IN THE SUPREME COURT OF FLORIDA

ROBERT CONSALVO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,780

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PROOF OF UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY BY MEANS OF BURGLARY MAY JUSTIFY A CONVICTION FOR BURGLARY.

The main issue is whether the instruction on presumptions from stolen property did not apply due to the disputes as to the facts within the instruction. In this case there were disputes as to whether the property in Appellant's possession was stolen. Appellee acknowledges that this particular issue is preserved.[1] Appellee does not dispute the law that the instruction on presumptions from possession of stolen property does not apply where there is a dispute to whether the property was stolen. Jones v. State, 495 So. 2d 856 (Fla. 4th DCA 1986); Curington v. State, 80 Fla. 494, 86 So. 344 (1920); Griffin v. State, 370 So. 2d 860 (Fla. 1st DCA 1979); United States v. Torrence, 480 F.2d 564 (5th Cir. 1973). Appellee's only claim is that there is some evidence to support a conclusion that Appellant was found in possession of property stolen during the burglary. Such a claim is irrelevant.

As even Appellee concedes, it is error to give the instruction where there is a dispute that the property is "recently stolen by means of burglary." Id. It matters not that one party believes that the evidence may support a conclusion that the property is recently stolen by means of burglary. As long as this is in dispute the instruction shall not be given. Id. As previously explained, there was evidence to support that the canvas bag was retrieved from a dumpster rather than stolen. See Initial Brief at 24-25. There is also evidence showing that

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[1] On pages 2480-82, Appellant's counsel specifically argued the instruction should not be given because the question of whether the property was stolen was in dispute. Appellee also admits the issue was preserved as "defense counsel claimed that the facts did not support the instruction because there was no proof that the property was stolen at the time of the burglary." Appellee's brief at 9.

Pezza's checkbook found in Appellant's possession was discarded, rather than stolen, as the account had been closed long before the burglary occurred R1842. In fact, defense counsel argued that these items were not stolen:

> We were talking where that checkbook could have come from. You know, there's a bag that we described as a cat bag ...
>
> And, remember, I asked the officer when they found it where was it? It was laying on top of the dumpster as if somebody had tossed it out that day. And I asked the officer could it have been, as well, taken out of the dumpster earlier and then put back in the dumpster. The answer is of course. That's where Robert Consalvo got it. Brought it into the house, kept one item now knowing it was of no value, being the checkbook. Everything else in here is of no value and so was the checks, but it's that morning that he keeps the checkbook and puts it in his back pocket. That's where a useless checkbook of no value gets Robert Consalvo. Has there been any other testimony regarding this closed account other than it's a closed account? No. This is the significance of it.

R2507-09 (emphasis added). Thus, it was disputed the items were stolen in the burglary.

Appellee claims that the evidence supports that an ATM card and Pezza's car were stolen from her home during the burglary. Again, the issue is not whether there is some evidence supporting that these items were stolen during the burglary. Rather, the issue is whether it is undisputed that these items were stolen during the burglary. First, neither the ATM card nor the car were items found in Appellant's possession so as to justify the instruction. In addition, it was clearly disputed by the defense that the ATM card was stolen during the burglary. There was evidence supporting that the ATM card was taken, or loaned out, well before the burglary. The state's evidence, if believed, had Appellant possibly using the ATM card at 4:00 p.m. on September 27th.[2] The medical examiner testified that the victim died within 20 seconds of being stabbed (R2083), and that the victim's most likely day of death

[2] On page 2 of its brief Appellee claims that James Andrews "identified and described photographs which showed Appellant using various ATM machines on September 27th, 29th and 30." This is not true. While the photos showed a person using the machines on those dates, Appellant was never identified as the person in those photographs R1423-30.

would be on the evening of September 30th R2121.[3] Appellant also disputed that the ATM card, which was used on September 27th, was stolen during the September 30th burglary, when Pezza was killed:

> MR. GLASS: ... they are going to base their entire case around the fact that Robert Consalvo used an ATM card at 4:08 p.m. on the 27th. They want you to believe that Lorraine Pezza had to be dead by then. That's the whole reason that they move all the evidence to go to that theory. Rather than letting the evidence lead the State in the case.
>
> So, Ron Wright said that it's more probable that, in fact, it was three -- Actually, he said the outside limits would be three days to seven days, and that it would be more probable three and a half to four days. And I believe that he even gave us a particular date, three and half to four days, surprised at a week. September 30th would be probable as the date that Lorraine Pezza died, September 30. That's the testimony in the case.

R2547-48 (emphasis added). Also, with the evidence indicating that the earliest the burglary and death could occur was on the evening of September 30th (R2121), evidence of Appellant's possible use of the victim's car, on September 29th[4] does not show that the car was stolen during the burglary. Appellant further disputed that the car was stolen:

> MR. GLASS: ... And by the way, as to the car, it's clear that Robert Consalvo through the testimony of Jean Corroppoli and maybe another witness, I really don't remember, indicated that Robert Consalvo had used the car before to run errands with Lorraine Pezza with permission. And on the 30th, the morning of the 30th he is using the car as well.

R2048-49 (emphasis added). Thus, it was disputed that the car was stolen during the burglary.

Even if there are some facts indicating that the items were stolen during the burglary, there was also evidence in dispute of whether the items were stolen during the burglary. In other words, it was a dispute for the jury to resolve. Where there was a dispute as to whether

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[3] The medical examiner's conclusions were based on the decomposition of the body. Based on the fact that there were no maggots, the medical examiner doubted that the death could have occurred on September 27th -- 7 days before he examined the body on October 4th R2122.

[4] Real Favraeau was shown a photo of Pezza's car and was asked if that was the car in Appellant's possession on September 29th R1102-03. Favraeau was unable to identify it as Pezza's car, but noted that it looked "similar" R1102-03.

the items were stolen during the burglary, it was error to give the instruction. Jones, supra; Curington, supra; Griffin, supra; Torrence, supra. A new trial is required.

Appellee also claims that no additional issues were raised to the instruction. Such a claim is without merit. After the trial court was made aware of the objection to giving the instruction on the basis discussed above, the trial court asked if there were any additional objections and Appellant objected due to the nature of the instruction itself and that the instruction commented on the evidence:

> MR. GLASS: Well, I believe that possession of recently stolen property can be that the person is the thief without jumping to the fact that he committed the burglary. In this case, he says possession of recently stolen property by means of burglary. In essence, means that he committed the burglary, and that's one of the issues here that he is incorporating int he first part of that sentence. Proof of unexplained possession by an accused of property recently stolen by means of burglary. Then it says may justify the conviction on the burglary. And we don't know in this case. That's one of the issues, is the property stolen in the burglary or not. He doesn't have -- See, it's my understanding that if there is a case and somebody reports a burglary and items are stolen and they find somebody with the items, then the presumption is and somebody says they were only stolen during that burglary. We don't have that here. He's got items that were taken, and the issue is going to be when were those items taken, on the morning of the 22nd or at the time of the death or at a time subsequent to the death. So we have got three time frames, and that's why I don't think that he should have this paragraph in there, which more or less indicates that if he's got stolen property on him, it means he committed the burglary.

