant later objected at the introduction of Jara's state of mind evidence:

> MR. BAILEY: Judge, in the arguments on the nature of the testimony from Nebraska Mr. Morton indicated he would instruct this witness he was not to testify that he was trying to kill me. That's exactly what he just testified. That's the statement I objected to. The objection is to that statement and move for a mistrial at this time.
>
> MR. MORTON: True, you asked what his testimony would be. I told you that I recall from the hearing that he said that and I didn't ask him about any charges or anything. That simply explains the context of what he did.

(R1455) (emphasis added). The trial court then indicated that the evidence was relevant to prove Jara's "state of mind" and overruled the objection (R1455). Thus, the trial court understood the objection and ruled on it and the issue is preserved for appeal.[15] Appellee also complains that Appellant never requested a curative instruction. However, the objection was overruled, thus it was not necessary to move for a curative instruction. Ralston v. State, 555 So. 2d 443, 444 (Fla. 4th DCA 1990) (request for curative instruction would be futile where objection was overruled). In addition, an instruction to disregard this type of evidence would not be effective anyway. See Asberry v. State, 568 So. 2d 86, 87 (Fla. 1st DCA 1990) (curative instruction would have been futile because explicit nature of officer's remarks).

Appellee next claims that Jara's state of mind was admissible to show Appellant's consciousness of guilt.[16] In no way does Jara's state of mind show another person's consciousness of guilt. As explained in

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[15] Appellee fails to mention what other possible issue is raised on R1455 and what type of ruling, other than relevance, the trial court could be making when speaking of "state of mind."

[16] Appellee refers to the evidence of flight to Nebraska. The admissibility of flight is not the subject of this appeal. Rather, the issue deals with Jara's state of mind testimony that it was his impression that Appellant intended to kill him.

the Initial Brief, evidence of one person's state of mind cannot be used to prove another's state of mind. E.g. Sommerville v. State, 584 So. 2d 200, 201-202 (Fla. 1st DCA 1991); pages 44-45 of Initial Brief. Appellee argues that the cases cited in the Initial Brief are not applicable because, although dealing with state of mind, they address out of court statements. This argument misses the point. All the cases deal with the state of mind other than the defendant's as being irrelevant. Appellee even acknowledges that the issue involves Jara's "impression of Appellant's intentions" (AB at 33). This Court has long disagreed with Appellee's position, that Jara could give his "impression of Appellant's intentions," by holding that "[T]he rule is well established that a witness is not permitted to testify as to the undisclosed intention or motive of a third person ..." Branch v. State, 96 Fla. 307, 118 So. 13, 15 (Fla. 1928).

Appellee also claims that Jara's testimony was offered to "justify his decision" as to using force. However, the jury was not empaneled to try a Nebraska police officer. Rather, Appellant was on trial. Furthermore, the prosecutor below used the evidence not to justify Jara's decision, instead it was used to argue that Appellant purposely acted with premeditation in Nebraska which shows he acted the same way in Florida:

> MR. MORTON: ... Flight and what happened in Nebraska when he was caught tells you his state of mind. What does he have? A killing state of mind ...
>
> As Sergeant Jara told you, I'm here and I'm trying to get his gun and suddenly I'm thinking to myself this man is trying to kill me, kill us. Why am I being so nice? I grabbed his hair and put my knee. That's what I had to do just to get him, make him let go of the gun.
>
> State of mind. Killing. Specific intent. Back in Hollywood as he got away.

(R1967) (emphasis added). The evidence was neither admissible, nor was it offered, to justify Jara's decision which was not relevant. Jones v. State, 577 So. 2d 606 (Fla. 4th DCA 1991) (reversal warranted where BOLO was used to contradict consent defense and not toward showing officer's actions); Harris v. State, 544 So. 2d 322, 324 (Fla. 4th DCA 1989) (error to allow accusatory evidence to justify officer's presence); Conley v. State, 620 So. 2d 180 (Fla. 1993) (error to use accusatory information to establish logical sequence of events -- prejudice outweighs probative value).

