IN THE SUPREME COURT OF FLORIDA

DAVID ALAN GORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,916

REPLY BRIEF OF APPELLANT

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ARGUMENT

POINT I

WHETHER THE COURT ERRED IN DENYING CAUSE CHALLENGES.

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So. 2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. 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 struck 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.

Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990) (e.s.).[1]

Appellant at bar complied with Trotter: the court's refusal to grant a number of cause challenges forced the defense to exhaust its peremptory challenges. The defense then asked for additional challenges, specifically naming objectionable jurors (Tobin, Kramer, Arcomone) still on the panel. R 1403-1404. The court granted only one additional challenge, which the defense used on Mr. Crump.[2] (Since Mr. Crump had just come up as the next person on the seating chart, the defense had not previously had a chance to excuse him.) The defense sought additional peremptory challenges, again pointing to persons whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory

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[1] Thus, under Trotter, a juror is "objectionable" so long as the defense wishes to exercise a challenge against him or her. Juror Tobin was "objectionable" because the defense sought to exercise a peremptory challenge against her. R 1399-1404. The state's argument that the this juror was not "objectionable" at page 13 of its brief is contrary to law.

[2] Mr. Crump, who had just come up as the next person on the seating chart, was also objectionable: he felt that sympathy should play no part in consideration of mitigation, R 702, and his wife was a probation officer, R 440, and hence a juror that the defense would not want where the defendant committed the murder while on parole.

challenges had been exhausted. The court denied the request and the objectionable jurors sat in judgment of appellant's fate.

Notwithstanding appellant's compliance with Trotter, and without disputing that the objectionable jurors sat on the panel, the state now contends that defense counsel incompetently failed to preserve this issue for appeal.[3] The state has cited no case for its argument that this Court should adopt a new rule and apply it retroactively to appellant. The state made no such argument below.[4] The only apparent basis for the state's argument is that counsel did not use the additional peremptory challenge on any juror against whom he had lodged a cause challenge. This ignores the purpose of peremptory challenges, ignores that Crump had just come up on the seating chart and was an objectionable juror, ignores that the single additional challenge did not make up for the many erroneously denied cause challenges, and ignores that more than one objectionable juror actually sat in this case.

Bryant v. State, 656 So. 2d 426 (Fla. 1995) refutes the state's argument based on juror statements that they would follow the law notwithstanding other statements that they would not set aside their prejudices. There the trial court erred in denying a cause challenge to a juror who, while saying he could follow the court's instructions, "indicated that he was a strong supporter of the death penalty, and believed that if someone is guilty of first-degree murder the ap-

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[3] The state's brief is internally inconsistent. At page 12, footnote 3, it states that the failure to exercise a peremptory challenge on Mr. Kramer waived the cause challenge to him. But in the last paragraph of page 15 it states that the defense waived cause challenges to others because it did exercise cause challenges on them.

[4] Indeed, the state argued in the trial court that the defense had no right to seek additional peremptory challenges. R 1414-15.

propriate penalty is the death penalty and that a life sentence is too lenient." Id. 428.

At bar, juror Arcomone was subject to cause challenge under Bryant. Pursuant to her strong and long-held view favoring the death penalty, she would focus only on the criminal act and not consider the mitigators. R 1249-52.

Similarly, Mr. Wales specifically said he did not think he could be a fair and impartial juror. R 1232. He would not consider extreme economic impoverishment in mitigation. R 1033.

Ms. Miller, who had detailed knowledge about the case, R 608, 813-15, could not set aside completely her feelings about the case, and would be somewhat biased despite her best efforts. R 818-19. At most, "if what I learn in this courtroom proves that what I think I already know is incorrect, that bias may not be as strong as I feel it is right now with what I do know." 818-19. After detailed questioning by the state, she maintained that her bias about the case was still with her. R 824. She would consider alcoholism and an economically depressed background if instructed by court, but "If you're asking me in the case of a murder trial do I think they would have effect, no." R 1052.

Mr. Donithan said he would have trouble keeping his attention on the trial because of its length, and it would create undue hardship for him to sit on the jury because he worked on a straight commission. 759-60. He thought the death penalty should be used more often, and it "could be touch and go" whether he would recommend a life sentence. 761. He would follow the law "As well as I could." 762. He did not think sympathy should play any part in his verdict. Id. Without hearing any aggravating evidence, he would vote for death. 1261.