R2481-82 (emphasis added). Thus, the additional issues are preserved for appeal.

Appellee claims that the instruction cannot be challenged because it is a standard jury instruction. However, this Court has made it clear that standard jury instructions are not necessarily correct and are not free from appellate scrutiny:

> The Court hereby authorizes the publication and use of the revised instruction in criminal cases and the instruction in misdemeanor cases, but without prejudice to the rights of any litigant objecting to the use of one or more of such approved forms of instructions. The Court recognizes that the initial determination of the applicable substantive law in each individual case should be made by the trial judge. Similarly, the Court recognizes that no approval of these instructions by the Court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him. This order is not to be construed as any intrusion on that responsibility of the trial judges.

See In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598 (Fla. 1981); Yohn v. State, 476 So. 2d 123 (Fla. 1985). Or as stated in Harvey v. State, 448 So. 2d 578, 581 (Fla. 5th DCA 1984), standard instructions are "not immutable postulates from Olympus" but are sometimes "camels rather than race horses."

Appellee's reliance on Edwards v. State, 381 So. 2d 696 (Fla. 1980) to claim that this Court has approved this instruction against the arguments presented here is without merit. The Edwards case dealt with none of the issues presented here. Instead, in Edwards this Court held that the instruction didn't violate the due process right against self-incrimination.

Appellee has not countered the argument in the Initial Brief that the instruction is improper and constitutes an unwarranted comment on the evidence by the trial judge. The error is not harmless. The state's case centered on felony murder. The felony was the burglary. It cannot be said beyond a reasonable doubt that the instruction stating that possession of recently stolen property may justify a finding of burglary could not influence the jury.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR ARGUING A COLLATERAL BURGLARY AS SIMILAR FACT EVIDENCE.

Appellee does not dispute that the Walker burglary was not admissible as Williams rule similar fact evidence.[5] However, despite the fact that the Walker burglary was not admissible as Williams rule similar fact evidence Appellee claims that it was proper for the state to argue it as such as a fair comment on the evidence. Appellee relies on a number of cases. However, none of the cases deal with a situation, as in this case, where evidence is admissible for one

[5] Appellee has relied on point IX of its answer brief as to the admissibility of the Walker burglary. In point IX, Appellee only claims that the burglary was admissible as being "inextricably intertwined" with the crime charged. Appellee never claims that the burglary would be admissible as similar fact evidence.

purpose, but inadmissible for another. It is not fair comment to argue the evidence for the purpose for which it is not admissible. See Parsons v. Motor Homes of America, 465 So. 2d 1285, 1290 (Fla. 1st DCA 1985). For example, where an out-of-court statement is not offered for the truth of the matter asserted it may nonetheless be admitted into evidence if relevant to another matter such as state of mind. However, no matter how logically the statement may be toward establishing facts other than state of mind, counsel may not argue the statement for its truth. Conley v. State, 620 So. 2d 180, 183 (Fla. 1993) (out-of-court statement was introduced to explain officer's actions, but error occurred "Regardless of the purpose which the State claims it offered the evidence, the State *used* the evidence to prove the truth of the matter asserted"); Ellis v. State, 622 So. 2d 991, 996 (Fla. 1993) (error where state said it was offering evidence as impeachment, but in closing argument evidence was argued for truth). United States v. Cain, 615 F.2d 380 (5th Cir. 1980) (one subsection does not open back door for evidence excluded by a former section). Appellee's claim to the contrary is unsupported by law and has no merit. By arguing the Walker burglary proved Appellant was guilty of the Pezza killing, where there were insufficient similarities to make the Walker burglary admissible as Williams rule similar fact evidence, the prosecutor was merely arguing bad character evidence to the jury. This was error.

Finally, Appellee claims in this point that any error that occurred in this case is harmless.[6] It should first be noted that the burden of proving that the error is harmless is on the beneficiary of the error and the burden is very heavy -- proof beyond a reasonable doubt that the error did not influence the jury. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).

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[6] Appellee has incorporated this argument into all the other points in its brief.

Appellee attempts to meet this burden by listing possible evidence which it believes could support a finding of guilt. In doing so, Appellee has looked at the evidence from a one-sided point of view. Appellee has ignored the evidence that points away from Appellant as being the killer. For example, there was a fiber found in the victim's hand that belonged to the killer (R2310) and was never connected to Appellant. There was also a footwear impression in the blood at the crime scene R1493. Because the blood had dried out by the time the body was discovered, the impression could only have belonged to the killer. Appellant's shoes were examined, but there was no blood on them R2279. The police compared Appellant's shoes to the impression at the scene -- they did not match R2136. Most, if not all, of the evidence to which Appellee refers was contradicted, impeached or simply does not prove that Appellant was the killer.[7] The jury may have partially or totally rejected the evidence and inferences. That is why the focus of a harmless error analysis must be on the improper argument or evidence. State v. Lee, 531 So. 2d 133, 137 (Fla. 1988). Contrary to Appellee's approach, the harmless error test is not a mechanism for anyone [including Appellee] to "substitute itself for the trier-of-fact by simply weighing the evidence." DiGuilio, supra, at 1139. Instead, "the focus is on the effect of the error on the trier-of-fact" and "the

[7] For example, Appellee relies on the so-called confession to William Palmer. However, as explained on page 59, footnote 7, of the Initial Brief Palmer was effectively impeached and the jury may have given him no credibility. Evidence showed the items such as the canvas bag and checks had been discarded rather than stolen during the burglary. See Initial Brief at 24-25. As explained in Point I of this brief, items such as the ATM card and the victim's car, which were possessed by Appellant prior to the murder, simply do not identify Appellant as the murderer. The statements attributed to Appellant were challenged on cross-examination and explained to the jury in closing argument R2515-17,2539-40. Nor is knowledge that the victim had been stabbed equal proof that Appellant did the stabbing. There was no showing that the towel with the DNA evidence was taken at the time of the burglary/murder. In fact, it was not found until October 3rd, and had not been seen until that day R1718-19. Thus, it does not necessarily tie Appellant to the burglary/murder. At best, what was presented was a circumstantial evidence case against Appellant. The jury took 10 hours to deliberate R2735. There clearly was a jury issue in this case which could be impacted by improper argument or evidence.

question is whether there is a reasonable possibility that the error affected the verdict." Id. Again, it is the state's burden to show harmless error beyond a reasonable doubt. Id.

Although using the rhetoric that the error was harmless, Appellee has essentially conceded that the error was not harmless. Appellee admits that use of the Walker burglary could have contributed to the jury's decision by noting that the "evidence upon which the jury could have relied includes ... Appellant was caught burglarizing the apartment of an elderly widow who lived downstairs" (i.e. the Walker burglary). Appellee's brief at 15. The potential impact cannot be ignored where the prosecutor argued to the jury that Appellant was guilty of the Pezza murder and burglary as shown by his involvement in the Walker burglary R2639-42. Thus, it cannot legitimately be said that the error was harmless.

POINT III

THE TRIAL COURT ERRED IN RULING THAT NO DISCOVERY VIOLATION OCCURRED AND IN FAILING TO HOLD AN INQUIRY INTO THE VIOLATION.