Finally, Appellee claims that the error of admitting Jara's state of mind impressions as to Appellant's intentions is harmless. Such a claim is specious. As noted previously, the prosecutor below improperly used evidence of Jara's state of mind impression to argue that Appellant's actions were premeditated (R1967). This is not harmless where the only legitimate issue was whether the killing was premeditated or not. As stated in Fleming v. State, 457 So. 2d 499 (Fla. 2d DCA 1984), the danger of misusing evidence of another's state of mind for the purpose of imputing a state of mind in the defendant is so prejudicial that reversal is warranted even if there was some relevance to such evidence:

> ... we must conclude that Audra Fleming's state of mind constituted a collateral concern which was of little consequence in determining the identity of her killer. Even if we are to find Audra's state of mind relevant to this controversy, we still would deem the challenged evidence inadmissible. Certainly the danger that the jury would misuse this evidence for the impermissible purpose of imputing a state of mind to appellant (specifically, rage resulting from a confrontation, and thus a motive for murder) outweighs the minimal importance of establishing the true purpose of Audra's visit.

457 So. 2d at 501-502 (emphasis added).[17] The error cannot be deemed harmless beyond a reasonable doubt.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE OVER APPELLANT'S OBJECTION.

On page 35 of its Answer Brief Appellee addresses Appellant's written motion in limine attacking the state's notice of intent to

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[17] See also Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980):

> We share the conclusion reached by the court in *People v. Ireland, supra*, 450 P.2d at 585:
>
> > The error was prejudicial. The statement in question not only reflected Ann's state of mind at the time of the utterance; it also constituted an opinion on her part as to conduct which defendant would take at a future time. On the basis of this hearsay opinion the jury might reasonably have inferred that Ann several hours before the homicide, had formed the intention to kill her. The next logical inference, to wit, that Ann's assessment of defendant's then intention was accurate and defendant had in fact formed an intention to kill several hours before the homicide ... strikes directly at the heart of the defense. The judgment, must therefore, be reversed.
>
> The Court went on to say that:
>
> > The quantum of prejudice ... is highest when the circumstantial facts in the statement are intimately related to the issue to be proved. In the context of homicide cases, such as this, it is clear that where the improper purpose for which the jury might consider the evidence bears closely on the central question of defendant's guilt or innocence there is less likelihood that the jury will confine itself to its proper realm. Here the functional utility of the limiting instruction becomes most doubtful. This is the lesson of the famous case *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933).

385 So. 2d at 1023 (emphasis added).

use evidence of other crimes. Appellee claims that defense counsel waited until trial to challenge the notice thus "sandbagging" the state and depriving it of its right to appeal. Such a claim is misleading and irrelevant. The instant issue is not the issue to which Appellee refers. The instant issue does not deal with the written motion in limine subject of the defective notice nor the relevancy of flight to Nebraska. Rather, the issue involves the state's introduction of the details of Appellant fighting and struggling with police at the time of his arrest in Nebraska.[18] Appellant properly objected to this evidence being introduced (R1201-03,1451).

Appellee next argues that evidence of Appellant's flight to Nebraska is relevant to consciousness of guilt. Again, flight to Nebraska is not the issue here. Rather, the present issue is the relevancy of the details of Appellant's fighting with police in Nebraska. Appellee does not explain how the details of the fight are relevant toward showing consciousness of guilt. As explained in pages 47-48 of the Initial Brief while the flight to Nebraska and the fact that Appellant was found with the car and gun, may be relevant, the collateral details of fighting with police merely goes to bad character.[19]

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[18] To set the record straight, it should be noted that Appellant could not have made his objection to the nature of the details in response to the state's notice because the notice failed to divulge what details the state intended to introduce. It was only revealed at trial what details the state was introducing. In addition, it can hardly be said that Appellant was "sandbagging" the state's right to appeal in issue regarding collateral crime evidence when, in fact, the state has no right to a pretrial appeal of such evidence. Fla.R.App.P. 9.410. Besides, the state failed to raise any such claim below and thus waives the claim, especially where the trial court entertained the defense challenge. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

[19] See also Shorter v. State, 532 So. 2d 1110, 1111 (Fla. 3d DCA 1988) (evidence that defendant had put 3 officers in hospital "would have been inadmissible in evidence as its prejudicial impact far