Asked by the state if he would listen to evidence and look for aggravating and mitigating circumstances and base the penalty verdict on them, he replied: "I think so." 1293.

Under Bryant, the court should have granted the cause challenges to the foregoing jurors as well as to jurors Kramer, Agostini, Gehart, and Patterson.

In arguing that this Court should defer to the trial court, the state overlooks that the trial court based its determination of cause challenges solely on the question of whether jurors gave the right answer to narrow follow-the-law questions. R 1067-68.

POINT II

WHETHER THE STATE MISLEAD THE JURY AS TO APPELLANT'S PAROLE ELIGIBILITY.

Throughout the proceedings below, the defense maintained that it was misleading to tell the jury that appellant was parole eligible in twenty-five years. R 4946-56 (pre-trial motion), 971-73 (jury selection), 1659 (same), 3273-78 (charge conference), 3621-33 (jury questions during deliberation). Nevertheless, the state now contends that defense counsel incompetently waived this issue for appeal, so that this Court should disregard the fact that the jury relied on material information which was false.

The claim that defense counsel invited state's presentation of materially false evidence is specious. The best light that one can put on the cross-examination of Mr. Stone about parole eligibility is that the state acted with reckless disregard for the truth.[5] Even this excuse is doubtful, since the defense pre-trial motion and the argument during voir dire examination put the state on notice that parole eligibility was an important issue.

The state does not deny that due process guarantees the right to be sentenced upon information which is not false or materially incorrect. See U.S. v. Tavano, 12 F.3d 301 (1st Cir. 1993) (citing cases). This court may review an error which amounts to a denial of due process, Ray v. State, 403 So. 2d 956, 960 (Fla. 1981), or which "goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970), Hooters

[5] Similarly, the state told the judge pre-trial that "after serving twenty-five calendar years under the statute as it is today, this man would be eligible for parole under this crime." R 4954.

of America v. Carolina Wings, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) (quoting from Ray and Sanford).

Even correct information respecting parole eligibility may be misleading or improper. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). Here, of course, the state presented false information to the jury. Thus this case is even more compelling than Simmons v. South Carolina, 114 S.Ct. 2187 (1994) in which the state court improperly barred correct evidence about parole eligibility. At bar, it both presented false testimony and induced the trial court to give erroneous instructions. Reversal is required under Hitchcock and Simmons.

The state is incorrect in contending that the misrepresentation regarding parole eligibility did not affect the sentencing decision. The jury was so concerned that it wrote two questions on this topic. "Harmless-error review looks, we have said, to the basis on which 'the jury actually rested its verdict.' Yates v. Evatt, 500 U.S. --, --, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S.Ct. 2078, 2081-82 (1993) (emphasis in original). The state must show "beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained." Id. 2081 (quoting Chapman).

Given the jury's questions, the state cannot show that the verdict "was surely unattributable to the error." Hence, resentencing is required.

POINT III

WHETHER THE COURT ERRED IN LETTING THE STATE USE A CONVICTION FOR ARMED TRESPASS FOR THE "PRIOR VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE.

As the state grudgingly conceded at page 28 of its brief, a crime which is not "inherently violent" cannot satisfy this circumstance under Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994). Given Elam, appellee's reliance on Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986), Brown v. State, 473 So. 2d 1260 (Fla. 1985), and Mann v. State, 453 So. 2d 784 (Fla. 1984) is misplaced. Elam conforms to the rule set out in Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) that aggravating circumstances must be strictly construed in favor of the defense.

Further, Brown, in which this court reduced the sentence to life imprisonment because of a life verdict, does not support the state's claim that the details of the trespass were "properly before the jury since that conviction formed the basis for appellant's status as a person under sentence of imprisonment." The imprisonment circumstance is not a back door for admission of irrelevant evidence.