Appellee claims that there was no discovery violation. However, there were two aspects of the violation. As was fully explained in the Initial Brief at pages 30-33, there was a clear discovery violation where the prosecutor gave Appellant what appeared to be a complete analysis prior to trial; then ordered that further analysis be done without any notice to Appellant; based on the discovery Appellant relied on a defense of unmatched prints in opening statement; after opening statement the prosecutor disclosed analysis which undermined the defense position that was given in opening statement. Brown v. State, 579 So. 2d 760 (Fla. 1st DCA 1991); Smith v. State, 499 So. 2d 912 (Fla. 1st DCA 1986); Hasty v. State, 599 So. 2d 186, 189 (Fla. 5th DCA 1992) and Raffone v. State, 483 So. 2d 761 (Fla. 4th DCA 1986) illustrate the principle that a discovery violation occurs where the prosecutor tenders what

appears to be a complete analysis, lulling the defense into relying on that discovery, but then ambushes the defense with an additional analysis. Appellee simply ignores the prosecutor's act of giving Appellant discovery, without any indication or hint that it was not complete, leaving him with the false impression that the prints found on the cards at the crime scene would not be identified, and the law above that recognizes this type of discovery violation.

Appellee addresses the other aspect of the violation by insulating Mr. Messick from the prosecution. However, the prosecutor ordered additional analysis. But for such an order, no further analysis would have resulted. The prosecutor should have known such an order could lead to more results. Also, as an agent of the state, actions of Messick are imputed to the state. Pender v. State, 647 So. 2d 957 (Fla. 5th DCA 1994) (even though undisclosed photo was never in possession of prosecutor, the doctor with child protection team possessed it and therefore an inquiry into discovery violation was required); Hasty v. State, 599 So. 2d 186, 189 (Fla. 5th DCA 1992) (information in possession of police is in constructive possession of the prosecutor and non-conveyance of information gave defendant false information which was not corrected until immediately prior to trial and constituted violation). Thus, Appellee's claim of "unprompted" discovery which cannot be imputed to the state is without merit.

Appellee claims that even though the trial court found no discovery violation occurred that there was an adequate inquiry into whether the violation was willful, substantial, and prejudicial. However, Appellee fails to point to any inquiry by the trial judge. Instead, Appellee attempts to construct its own inquiry by pointing to Mr. Messick's later trial testimony to make a claim if an inquiry had been done there was evidence to support that the violation was not substantial and not prejudicial. In addition to disagreeing with Appellee's inquiry and

conclusion to these matters (see below), Appellant would point out that it is the trial court's duty to hold an adequate inquiry and is not left to the parties to attempt to do so on appeal.

Appellee's having to refer to Messick's later trial testimony for analysis of the violation proves that an adequate inquiry was not held in this case. The trial court never inquired of Messick at the time of the alleged inquiry. As fully explained on page 34 of the Initial Brief, there was no inquiry into whether the violation was substantial, prejudicial or wilful.

Finally, Appellee claims that the error was harmless because the violation did not prejudice the defense. Appellee bases this on the claim that the defense remained intact because there remained two unidentified prints. Appellee fails to recognize the facts of this case and the importance of the trial attorney's credibility. The impact of the violation would be that the jury would believe that the defense attorney lied to them about the evidence. Appellant's attorney told the jury in opening statement that there were playing cards at the crime scene with unidentified third party prints R1082-83. It was after the opening statement Appellant was informed that these prints had been identified. The introduction of this evidence during trial made Appellant's counsel look like a liar in the eyes of the jury.[8] The destruction of an attorney's credibility before a jury is devastating. This is especially true in a circumstantial evidence case where the jury is relying on the attorneys to explain the evidence and inferences. The jury would reasonably find that if they cannot believe counsel about a straightforward piece of evidence, how can they trust his arguments as to how other evidence, and inferences therefrom, should be evaluated. It cannot be said that the violation was harmless.

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[8] Appellee refers to the fact that two prints remained unidentified after the additional analysis. However, these unidentified prints were not on the playing cards to which Appellant's counsel referred in the opening statement. Thus, Appellant had emphasized that unidentified third party prints were present on these cards at the scene, but the later disclosed evidence made him look like a liar to the jury.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INQUIRE INTO THE STATE'S DISCOVERY VIOLATION OF FAILING TO DISCLOSE TEST RESULTS AND A LETTER THAT WAS USED DURING TRIAL.

Appellee claims that the discovery violation was harmless with regard to Appellant's ability to show lack of investigation by the state because there was other crime scene evidence which Appellant attacked. Appellee's brief at 30. Appellee wisely does not identify the other evidence Appellant attacked. Appellant did attack the state's case due to the number of unidentified prints found at the crime scene. However, as we know from Point III, Appellant's attack was again ambushed by another state discovery violation.

Appellee claims this issue was not preserved for review. This claim is totally without merit. Pages 2016-21 of the record show that the issue was preserved. Appellee's position seems particularly flawed where Appellee also argues that the trial court ruled on Appellant's objections by ruling there was no discovery violation (see also R2021) and that an adequate inquiry was held after Appellant's objections.

Appellee also claims that it was not a discovery violation to fail to disclose the lab analysis that neither negative nor positive results could be obtained from the cigarette butts found at the crime scene. Appellee makes this claim on the basis that there was nothing put in writing to be disclosed. Such a claim is without merit. Florida Rule of Criminal Procedure 3.220(b)(1)(J) requires "results" of "tests, experiments, or comparisons" to be disclosed.[9] There is no requirement in Rule 3.220(b)(1)(J) that the result be placed in writing prior to its

[9] In the present case there was an analysis or test which yielded a conclusion that negative or positive results could not be obtained.

being discoverable.[10] Appellee refers to Rule 3.220(b)(1)(B) which defines the term statement as it is used within subsection B of the rule. That definition of the term "statement" does not apply to subsections C through M -- including subsection J.[11] Thus, Appellee's claim that there was no discovery violation is without merit.

Appellee claims that the prosecutor's failure to disclose a letter that it utilized during trial was not a discovery violation because it was work product. Appellee would be correct but for the fact, as explained on page 37 of the Initial Brief, the prosecutor intended to use, and, in fact, used the letter during trial. The use was not accidental. The prosecutor must have brought the letter to court for some reason -- he intended to use it. James v. State, 639 So. 2d 688, 689 (Fla. 5th DCA 1994) ("We note that the state apparently anticipated the need for the photograph because the prosecutor had it in the courtroom with him"); Fla.R.Crim.P. 3.220(b)(K) requires disclosure of papers or objects that the prosecutor "intends to use" at trial. While normally work product is not discoverable, the state waives the privilege once it intends to use the work product during trial. Thus, there was a second discovery violation.

Finally, Appellee notes that the trial court found the violations were neither willful, substantial, nor prejudicial. Appellee does not challenge the fact that the trial court merely

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[10] If such a requirement existed, the state could merely end run the rules of discovery by telling its experts not to place the results in writing.