Appellee's reliance on this Court's decision in Straight v. State, 397 So. 2d 903 (Fla. 1981), and the other cases which rely on Straight, is misplaced. Straight does not hold that it is permissible to admit details of collateral crime activity. More importantly, in Straight it was emphasized "activity not charged is admissible if relevant to an issue of material fact" and that the defendant's use of a gun "was relevant to the issue of his guilty knowledge." 397 So. 2d at 908 (emphasis added). In Straight, guilty knowledge was an issue of material fact because "The appellant denied any involvement or knowledge of the crime charged." 397 So. 2d at 909. In the present case "guilty knowledge" was not a material issue. Appellant's defense was that he was guilty of second degree murder. Appellant was not contesting that he was the shooter. Appellant would have guilty knowledge regardless of whether he was guilty of first degree murder as the prosecution theorized or if he was guilty of a lesser crime as the defense urged the jury. The details of Appellant's fighting the police does nothing to differentiate between the guilty knowledge one would have for first degree murder and second degree murder. Thus, the details were not relevant to a material fact in issue. In addition, if these details have any slight relevance,[20] it would be substantially outweighed by the undue prejudice caused by their admission.

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outweighed whatever limited relevance it might have had as to the defendant's alleged consciousness of guilt"); Reaves v. State, 19 Fla. L. Weekly S173, 174 (Fla. April 17, 1994) (details of attempted sale of cocaine during flight was not relevant to murder from which defendant was fleeing despite fact it was part of his plan to escape).

[20] Any relevance becomes even more insignificant when one considers that the state had already introduced evidence of flight from the scene and to Nebraska as consciousness of guilt.

Finally, Appellee claims that the error is harmless. However, introduction of the collateral details is presumptively prejudicial. Straight v. State, 397 So. 2d 903 (Fla. 1981). Especially, in the present case, where the collateral act of violence against a police officer is inflammatory. Appellee concedes that evidence of premeditation, at best, is totally circumstantial. Because there was a close and genuine issue as to premeditation, it cannot be said beyond a reasonable doubt that the error was harmless.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE JURY PANEL.

Appellee claims there is no error because the trial court was amenable to individual voir dire after hearing Dr. Roosa's explanation that he was skeptical about associating mental impairment to criminal behavior. However, prior to Dr. Roosa's statement (R558-59) the trial court repeatedly denied Appellant's motions for individual voir dire (R3087,257,260-2717-20,2738-40). The trial court did not invite any individual questioning until after the damaging comments had been made. Likewise, Dr. Roosa's comments at 558-59 of the record were not "invited" by defense counsel's one question at 731. The prejudicial material can hardly be "invited" where it has already been previously placed before the jury at a time when individual voir dire was denied. Appellee is blaming defense counsel for failing to close the barn door after the horses have escaped when defense counsel was objecting to the opening of the door in the first place.

Finally, Appellee cites to cases to argue that the jury venire could not be tainted by Dr. Roosa's comments. However, in those cases the comments did not deal with a subject that the jury would consider.

As explained on page 56 of the Initial Brief, the statement is the type that could infect the jury.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO HAVE EVIDENCE STRICKEN WHERE THE PROSECUTOR HAD VIOLATED THE RULE OF SEQUESTRATION.

Appellee first claims that the prosecutor and witness Hoffman never discussed the medical examiner's testimony. This is not true. Appellee cites no portion of the record for this claim. Defense counsel brought out the fact that the prosecutor and Hoffman had spoken about the medical examiner's conclusions and that this came from his testimony (R1757). Neither the prosecutor nor the witness denied this as fact. Instead, the prosecutor stated that it was not a violation of the rule. As explained in the Initial Brief, the prosecutor had violated the rule by informing Hoffman of the medical examiner's testimony.

Finally, Appellee claims the error was not prejudicial because Hoffman's testimony was not influenced. However, Hoffman admitted that his testimony had been influenced by the medical examiner's testimony (R1755-56).

POINT XII

THE TRIAL COURT ERRED IN FAILING TO MAKE THE REQUIRED FINDINGS WHERE THE STATE FAILED TO COMPLY WITH THE TEN DAY NOTICE REQUIREMENT OF SECTION 90.404(2)(b), OF THE FLORIDA STATUTES.