As to its claim that the erroneous use of this circumstance was harmless, the state has not even attempted to show that the sentencing decision was "surely unattributable to the error" under Sullivan. The question to be answered by harmless error analysis "is not whether guilt [or here, the sentence] may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials". Yates v. Evatt, 111 S. Ct. 1884, 1898 (1991) (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

At bar, both the state's argument to the jury and and the trial court's findings respecting this circumstance dwelt mainly on the armed trespass. R 3558-59 (state's argument), 4564 (sentencing order). Any claim that the improper circumstance did not influence the sentencing decision is directly contrary to the state's position below. The state and the court understood that the contemporary felonies merged this circumstance with the felony murder circumstance. See Jackson v. State, 575 So. 2d 181 (Fla. 1991) (prior violent felony circumstance merged with felony murder circumstance), Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994) (prior violent felony circumstance did not merge with felony murder circumstance "because the record reflects that Armstrong had a previous felony conviction for indecent battery on a fourteen-year-old child.").

POINT IV

WHETHER USE OF THE AVOID ARREST, PREMEDITATION, AND HEINOUSNESS CIRCUMSTANCES REQUIRES RESENTENCING.

In arguing that, because this Court upheld circumstances in the original appeal it must uphold them now, the state ignores its own authority of Preston v. State, 607 So. 2d 404 (Fla. 1992) cited at page 29 of its brief for the proposition that a resentencing is a totally new proceeding so that prior sentencing findings are not relevant. There have been substantial changes in case law since the original sentencing, and this Court has since announced that aggravating circumstances must be strictly construed in favor of the defendant. Trotter, 576 So. 2d at 694. Hence, the decision on the first appeal does not authorize use of the circumstance on this appeal.

A. As to the "avoid arrest" factor, Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992) refutes the state's argument. There this court disapproved use of the circumstance notwithstanding the trial court's finding that:

> The evidence establishes that the [d]efendant had worked around the victim's home and was known by the victim, the victim's spouse and her children. The evidence established that the defendant had spoken with the victim and her two children the week prior to the murder and at that time sought out information concerning the family's time schedule and the fact that the victim's husband would be out of town on the date the crime was committed. This evidence is clear to establish that the victim could have identified the defendant if she had survived the beating she was subjected to and the stabbing that occurred during the course of the robbery and burglary.

The state's emphasis on appellant's statement, that he would kill Regan Martin "anyway", R 1945,[6] does not establish that "the sole or dominant motive for the killing was to eliminate a witness."

B. As to the coldness circumstance, the change in the law since the original appeal has been even more dramatic. In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) the Court recognized that prior cases had failed to narrow the circumstance. Under Rogers, the "calculated" element requires that, regardless of how well-planned the underlying felony was, the defendant must have planned the murder prior to the beginning of the criminal episode. Thus the evidence "must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began." Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990). The fact that the murder occurred as a result of the victim's escape attempt refutes the claim of a premeditated design. Geralds, Gore (Marshall) v. State, 599 So. 2d 978 (Fla. 1992).

C. Likewise, the law respecting the heinousness circumstance has changed in the past 10 years. As applied to shooting murders, the circumstance is unconstitutionally vague absent hard and fast guidelines for its application. See Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992) (although circumstance is constitutional as applied to strangulation, application to other forms of murder may be unconstitution-

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[6] At footnote 13 of its brief, the state asserts with no citation to the record, that the statement was made during one of the sexual batteries and that "all of the sexual batteries took place before Ms. Elliott attempted to escape." The only evidence as to the timing of the shooting with respect to the statement is in Regan Martin's testimony at record pages 1944-47. The events recited there contain no coherent time sequence, and all she said about the shooting was that "at one point I was lying on the floor when I thought I heard what I thought was a BB gun". R 1945 (e.s.). The state did not clarify the sequence of events.

ally vague). In the case of death by gunshot, the circumstance will be unconstitutional unless the state can show that the defendant deliberately chose an unnecessarily torturous way to commit the murder. See Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993) (circumstance struck where victim lay on floor and begged for his life and spoke of his wife and children: "The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering."). Expansion of the circumstance beyond such cases violates the Eighth Amendment.

POINT VI

WHETHER ERRONEOUS JURY INSTRUCTIONS REQUIRE RESENTENCING.