[11] Rule 3.220(b)(1)(B) specifically mentions and defines the statements of persons referred to in "the preceding paragraph" subsection -- i.e. subsection A. Subsections B limits the definition of the term statement to those in subsection B by limiting it to the term "statement as used herein" and then delineates that statements include written and recorded statements. It should also be noted that in some subsequent subsections (such as C and D) the rules refer not merely to statements, but expressly stated "written or recorded statements." If the definition of "statements" in subsection B applied to all subsequent subsections, why then do some subsequent subsections use the term "written or recorded." Such words would be mere surplusage. Instead, the subsequent subsections illustrate that subsection B limits the definition of "statement" to only subsection B (or "as used herein").

mimicked these words without holding an adequate inquiry into the discovery violations. As explained at page 36 of the Initial Brief, Appellant was prejudiced by the violations and they cannot be deemed harmless. Appellee's response is that Appellant's counsel "should not have asked questions to which he did not know the answers." Appellee's brief at 29. Appellant's counsel felt free to ask questions because it was presumed that the state was not violating its discovery obligations. He was entitled to believe that the state would not ambush through undisclosed evidence. Without an inquiry into the procedural prejudice, it cannot be said that the state's ambush was harmless (see page 36 of the Initial Brief).

Appellee also makes the claim that the nondisclosure was inadvertent. Appellee gives no record cite in support of this claim. This is because there was no inquiry into the willfulness or inadvertence of the nondisclosures. However, it is known that the state stood quietly by while Appellant utilized the lack of investigation as part of his defense and the failure of the state to do the lab analysis on the cigarettes, and then ambushed Appellant with the nondisclosed information. This hardly seems to be inadvertent. Appellant's counsel and his defense again were made to look bad in the eyes of the jury by the ambush.

POINT V

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL DUE TO THE PROSECUTION'S UTILIZATION OF A STRAWMAN DEFENSE WHICH DID NOT EXIST.

This point depends on one issue -- whether Appellant actually presented a suicide defense so as to make it permissible to knock it down. If there was no actual suicide defense, but merely a strawman created by the prosecutor in closing argument, then reversible error occurred pursuant to Bayshore v. State, 437 So. 2d 198 (Fla. 3d DCA 1983) and Brown v.

State, 524 So. 2d 730 (Fla. 4th DCA 1988). If Appellant actually relied on a suicide defense there would be no error. See Biondo v. State, 533 So. 2d 910 (Fla. 2d DCA 1988).

Appellee does not dispute that Appellant never asked for an instruction on a suicide defense nor argued such a defense to the jury. Appellee defends the prosecutor's closing argument knocking down the suicide defense on the basis that the prosecution had but one closing argument and Appellant had two closing arguments ("one rebuttable and one not") and thus could use the suicide defense for the first time in its final rebuttal portion of closing argument. However, new defenses cannot be used for the first time in the rebuttal portion of the closing argument -- Appellant could only rebut what the prosecutor had argued. Moreover, prior to the state's closing argument Appellant had informed the jury that he was not using the suicide defense R2532-33. Thus, the prosecutor was truly creating a strawman defense in its closing argument merely to knock it down in violation of Bayshore, supra, and Brown, supra.

Appellee attempts to justify the testimony introduced during trial on the ground that a suicide defense was possible through the pretrial discovery and testimony of Dr. Wright and Eva Bell. Such a claim is without merit. Under the totality of the circumstances, no reasonable person could find that a suicide defense was offered. Where Appellant took the position in the opening statement that some person broke into the Pezza residence to commit a burglary and killed Ms. Pezza, and made the same argument in his closing argument -- no reasonable person could find that he was raising a suicide defense. Only the prosecutor built that strawman. Obviously, pretrial discovery does not permit the state to knock down and

denigrate defenses which are investigated but are never presented to the jury.[12] Dr. Wright's testimony regarding suicide was clearly not to establish a defense. In fact, his testimony was that there was no doubt that this was not a suicide (R2092) and in reviewing 2,000 suicides he had never seen a deceased with a stab wound to the back R2082. No reasonable person could find a suicide defense through Wright's testimony. Instead, the subject of suicide with Dr. Wright was in the context of why he did not examine the body at the crime scene -- because it had been reported to him as a suicide R2098,2532-33. Eva Bell was the social worker who first had concern for the victim. Bell did testify that Pezza in the past had been suicidal. The obvious reason for this evidence is to show a basis for Bell's possible concern for Pezza.[13] Appellant explained this to the jury in his initial closing argument R2532-33. The suicide defense was only in the prosecution's mind -- as a strawman to destroy.

Finally, Appellee claims that the error is harmless because there was evidence which could be construed so as to support a guilty verdict. As explained in Point II of this brief, Appellee misconstrues the nature of the harmless error test. As explained on page 41 of the Initial Brief the error in this Point cannot be deemed harmless beyond a reasonable doubt.

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[12] It is defense counsel's duty to explore pretrial every avenue of defense such as alibi, insanity, etc. Under Appellee's theory, because such defenses were explored pretrial, the prosecutor was fully permitted to denigrate and knock down these defense even though they were not presented to the jury. In addition, in response to the claim of a suicide defense Appellant specifically disavowed a suicide defense prior to trial -- "It should be noted that Consalvo has filed no pleading nor has counsel ever made a representation to the court that such a [suicide] defense would be set forth or relied upon a trial" R3489.

[13] Bell went to Pezza's residence when no one was able to contact Pezza R1611.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE OF A THEFT OVER APPELLANT'S OBJECTIONS.

Appellee concedes that this issue was raised and ruled on pretrial. Appellant relies on Point VII of this brief for the argument on preservation.

Appellee concedes that the evidence complained of was inadmissible to show Appellant's state of mind as theorized by the trial judge and prosecutor below. Appellee's brief at page 47, footnote 7. Instead, Appellee claims that the evidence was admissible pursuant to Peede v. State, 474 So. 2d 808 (Fla. 1985). However, Peede is inapposite to the instant case. In Peede, the victim's statement, made "just prior to her disappearance," was explicit that she was afraid the defendant was going to kill her. This direct statement was admissible to show her state of mind that she would not voluntarily be with the defendant. Unlike in Peede, the statements that are in issue here (see Initial Brief at 42) do not inform one of Pezza's state of mind.[14] They do not demonstrate a fear of Appellant as Appellee claims.[15] The hearsay statements went to the details of the theft as explained in the Initial Brief. Also, as explained in the Initial Brief, assuming arguendo that the evidence did show state of mind, Pezza's state of mind approximately a week before the murder was not relevant.

Appellee's claim that the error is harmless is without merit. See Point II. Appellee's confusion on this point demonstrates part of the harm of the error. The inadmissible hearsay

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[14] See Initial Brief at 43.

[15] Appellee's confusion stems from reference to evidence at the motion in limine. Appellee's brief at pages 43-44 refers to the motion in limine and not to the evidence at trial. This issue only deals with Pezza's description of the theft to Officer Hopper. This issue does not deal with subsequent conversations between Pezza and police.

could be misused by the jury to impermissibly impute a state of mind. See Fleming v. State, 457 So. 2d 499 (Fla. 2d DCA 1984) as explained on page 43 of the Initial Brief.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING AN IRRELEVANT AND IMMATERIAL STATEMENT BY APPELLANT OVER OBJECTION.