Appellee essentially claims that defense counsel waited until trial to challenge the notice thus "sandbagging" the state and thus depriving it of its right to appeal. However, Appellee failed to make such a claim below and permitted the trial court to entertain Appellant's motion. Thus, Appellee cannot complain for the first time on

appeal about the trial court entertaining the motion. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (contemporaneous objection rule applies equally to the state). In addition, it can hardly be said that the defense was "sandbagging" the state's right to appeal when, in fact, the state has no right to appeal this issue. Fla.R.Crim.P. 9.140.

Appellee claims that an adequate notice was not required because Appellant's fighting and struggling with police in Nebraska was inseparable crime evidence to the shootings in Florida three days earlier.[21] Such a claim is specious. Appellant applies no analysis to support its conclusion and merely recites "inseparable crime evidence" as a talisman. There is a problem of admitting evidence under a label, whether it be "entire context of the crime" or "inseparable crime evidence" without any analysis. See Ehrhardt, Florida Evidence § 404.9 (1994 Edition) (at page 162: "There are also many appellate decision that merely apply labels to the evidence without any real analysis"). The talismanic use of the label "inseparable crime evidence" has been, as Professor Ehrhardt indicates, so overextended that the concept "could well swallow the rule." Ehrhardt, Florida Evidence § 404.17 (1994 Edition). Appellee's application of "inseparable crime evidence" as a talisman in this case certainly overextends the concept.[22]

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[21] In footnote 9 of its brief Appellee claims that the issue of the admission of this evidence was addressed in a separate issue. However, Appellee merely addressed the issue of the admissibility of Appellant's flight from Florida to Nebraska and being found in possession of the car and weapon. Appellee failed to address the issue that was the subject of this appeal -- the admissibility of the details of Appellant's fight with the Nebraska police officers. See Point VII.

[22] Appellee even uses the talisman in a misleading way. Appellee states (page 54) that the recovery of Scott Yaguda's car and the murder weapon are inseparable from the charged offenses. However, the

Merely because another act may be relevant does not mean it meets the definition of "inseparable crime evidence." See Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988) (evidence under this provision "is merely a special application of the general rule that all relevant evidence is admissible"). Assuming arguendo, that the fighting with police in Nebraska had some relevance (but see Point VII, supra), such evidence was not "inseparable" from the Florida charges.

Professor Ehrhardt defines "inseparable crime evidence" as when:

> "the act will be so linked together in time and circumstance with the happening of another crime, that one cannot be shown without proving another."

Ehrhardt, Florida Evidence, § 404.17, pages 177-78 (1994 Edition).[23] This Court has applied this standard. Henry v. State, 574 So. 2d 66, 70-71 (Fla. 1991) ("the facts of the second killing were so inextricably wound up with the first that to try to separate them would have been unwieldy and likely to lead to confusion).[24]

In the present case, it cannot be said that the shootings in Florida were so linked with Appellant's fight with police in Nebraska that the shootings in Florida could not be shown without evidence of the fight. The prosecution could present the evidence of the shootings in Florida and the fact that Appellant had fled to Nebraska and

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recovery of these items was not the subject of the notice and, in fact, the recovery does not constitute a wrong, bad act, or crime, which requires a notice. Rather, the subject of the notice is Appellant's act of fighting the police in Nebraska which is very separable from his conduct in Florida.

[23] The state's notice described the collateral act to be used pursuant to § 90.404 as an attempted murder (R3091), which were the details of Appellant's fighting with police officers.

[24] Henry was, in fact, cited by Appellee. The other cases cited by Appellee are factually totally different than at bar in determining whether the evidence was inseparable.

found in possession of the car and gun, without presenting evidence of the fight with police officers. In other words, the fight with police officers was not inseparable with the crimes charged in Florida.