B. Coldness (CCP).

The state is incorrect in arguing that this issue is not preserved for appeal. The defense specifically objected to the instruction that was given on the ground that it is unconstitutionally vague and fails to cure the vagueness of the statute. The court overruled the defense objection that the instruction "is still unworkably vague for purposes of the Eighth Amendment", 3409, and instructed the jury: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The kind of crime intended to be cold, calculated and premeditated is one that follows a careful plan or pre-arranged design." 4449.

Contrary to the state's argument, the instruction unconstitutionally expanded the circumstance. The jury would readily have applied the circumstance where the murder "follow[ed] a careful or pre-arranged design" even it the design was only to commit sexual battery rather than murder. This would be a clear misapplication of the circumstance under, e.g., Jackson v. State, 498 So. 2d 906 (Fla. 1986) (fact that the underlying felony was fully planned ahead of time does not qualify unless plan included commission of murder), Power v. State, 605 So. 2d 856 (Fla. 1992) (defendant raped, kidnapped, stabbed 12-year-old girl. Although rape was carefully planned, evidence did not show that murder was carefully planned), and Rogers v. State, 511 So. 2d 526 (Fla. 1987) (defendant shot robbery victim three times because he was "playing hero" and trying to flee).

D. Instructions regarding mitigation.

Respecting the instructions on specific mitigating circumstances such as appellant's deprived background, the state makes a general argument that the "catch-all" instruction is sufficient under Dougan v. State, 595 So. 2d 1, 5 (Fla. 1992), Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989). But none of those cases involve the situation here, where jurors said they would not consider such factors in mitigation, absent such an instruction from the court. Hence, the state's cases cannot avail it here. Contrary to the state's argument are California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 840, 93 L.Ed.2d 934 (1987) and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Justice O'Connor's concurrence in California v. Brown explained that a catch-all instruction will be insufficient if the jury is otherwise misled as to the nature of non-statutory mitigation. 479 U.S. 545-46.

In Penry, the defendant presented in mitigation evidence respecting his mental retardation and abused background, but the trial court refused to give specific instructions that the jury could consider and give effect to this evidence. The state court reasoned that the state's standard jury instructions adequately covered these matters. Justice O'Connor, writing for the Court, disagreed, writing that "full consideration of evidence that mitigates against the death penalty is essential". 492 U.S. at 328. The Court specifically rejected the state's arguments that it was enough that the defense was allowed to present and argue the mitigating evidence, and that the standard instructions were sufficient to permit consideration of the mitigation. Id. 325. It concluded that the "risk that the death

penalty will be imposed in spite of factors which may call for a less severe penalty" is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Id. 328 (quoting from Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

At bar, there was more than a risk that the jury would reject valid mitigation. Answers during voir dire established that jurors would not consider specific items of mitigation without specific instructions. Resentencing is necessary under the eighth amendment.

POINT IX

WHETHER THE COURT ERRED IN REFUSING TO HEAR THE DEFENSE MOTION TO SUPPRESS IDENTIFICATION.

On this point, the state's brief places great emphasis on the fact that the defense presented an expert who testified that appellant told him that he had shot Lynn Elliott. The state ignores the fact that, had the defense been permitted to exclude the state's evidence that appellant was the shooter, it would not have presented the testimony of the expert.

POINT X

WHETHER THE COURT ERRED IN REFUSING TO ALLOW INTRODUCTION OF STATEMENT THAT WATERFIELD WAS INVOLVED IN THE MURDER.

The state is incorrect in its argument that defense counsel incompetently waived this issue. In this regard, the state places great reliance on remarks that defense counsel made at record pages 2286-87. The state misapprehends the nature of the discussion at that part of the transcript.

At record pages 2264-94 the parties argued this matter at length. Much of the discussion centered on poring over what the attorneys had said at the initial trial as to guilt. At record pages 2277-85, the judge read into the record extensive excerpts of the transcript of the initial trial, and then discussed those excerpts. Among these excerpts were various remarks by the state attorney at the initial trial to the effect that the state did not intend to present testimony that "Freddy's in on this one." R 2281 ("Mr. Midelis, the Assistant State Attorney, 'Yes, sir. That's the end. I'm not going any further, Your Honor. I have agreed and Mr. Stone has agreed not to go into the gun being in the house and to agree not to mention "Freddy's in on this one," we have no intention of doing that, Your Honor.'"), 2283. It appears from the court's recitation and remarks, that the court concluded that the parties at the initial trial had agreed that the remarks would not be admitted. R 2284 (statement of instant trial judge that statement was not admissible at prior trial "because [of] agreement between Counsel for the State and the Defense.").