This issue was raised and ruled on pretrial, but Appellee claims that it was not preserved at trial. However, the defense, prosecution and trial court agreed that all pretrial motions regarding statements were deemed to be preserved without the necessity of further objections:

> THE COURT: Okay. So then by agreement and acceptance of myself, I'm going to indicate on the record that the necessity does exist for you to in front of the jury interpose your objection. That as far as I'm concerned, they are preserved by virtue of your filing and the ruling we had on the pretrial motions to suppress that's relative to any items introduced in evidence that was the subject of any suppression relative to any statements introduced.

R1194 (emphasis added). The trial court later reaffirmed this agreement as to the lack of objection at trial did not waive the issues that had been considered in the pretrial motions:

> THE COURT: I have no problem with you not waiving. You haven't waived anything except the American flag in this case. The point is that I don't find that the failure to object to anything constitutes a waiver as to anything subsequent.

R1342. Thus, the issue in this point was deemed preserved by the trial court.[16]

Appellee claims that the evidence was admissible pursuant to Jackson v. State, 538 So. 2d 533 (Fla. 5th DCA 1989). However, Jackson states that a false statement is admissible to rebut a defense to the crime charged. That situation is not present here. As pointed out in the Initial Brief, the evidence at bar was totally irrelevant to the crime charged. The evidence

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[16] The trial court was in the position at this time to recognize if there had been any changes in the evidence during trial so as to render the pretrial motions insufficient. He did not. Of course, the trial court's acknowledgement went only to the subjects of pretrial motions. The trial court's comments that required Appellant to make objections goes to issues that have not been previously presented to the trial court.

at bar merely shows bad character -- i.e. that Appellant is a liar. Bad character evidence is presumptively prejudicial and cannot be deemed harmless. This is especially true when combined with the other errors that occurred in this case.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF EVA BELL TO HEARSAY STATEMENTS OVER APPELLANT'S OBJECTION.

Appellee relies on the argument in Point VII of this brief with regard to preservation. Appellee claims for the first time that the out-of-court statement met the "excited utterance" exception to the hearsay rule. However, such a claimed exception was never presented to the trial court below, and the trial court never ruled on the exception. Appellee, as the party seeking the exception to the hearsay rule, had the burden of presenting the excited utterance exception in the court below. Failure to do so prevented the issue from being factually argued and litigated in the court below. Thus, the excited utterance argument cannot now be relied on by Appellee. See Hayes v. State, 581 So. 2d 121, 124, ftnt. 8 (Fla. 1991) (noting that the appellee was making an argument on a hearsay issue that had not been made in the trial court and the effort to do so on appeal was untimely).

POINT X

IT WAS REVERSIBLE ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

On page 69 of its brief, Appellee claims that in prior cases this Court has rejected the Grand Jury Clause issue raised in this point. Such a claim is without merit. All the cases cited by Appellee involve the Notice Clause and none deal with the Grand Jury Clause.[17] The lesson

[17] Appellee's confusion regarding the Notice Clause and the Grand Jury Clause is demonstrated by the fact that its argument on this point at page 69 of its brief is copied from its argument on the Notice Clause on page 70.

to be gathered from those cases is that defendants are theoretically on notice of two types of first degree murder.[18] The present issue has nothing to do with notice. Instead, this issue deals with an indictment being constructively amended to bring forth an allegation that was either rejected or not reviewed by the Grand Jury. Appellee has not presented any caselaw that permits bringing forth a theory or charge different from that which was presented to the Grand Jury. As explained in the Initial Brief, there is no justification to do so.

Appellee also claims that since Appellant did not move to dismiss the indictment that the issue cannot be reviewed on appeal. Such a claim is without merit for any one of several reasons. None of the cases cited by Appellee are relevant to the present issue as none of them deal with the constructive amendment of an indictment to bring forth a charge not charged by the Grand Jury.[19] Moreover, the real problem is not with the indictment itself as presented by the Grand Jury. Rather, the problem is with the constructive amendment of the indictment by presenting a theory not charged by the Grand Jury. It does absolutely no good to move to dismiss the indictment presented by the Grand Jury.

Furthermore, it is a basic violation of due process and a fundamental error to convict on a theory not brought by the Grand Jury.[20]

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[18] But see Point XI.

[19] Carver v. State, 560 So. 2d 258 (Fla. 1st DCA 1990), dealt with an information, not an indictment, and thus could not deal with the Grand Jury Clause. In White v. State, 446 So. 2d 1031 (Fla. 1984), there was a challenge of an amendment of an information by later charging via an indictment -- but there was no type of amendment of the indictment. Finally, Huene v. State, 570 So. 2d 1031 (Fla. 1st DCA 1994) dealt with the deletion of a premeditation theory from an indictment which courts have recognized are to a defendant's advantage and are far different from the situation where theories are added to an indictment.

[20] See Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); Markham v. United States, 160 U.S. 319, 16 S.Ct. 288, 40 L.Ed. 441 (1895); The Schooner Hoppet and Cargo v. United States, 11 U.S. 389, 394, 7 Cranch 388, 382, 3 L.Ed. 380 (1813) (Chief Justice John Marshall stated, "But a rule so essential to justice and fair proceeding as that which requires a substantial

Finally, there is only jurisdiction to try a defendant on the charge that is brought by the Grand Jury. Jurisdiction can not be expanded through either consent or waiver.

PENALTY PHASE

POINT XII

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED TO AVOID ARREST.

In its answer brief, Appellee briefly claims that the avoid arrest aggravator could be based on Appellant's breaking into the Pezza residence to eliminate her as a witness of a theft that occurred three days earlier.[21] However, Appellee offers no analysis or proof to show that Appellant's motive in breaking into Pezza's apartment was to eliminate her as a witness to the prior theft. Appellee even concedes that the reason for the trial court's finding this aggravator was to avoid arrest for the burglary and not for the prior incident. Appellee's brief at 78. In fact, the evidence presented by the state at trial negated that the motive for the break in was to eliminate a witness. The facts show that Appellant planned to break into the Pezza residence for drugs R2377.[22] No other evidence was presented for the motive for the break in. Also,

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statement of the offense ... The rule that a man shall not be charged with one crime and convicted of another, may sometime cover real guilt, but its observance is essential to the preservation of innocence."); State v. Gray, 435 So. 2d 816 (Fla. 1983); State v. Sykes, 434 So. 2d 325 (Fla. 1983); Ray v. State, 403 So. 2d 956 (Fla. 1981); Perkins v. Mayo, 92 So. 2d 641 (Fla. 1957); Minor v. State, 329 So. 2d 30 (Fla. 2d DCA 1976); Haley v. State, 315 So. 2d 525 (Fla. 2d DCA 1975); Causey v. State, 307 So. 2d 197 (Fla. 2d DCA 1975); Long v. State, 92 So. 2d 259, 260 (Fla. 1957) ("where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment").