Appellee next seems to make an alternative claim that notice of other wrongs, bad acts, or crimes was not required because the fight with police would be admissible as relevant evidence under § 90.402. Such a claim has no merit. First, the evidence of the fight with police would not be relevant under § 90.402. See Point VII, supra. Second, all evidence of wrongs, bad acts, or crimes under § 90.404 must meet the requirement of being relevant under § 90.402. § 90.404 is merely a special subsection of the relevant evidence that is admissible under § 90.402. Bryan v. State, 533 So. 2d 744, 746 (Fla. 1986) (this provision "is merely a special application of the general rule that all relevant evidence is admissible"). This special subsection of relevant evidence has such additional requirements as notice because of the unique nature of the evidence. If Appellee's claim, that because the evidence would be relevant under § 90.402 notice is not required, the notice requirement would be a nullity because § 90.404 is merely a special subsection of the general rule that all relevant evidence is admissible.

Appellee next claims that the evidence of the fight with police would be admissible under § 90.404(2)(b) pursuant to Straight v. State, 397 So. 2d 903 (Fla. 1981). As explained earlier in the brief, the fight with police would not be probative of whether Appellant was guilty of murder in the first degree.[25] Appellee finally does address

[25] The question for the jury would be whether Appellant was guilty of first or second degree murder. Appellant would have guilty knowledge regardless of whether he was guilty of first degree murder as the prosecution theorized or if he was guilty of a lesser crime as the defense urged the jury. The details of Appellant's fighting the

the true issue in this point -- the state's defective notice. Appellee claims that the trial court conducted an adequate Richardson hearing and cites to pages 1186-1203 of the record. However, the record belies this fact. The trial court ruled that the notice was defective and inadequate (R1191,1193) and ruled that notice was not required (R1185,1198). The pages that Appellee refers to is a discussion of whether a notice was required and not whether the defective notice was willful or prejudicial. The trial court did not make specific findings required as to the prejudice or willfulness of the violation. In fact, Appellee has failed to recite any portion of the record as to any findings, either explicit or implicit, as to the willfulness of the notice violation. This essential part of a Richardson hearing was totally missing. Thus, reversal is warranted.

In addition, the only discussion of prejudice was representations by the prosecutor that Appellant was not prejudiced because he had deposed all the witnesses (R1191). Appellant pointed out that the notice was filed after the depositions and the defense still was not aware of what collateral bad acts the state was intending to introduce (R1191). The trial court never made any findings as to prejudice. In fact, the trial judge stated he was not even aware what acts the state's notice was referring to (R1197-98). The trial court can hardly be deemed to be performing an adequate inquiry into the defective notice when it is unaware of what an adequate notice would entail.

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police does nothing to differentiate between the guilty knowledge one would have for first degree murder and second degree murder. Furthermore, the evidence of guilty knowledge was the flight from the scene to Nebraska. But, the point still remains, flight does not explain consciousness of guilt between different crimes. See Merritt v. State, 523 So. 2d 573 (Fla. 1988) (error to give flight instruction for murder charge where other crimes may have been cause of flight).

Finally, Appellee points to the fact that a "so-called" cautionary instruction was discussed and given as evidence of a proper and adequate Richardson inquiry. However, Appellee fails to mention the contents of the instruction. The instruction merely told the jury that they were not to speculate whether Appellant's actions in Nebraska would be illegal in Nebraska, but were only probative of the crimes charged in Florida (R1427,1437,1515-16,2088-89).[26] As Appellant complained below, the limiting instruction totally fails to limit the jury's consideration of the collateral crime evidence to its potential relevancy.[27] The reason the instruction fails to do so is because no one could articulate why Appellant's fighting with the Nebraska police was relevant to the Florida shootings. See Point VII, supra. There simply cannot be an adequate inquiry into the defective notice where no one understands why the evidence being noticed is relevant.

POINT XIII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO VIOLATE HIS STIPULATION.

Appellee first claims the stipulation was based on a premise that Mr. Yaguda would not be available to testify. However, the record fails to disclose such a premise. Instead, when the prosecutor relayed the stipulation to the court it was clear that such a premise did not exist:

> The attorneys in this case, myself and Mr. Bailey, have agreed to perpetuate or to allow

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[26] In addition, the "so-called" limiting instruction, by telling the jury that testimony regarding actions (if to be believed) were probative of the crimes charged in Florida constitutes an improper comment on the evidence by the judge -- i.e. that these acts are probative of the crimes charged.