After the court read these transcript excerpts into the record, defense counsel made the remarks quoted in the state's brief. It is clear from the context, that defense counsel's statement about not going "into any question about Freddy is on this one" was a paraphrase

of what the prosecutor had said at the initial trial as to guilt. R 2286-87. We can tell this because, as the argument proceeded, defense counsel specifically argued that it should be allowed to present the statement that "Freddy was in on this one." R 2293-94. As defense counsel tried to continue to argue the matter, he was cut off:

> [DEFENSE COUNSEL] I object to this --
>
> [PROSECUTOR] You ruled to move along.
>
> THE COURT I want y'all to listen to me very carefully. I don't know how much clearer I can make this. I sustained the State's objection to any questioning attempting to elicit any statement that Mr. Gore may have made at the garage about something to the effect of, "Freddy was in on this one" or any information about the whereabouts of the gun in the house pursuant to the agreement that was made in the original trial proceeding and pursuant to Judge Vocelle's order from the transcript that I have just went over.
>
> Number two, I am going to permit the State to ask the questions that I just spelled out because I find it admissible, it was admitted at the first proceeding, I find it admissible at this proceeding. That is my position, I don't want to hear any more argument on it. I am not treating anybody differently than I am anybody else. I'm trying to do the best I can, follow the rules of evidence and apply them in this case. Thank you. Let's proceed.
>
> [DEFENSE COUNSEL] Judge, could I be heard based on what Mr. Colton just said?
>
> THE COURT No, sir. I've heard enough. Thank you. I gave y'all ample opportunity to make statements. Thank you.

R 2295-96 (e.s.). Thus it is clear that the trial court ruled against the defense. It sustained the state's objection to the statement about Freddy. It refused to hear any further argument from the defense. The issue is preserved for appeal.

The foregoing also refutes another argument made by the state: at page 78 of its brief, the state maintains that if "appellant genuinely believed that the testimony was so important, he could have called Redstone as his own witness, but he did not." As seen from the

foregoing, the trial court ruled the evidence inadmissible, and refused to hear anything further about it. Hence, the defense could not have called Redstone as its witness.

POINT XII

WHETHER THE COURT ERRED IN LETTING THE PROSECUTORS TALK TO WITNESSES DURING BREAKS IN THEIR TESTIMONY.

Contrary to the state's argument, appellant is making the identical argument here that as below: letting the state talk with its main witnesses during breaks in their testimony violated the rule of sequestration. The state apparently bases its argument on the fact that the defense cited no specific authority for its objection. The state's argument is incorrect: defense counsel need not cite specific authority for an objection. Wike v. State, 648 So. 2d 683 (Fla. 1994) (reversing for failure to grant final argument notwithstanding defense counsel's failure to cite applicable rule).

Further, since the court and the state vehemently denied the existence of any rule governing this matter, the court did not exercise its discretion. "An abuse of discretion occurs when ... the decision is based on an erroneous conclusion of law". Heat & Control, Inc. v. Heater Industries, Inc., 785 F.2d 1017, 1022 (Fed. Cir. 1986) (citing cases). See also U.S. v. Varner, 13 F.3d 1503, 1508 (11th Cir. 1994) ("Abuse of discretion occurs when the court 'misconstrues its proper role, ignores or misunderstands relevant evidence, and bases its decisions upon considerations having little factual support.' [Cit.]"). In fact, the trial court completely misunderstood the applicable legal standards: not only was it unaware of the rule, it thought it would be an abuse of discretion to enforce it. R 2129 ("perhaps it would be abuse of my discretion to tell either Counsel, the State or Defense not to talk to somebody during a break from the witness stand. I'm not going to get involved in that. I don't think it's proper for the Court to do that. I don't know if its prohibition

[sic] that would prohibit either party to do that. This is something I don't prefer to get into at this point.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 28 day of August, 1996.

Of Counsel