[21] Appellee raises such a claim in a perfunctory manner without analysis. This is because Appellee's real claim is that Appellant was eliminating Pezza as a witness to the burglary that he was in the midst of committing when she began screaming. Appellant will address Appellee's claim as to this issue.

[22] Specifically, when state witness William Palmer was asked by the prosecutor as to what reason Appellant gave for going in the Pezza residence, he stated, "He said he was going there to get more drugs" R2377. A number of drugs including Budalbital (which is a kind of barbiturate which is a sedative hypnotic R2086), Premarin, Xephalexin, Hydroloxyaine HCL,

the other facts presented did not show eliminate witness motive for the break in.[23] At best, the evidence merely showed a suspicion that Appellant broke in the residence to eliminate Pezza as a witness. Even this suspicion was negated by the state's own evidence that Appellant had broken in to acquire drugs. The avoid arrest aggravator is invalid when the state's evidence was that Appellant broke in the residence to steal drugs rather than to eliminate a witness.

Appellee's claim is that the avoid arrest aggravator was present because Appellant eliminated Pezza as a witness to the burglary that he was in the midst of committing when she began screaming. This is not sufficient for the avoid arrest aggravator. Floyd v. State, 497 So. 2d 1211, 1213 (Fla. 1986) (defendant stabbed victim to death (12 times) in her home when she surprised him in the course of the burglary); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994) (avoid arrest aggravator not proven where it cannot be shown beyond a reasonable doubt what had happened during the killing). Appellee offers caselaw in which the avoid arrest aggravator was found, but fails to perform any analysis on the caselaw -- particularly in relation to this case. Instead, Appellee recites partial facts of the cases without any thoughtful analysis of what the caselaw means and shows in defining the avoid arrest aggravator. However, an analysis of the caselaw cited in Appellant's Initial Brief and Appellee's Answer Brief helps define the avoid arrest aggravator.

Caselaw shows that the standard for the avoid arrest aggravator is proof beyond a reasonable doubt and the requisite intent "must be very strong in this case." E.g. Floyd v.

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and Tetracycline, were found in Pezza's residence R1509.

[23] Appellant never tried to run or hide any facts regarding the alleged theft so as to say he was avoiding arrest for that theft. Also, Pezza was never a witness to any alleged theft by Appellant. She reported property missing, but she was not a witness to Appellant stealing anything. At best, there was a mere suspicion of a theft.

State, 497 So. 2d 1211 (Fla. 1986); Riley v. State, 366 So. 2d 19 (Fla. 1978). The trial court cannot draw "logical inferences" to support the aggravator where the state has not fully met its burden of proof. Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

The caselaw shows that the avoid arrest aggravator is not supported by proof of instinctive type of actions that are not well-planned out in advance. E.g. Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) (where Cook shot victim "to keep her quiet because she was yelling and screaming" this Court rejected avoid arrest because these facts indicate that Cook shot "instinctively" and not with "calculated plan to eliminate" the witness); Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (killing was instinctive and "without a plan to eliminate" witness). The avoid arrest aggravator will not be found where the defendant is interrupted during the commission of a felony and reacts to the victim. Id.

Unlike the circumstances presented in the instant case, the cases Appellee cites show avoid arrest beyond a reasonable doubt. There are cases such as Sweet v. State, 624 So. 2d 1138 (Fla. 1993) and Clark v. State, 443 So. 2d 973 (Fla. 1983) where the defendant made statements admitting that the purpose of the killing was to eliminate the victim as a witness. Sweet, supra, at 1142 (in finding avoid arrest it was emphasized defendant "made statements after his arrest which indicated his intent"); Clark, supra, at 977 (it was noted that defendant made statement to cellmate "one of them could identify him"). Unlike in Sweet and Clark, Appellant made no such type of statements in this case.

In the situation where the defendant is in the midst of a burglary, the avoid arrest aggravator will not apply even when there is an interruption by the victim yelling or screaming. Robertson v. State, 611 So. 2d 1228, 1230, 1232 (Fla. 1993) (defendant shot the victim "because she was screaming"); Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) (Cook shot

victim "to keep her quiet because she was yelling and screaming"). Compare the instant case where the state presented evidence that Pezza "started screaming, so he [Appellant] said he stuck her. Then she really started screaming, to he stuck her a couple more times" R2376. The evidence is contrary to the avoid arrest aggravator. The caselaw also shows that when a witness to a shooting runs to a telephone, calls the operator, and requests the police the avoid arrest aggravator cannot be inferred. Garron v. State, 528 So. 2d 353, 360 (Fla. 1988).

All the other cases cited by Appellee contain facts which constitute proof beyond a reasonable doubt of the avoid arrest aggravator where the defendant takes time and carries out the types of actions that are usually associated with an execution style murder. Execution style murders, by their very nature, tend to show that the purpose of the killing is to eliminate the person as a witness. Other types of actions accompanying execution style murders -- such as cutting of phone lines, tieing up the victim, putting a pillow over the victim's head before execution, show a planned process to eliminate the witness.[24]

In the cases upon which Appellee relies to argue that Appellant was eliminating Pezza as a witness to the burglary he was in the midst of, Appellee fails to mention that, unlike in the present case, the cases all involved actions associated with execution style murders and/or statements by the defendant indicating his purpose to eliminate a witness. For example, in Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983), there was strong evidence of witness elimination because of the execution style nature of the killing -- phone cords severed and pillow placed over victim's head then victim shot as she pleaded not to be killed. In Walls v. State, 641 So. 2d 381 (Fla. 1994), in addition to the defendant's confession that he killed the

[24] This is in contrast to a shorter duration killing which is in response to such things as the victim screaming.

victims "because he wanted no witnesses," the victim was tied up and her head was forced into a pillow when she was shot in the head. In Henry v. State, 613 So. 2d 429, 433-34 (Fla. 1992), the defendant performed an execution style murder by disabling the victims (by rendering one unconscious with a hammer and tieing up and blindfolding the other) and later returning "with a liquid accelerant which he poured on her and lit while she begged him not to"). In Correll v. State, 523 So. 2d 562, 568 (Fla. 1988) it again is clear that the defendant killed four individuals in an execution style so as to eliminate all witnesses:

> It is evident that Correll intended to leave no survivors in the house. All the telephone lines were cut, and the knife which severed one of the lines was already bloody ...

523 So. 2d at 568 (emphasis added). As mentioned earlier, in both Clark v. State, 443 So. 2d 973 (Fla. 1983) and Sweet v. State, 624 So. 2d 1138 (Fla. 1993) the defendants made statements after the killings showing that their intent was to eliminate the victim as a witness.

The instant case has none of the factors proving avoid arrest that are present in the above cases. Appellant never made a statement that he killed Pezza to eliminate her as a witness. There were none of the trappings of an execution style type murder -- such as severed phone lines, tied up victims, pillows over the victim's fact -- that were present in the above cases. Rather, the state's evidence showed that the killing was triggered by the victim's screaming as represented by William Palmer's testimony as to what Appellant told him:

> ... she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.

R2376. This evidence negates the avoid arrest aggravator. Robertson v. State, 611 So. 2d 1228, 1230, 1232 (Fla. 1993) (defendant shot the victim "because she was screaming"); Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) (Cook shot victim "to keep her quiet because she was yelling and screaming").