[27] Section 90.404(2)(b)2 of the Florida Statutes indicates that the jury is to receive an instruction on the limited purpose for which the evidence is received.

> Mr. Yaguda to testify in this case by virtue of this video taped sworn statement. The statement will be presented in court at the time of trial and it will be used as testimony at the time of the trial.

(R1277,3253-54) (emphasis added). A stipulation will not be nullified by an undisclosed premise.

Next, Appellee claims that the prosecutor was justified in backing out of the stipulation because he believed Mr. Yaguda would not be available for trial. However, to obtain relief from a stipulation a party can not simply ignore it, instead the party must apply by formal motion to the trial court. Smith v. State, 107 So. 2d 257, 260 (Fla. 1925). In the present case the prosecutor made no motion for relief, instead he merely ignored the stipulation at the last second. As explained in the Initial Brief, the defense would be prejudiced by the tactical ambush.

POINT XIV

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

Appellee first claims that the prosecutor's first comments about "another bus driver" other than Sidney Granger could have been killed was merely fair reply and proper. Appellee neither explains or cites caselaw for such a conclusion. Appellee mainly argues that the issue is not preserved due to the lack of a request for a curative instruction. However, the trial court overruled Appellant's objection (R1974). Thus, it was unnecessary to request a curative instruction. Ralston v. State, 555 So. 2d 443 (Fla. 4th DCA 1990).

Appellee claims that the next objected to comments -- using hypotheticals which were not based on the facts of the case -- was a

fair comment on the evidence. Such a claim is specious, and the case Appellee cites does not involve commenting on facts not in evidence.

The above two issues are preserved for appeal. Admittedly, the last two improper comments were not objected to, but they do constitute fundamental error -- especially when combined with the other improper comments. Appellee implies that the prosecutor's improper comment that he could have called the lead detective is fair reply. However, the state's comment was not fair reply and is improper.[28]

Finally, Appellee claims that the prosecutor's attacks on defense counsel were proper without explaining why. As explained on pages 63-64 of Appellant's Initial brief such attacks are patently improper.

POINT XV

THE PROSECUTOR'S COMMENTS TO THE JURY DURING SENTENCING DEPRIVED APPELLANT DUE PROCESS AND A FAIR AND RELIABLE SENTENCING.

Appellee claims that the prosecutor's comments about the community calling for the death penalty is totally proper. Such a claim is without merit and contrary to the caselaw. See Chavez v. State, 215 So. 2d 750 (Fla. 2d DCA 1968); Keith v. State, 709 P.2d 1066 (Okl.Cr. 1985). Likewise, talking about the victims not having the comfortable life in prison as Appellant is patently improper. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988); Taylor v. State, 583 So. 2d 323, 329 (Fla. 1991).

Appellee concedes that these comments were "inappropriate." However, Appellee ignores the fact that the cumulative effect of the comments was to inflame the jury and to deny Appellant a fair trial.

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[28] It has been noted that a police officer is peculiarly within the state's power to produce and thus a defendant may fairly comment on the faiure to call the officer. See Martinez v. State, 478 So. 2d 871, 872 (Fla. 3d DCA 1985)

Thus, these comments constitute fundamental error. See Pait v. State, 112 So. 2d 380 (Fla. 1959).

POINT XVI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE USE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN THE PENALTY PHASE.

Appellee claims that evidence of the Nebraska incident, three days after the offense, would be relevant to rebut CCP and the mental mitigating evidence. However, the mental mitigators involve Appellant's mental state at the time of the offense and not his mental state some 3 days later. The same applies with CCP. Appellant's actions three days after the incident for which he was on trial are irrelevant because they do not prove to a layman his state of mind at the time of the incident. See Garron v. State, 528 So. 2d 353, 357 (Fla. 1988) (opinions based on observations one day after the incident is not admissible to show the defendant's state of mind on the day of the incident). Appellant's actions three days later could only be relevant to his state of mind on the day of the incident once explained and connected by experts in the field of psychiatry. Id.

Appellee also concludes such error was harmless. However, the state used the Nebraska incident and this was a very close case (7-5). It cannot be said beyond a reasonable doubt that the error was harmless.