Appellee has not disputed Appellant's argument on page 63 of his Initial Brief that due to the elimination of the avoid arrest aggravator only a single aggravator remains (the felony aggravator) and that a single aggravator will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). As explained on pages 63-66 of the Initial Brief it cannot be said that there was either nothing or virtually nothing in mitigation. Appellant's sentence must be reduced to life.

Finally, Appellee has not disputed that, assuming arguendo that the motive for killing was solely to eliminate Pezza as a witness, the avoid arrest and felony murder circumstances must be considered as one aggravating circumstance as laid out by Appellant on page 62 of his Initial Brief. As a result of there being only one proper aggravating circumstance to consider, along with the presence of the mitigating evidence, Appellant's sentence must be reduced to life. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

POINT XIII

THE TRIAL COURT ERRED IN RELYING ON MATERIALS NOT PRESENTED IN OPEN COURT.

Appellee has not disputed that the trial court violated Appellant's right to due process in violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) by failing to notice the parties that it was relying on materials that were never presented in open court, but claims that such a due process violation is not preserved and is also harmless. Such claims are without merit.

To claim that the due process lack of notice issue was waived Appellee relies on Brown v. State, 473 So. 2d 1260 (Fla. 1985) and Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

However, in neither case did this Court find that a due process issue was waived. In both cases the issue was reviewed on the merits. In Brown the issue was whether a PSI could be used as evidence to support an aggravating circumstance and not whether there was a waiver as to non-disclosure of the PSI. In fact, there was no non-disclosure in Brown. In Armstrong the issue was whether the sentencing decision was made prior to an opportunity to be heard. Despite the lack of objection, this Court ruled on the merits and ruled that under the particular circumstances of the case the defendant had in fact been given an opportunity to be heard.[25]

More importantly, Gardner error is not waived by the lack of an objection. Gardner v. United States, 97 S.Ct. at 1206 ("Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record"). The denial of due process is fundamental error. Hargrave v. State, 427 So. 2d 713 (Fla. 1983). Denial of due process by denying notice or the opportunity to be heard or rebut is fundamental. Wood v. State, 544 So. 2d 1004, 1006 (Fla. 1989) (cost case); Deter v. Deter, 353 So. 2d 614, 617 (Fla. 4th DCA 1977) (contempt case). Certainly if notice and opportunity are fundamental in cost and contempt cases, they are as important in imposing the ultimate penalty of death.

Next, Appellee in essence claims that the due process error can be deemed harmless because (1) allegedly the information relied upon in violation of due process was not important and (2) the information relied upon in violation of due process was proved at trial in the form of inferences. First, it must be noted that the denial of the due process right to notice and the opportunity to rebut and be heard on evidence cannot be deemed harmless. The denial of such process is in itself harmful. In Huff v. State, 622 So. 2d 982 (Fla. 1993), this Court rejected

[25] It should be noted that Armstrong did not involve Gardner error and Mr. Armstrong had been told by the trial court that it was relying on the PSI. In contrast, in this case Appellant was never informed by the trial court that it was relying on information outside the record.

the state's arguments that the violation of procedural due process by itself, where due process is violated by denial of an opportunity to be heard (or rebut), is not harmful in itself and places form over substance:

> The State further argues that Huff has only addressed the procedural improprieties and has not presented any specific objections to the contents of the order and thus has not demonstrated that reversal on this issue would serve any purpose. In effect, the State seems to argue that Huff's claims puts form over substance. We do not agree. When a procedural error reaches the level of a due process violation, it becomes a matter of substance ... the overriding concern is "the appearance of the impartiality of the tribunal," rather than actual prejudice.

622 So. 2d at 984 (emphasis added).

Likewise, in Scull v. State, 569 So. 2d 1251 (Fla. 1990), where the opportunity to be heard or rebut was impaired by "rushing" the sentencing process, this Court found that the denial of procedural due process was itself as prejudicial as actual bias:

> Haste has no place in a proceeding in which a person may be sentenced to death. Thus, we cannot agree with the state's assertion that the trial court's "rush" to resentence resulted in no prejudice to Scull.
>
> Here, the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness. This, we believe, is as much a violation of due process as actual bias would be. Accordingly, we must vacate the sentence and remand for another sentencing hearing in compliance with this opinion and with the dictates of due process.

569 So. 2d at 1252.

Appellee's claim that the information and depositions relied upon by the trial court in violation of due process were not important is totally without merit. If the facts were not important to the trial judge in making his findings -- the trial court would not have quoted from the depositions. It is precisely because the trial court deemed this information to be important that he utilized it in making his findings. Moreover, Appellee's claim that Porter v. State, 400 So. 2d 5 (Fla. 1981) stands for the proposition that the defense must show that the material be substantial to the trial court's decision is specious. This Court has never created

such a requirement. It is a historical fact that a substantial portion of the findings in Porter was based on the material, but it was never made a test or requirement. Such a test could not be legitimately applied by an appellate court. A trial judge may write two pages on an aggravating circumstance, but the scale may be tipped toward the finding of the aggravator based on a single sentence or idea. The appellate court cannot legitimately wade through the trial court's findings to determine what is and is not substantial.

If there is any test for determining whether material was important or substantial to the trial court's findings, it must be done from an objective viewpoint or standard -- where the trial judge relies on the material in its sentencing order it must be deemed important and substantial. Clearly, in this case the undisclosed materials were important to the trial judge or they would not have been relied upon and quoted from.

Appellee's claim that the violation of due process is harmless beyond a reasonable doubt because the information relied upon by the trial court from the undisclosed materials could be inferred from the trial is without merit.[26] First, such a claim is not true. But more importantly, we know that the trial court did not make the inferences or findings that Appellee claims are permissible from the trial court. It must be presumed that the trial judge would have relied upon the trial record if he found that the trial record could legitimately support his findings. Instead, the trial judge ignored, or apparently rejected, some of the trial record and relied on materials outside the trial. The reliance on this material is harmful in itself. It

[26] Portions of the trial testimony could be rejected due to inconsistencies or credibility problems. For example, the trial judge relied upon Gail Russell's non-trial testimony. Appellee claims that the trial court could infer the same from the trial testimony of Real Favraeau and parts of other witness's testimony. However, for all we know, the trial court found Favraeau and the other testimony unreliable. The one thing we do know is that he relied on the undisclosed version of Gail Russell -- in violation of due process.

cannot be legitimately negated by reliance on portions of the trial record that the trial judge never had confidence in. That is one reason why a harmless error analysis on the lack of notice and opportunity to rebut can basically never be deemed harmless. As noted in Lankford v. Idaho, 111 S.Ct. 1723 (1991):

> Whether petitioner would ultimately prevail on this argument is not at issue at this point; rather, the question is whether inadequate notice concerning the character or the hearing frustrated counsel's opportunity to make an argument that might have persuaded the jury to impose a different sentence, or at least to make different findings than those he made.

111 S.Ct. at 1731 (emphasis added). If the reliance on non-record materials had been disclosed, maybe the defense could have convinced the judge not to base his findings on them or not to make certain findings. It cannot legitimately be said that the error was harmless. Appellant relies on his Initial Brief for further argument on this point.