POINT XVII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON PREMEDITATED MURDER WHICH IMPERMISSIBLY RELIEVES THE STATE OF THE BURDENS OF PERSUASION AND PROOF AS TO AN ELEMENT OF FIRST DEGREE MURDER.

Appellee claims that it was not improper to give the flawed instruction because the trial court relied on the standard jury

instruction on premeditation. However, standard instructions are not infallible and should not be blindly followed. Yohn v. State, 476 So. 2d 123, 126 (Fla. 1985) (approval of standard instructions does not relieve the trial judge of his responsibility to correctly charge the jury); Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions as they are "not immutable postulates from Olympus").

In addition, the flaw in the instruction on premeditation permitted the prosecutor to argue that even though the murder statute requires a premeditated "design", such a "design" is not an element of murder (R2030). Because of the faulty instruction the prosecutor argued in essence that "deliberation" was not required and that premeditation can be "just do it" (R2030). THe error was not harmless.

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY INSTRUCTION THAT IF A MITIGATING CIRCUMSTANCE IS FOUND IT CANNOT BE GIVEN NO WEIGHT.

Appellee cites to the instruction given, which states that the jury may consider mitigation if it is established, to conclude there is no error. However, this is the very problem in this issue. The law is clear that if mitigation is established -- it must be considered and given some weight. As explained in the Initial Brief at page 75, giving some weight to mitigation that is established is mandatory and not permissive. The trial court was clearly wrong in rejecting the proposed instruction on the incorrect basis that mitigating evidence did not have to be given any weight (R2174).

POINT XXV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY.

Appellee does not really address this issue except to give a bare assertion that a reasonable person would not be in fear of the judge being partial. Appellee totally ignores the affidavit of the independent and objective witness, Mr. Means, which is noted on page 85 of Appellant's Initial Brief and pages 2979-80 of the record. Also, all the cases relied on by Appellee deal with situations far different than in this case -- where an independent, objective witness is convinced that the trial court's hostility toward Appellant will deprive him of a fair trial. Unlike in the other cases,[29] Appellant had done nothing contemptuous to draw the trial court's hostility. As explained on page 84 of the Initial Brief, if the grounds for disqualification are not frivolous or fanciful, the motion must be granted. The observations by Appellant, and the objective witness, required recusal.

POINT XXVI

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY WHERE APPELLANT ADVISED THE COURT THAT HE WISHED TO DISCHARGE COURT APPOINTED COUNSEL.

Appellee concedes that it was error not to inform Appellant that he had the right to represent himself. Appellee claims that such error is harmless based on this Court's decisions in Capehart v. State, 583 So. 2d 1009 (Fla. 1991) and Beatty v. State, 606 So. 2d 453

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[29] In Dempsey v. State, 415 So. 2d 1351 (Fla. 1st DCA 1982) the defendant's actions were contemptuous and thus the trial court's reaction was not a ground for disqualification. The other cases involve facts different than present here, and do not involve the objective observations of an independent witness.

(Fla. 1992).[30] In Capehart and Beatty the error would be harmless because the defendant in those cases never moved to discharge counsel until after the jury had reached a verdict.[31] Whereas, in this case Appellant moved to discharge counsel immediately after opening statements -- well before the guilty verdict. Thus, the error would be reversible error. See Perkins v. State, 585 So. 2d 390, 392 (Fla. 1st DCA 1991).

POINT XXVII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982) (factual validity may be raised for first time on appeal).

Contrary to Appellee's assertions, Appellant did challenge the constitutionality of Florida's death penalty on various grounds in the trial court (R2654-2716,2721-2732,2743-2754,91-92,222-252).

POINT XXVIII

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

The challenge to facial validity of the aggravators are reviewable on appeal. See Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982).

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[30] Appellee also cites to Parker v. State, 570 So. 2d 1053 (Fla. 1st DCA 1990). Unlike the present case, in Parker, the defendant never moved to discharge counsel. Thus, the issue was not preserved in Parker.

[31] The complaints regarding counsel in those cases was merely dissatisfaction with the result of a guilty verdict.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 21st day of June, 1994.

Jeffrey L. Anderson
Of Counsel