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND NON-STATUTORY MITIGATING CIRCUMSTANCES AND IN USING AN INCORRECT STANDARD IN EVALUATING OTHER NON-STATUTORY MITIGATING CIRCUMSTANCES.

Appellee claims that the trial court need not consider and evaluate all the non-statutory evidence that is presented during trial and sentencing. However, Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) makes it perfectly clear that mitigating evidence must be considered and evaluated when contained anywhere in the record, even where the defense does not ask the court to consider mitigation. It should be noted that the mitigation which the trial court failed to consider in this case is the type of mitigation that is well-established and has been recognized in caselaw as mitigating by this Court. Initial Brief at 70-72.

In addition, Appellant did propose to the trial court the mitigating factors -- rehabilitation (R3728), learning (R3720-21), personality traits (R3722-23).

Appellee infers that the trial court need not even "consider" or evaluate certain mitigation if it is not uncontroverted. Appellee's position reflects a misunderstanding of the trial court's duty in a capital case. The trial court must "consider" and/or "evaluate" mitigating evidence in the sentencing order whether uncontroverted or not. If there is conflicting evidence whether a mitigating factor has been established, the trial court will be free to accept or reject that factor within the bounds of its discretion. However, the factor still must be expressly evaluated in the sentencing order. In the event that the mitigating factor is uncontroverted or uncontradicted, then the factor must be found and weighed[27] -- it cannot be rejected. Unfortunately, Appellee has confused the requirements of when the trial court must "consider" a mitigating factor as opposed to when it must "find and weigh" a mitigating factor.

1. Appellant's potential for rehabilitation.

As noted in the Initial Brief at page 71, this is perhaps the most important mitigating circumstance that can be developed. The trial court neither accepted nor rejected this factor. We do not know that the trial court thought of this factor because he failed to consider it. Appellee argues the trial court did not have to "consider" it because it was not "uncontroverted." Such a claim is without merit. As explained earlier, Appellee confuses the occasion when a trial court must "consider" a factor as opposed to when it must "find" a factor. Regardless of any potentially conflicting evidence as seen by Appellee, the trial court had the duty to "consider" and evaluate the factor. Only then could the trial court evaluate whether

[27] The weight to give the factor will be within the trial court's discretion.

conflicting evidence exists and what weight it may deserve and whether the factor should be rejected or accepted. The trial court failed to do this. Thus, a new sentencing is required.[28]

2. Appellant is amenable to learning and has the ability to learn.

Appellee says that this mitigator was properly rejected by the trial court because there was evidence to the contrary. However, neither the trial court nor Appellee has cited to any contrary evidence. Both cite to the fact that Appellant had started classes in January of 1993, but that Appellant had been in jail since October of 1991. This fact alone is not contrary to Appellant being amenable to learning and having the ability to learn. It is not known whether Appellant was previously involved in classes prior to January of 1993 or even if he was aware of the classes in the past.[29] It cannot be legitimately said that Appellant did not have the ability to learn and was not amenable to learning based on lack of knowledge about Appellant taking prior classes. The one thing that was uncontroverted was Rudasill's testimony that Appellant was amenable to learning and has the ability to learn R3139-40.

3. Appellant has positive personality traits.

Contrary to Appellee's assertions, the trial court did not find as a mitigating circumstance that Appellant was courteous, respectful, a gentleman, well-liked by others and was helpful to others. As explained in the Initial Brief at page 71, these are mitigating and were

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[28] The exclusion of evidence relating to the possibility of rehabilitation is so important that a new sentencing will be required. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). The total failure to consider this factor is tantamount to exclusion of the evidence because what good is introduction of the evidence if it is not considered.

[29] The only thing Michael Rudasill knew about Appellant's taking prior classes contradicts the finding that Appellant only signed up for classes in January of 1993. Rudasill began working in December of 1993 R3141. Obviously, Rudasill had no personal knowledge whether Appellant had been in classes prior to this time. However, records indicate that Appellant had signed up for classes in September -- well before Rudasill arrived R3140-41. There was also a prior test that Appellant had taken that was in his folder R3141.

uncontroverted. Yet the trial court found but 2 mitigators (abusive childhood and employment history). The fact that the trial court found the 2 mitigators does not permit it to reject other uncontroverted mitigators.[30]

4. If Appellant had been raised in a different environment his behavior may have been different.

As this Court recognized in Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), mitigating evidence must be considered when contained in the record. This was presented in the record and is clearly mitigating. Initial Brief at 72.

Appellee claims that it as proper for the trial court to use an invalid standard in evaluating the mitigating circumstance of Appellant's abusive childhood. The basis for Appellee's claim is that the trial court has the discretion to give the mitigator any weight it chooses. Appellee misses the point. Appellant agrees that the trial court has discretion to decide what weight to give the mitigator once it is found. However, that discretion is not unbridled. When the trial court utilizes an invalid standard in trying to utilize its discretion, there is error and what amounts to an abuse of discretion. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in evaluating mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in evaluating "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

The cases relied on by Appellee for the claim that the trial court can utilize improper standards in reviewing mitigating factors simply do not stand for that proposition. The cases relied on by Appellee all involve the use of individual determinations by trial judges concerning

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[30] Appellee has not attempted to argue that this mitigator was not uncontroverted.

the specific circumstances of the cases before them -- and not by use of an invalid standard.[31] Here the trial court used an improper standard by stating he does not have to "consider a defendant's abusive childhood history where the murder was not significantly influenced by the defendant's childhood experiences." As noted by this Court in Brown v. State, 526 So. 2d 903, 908 (Fla. 1988), such a conclusion is incorrect. As explained in the Initial Brief at pages 73-75, the trial court missed the whole point of Appellant's turbulent family history because it was evaluated under an incorrect standard. The error cannot be deemed harmless when Appellant's turbulent family history is a very, very strong mitigating circumstance when evaluated under the correct standard. See Appellant's Initial Brief at 73-75.

Finally, Appellee claims that even if the trial court had erred in failing to consider or find mitigating evidence that such error is harmless because the trial court's statement that the two non-statutory mitigating factors he did find failed to outweigh the two aggravating factors. Such a claim is logically flawed. It is true that the sentencing decision is a balancing test of mitigators against aggravators and the trial court decided that the two mitigators did not outweigh the two aggravators on the scale. However, in saying that such a balance renders any error harmless, Appellee totally ignores the fact that the error will bring additional weight to the mitigating side of the scale. Appellee has not, and can not, prove beyond a reasonable doubt that, if the additional mitigation had been added to one side of the balancing scale, the scale may not have been tipped the other way.[32] The state has not met its burden of proving

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[31] For example, in Jones v. State, 648 So. 2d 669 (Fla. 1994) the trial judge gave little weight to the defendant's childhood not because of a standard that murders are not influenced by traumatic childhoods, but based on an individual determination.

[32] The trial court made no statements that had he considered this other mitigation that the final balance between aggravators and mitigators would not have changed.

beyond a reasonable doubt that one or more of the error in this point may not have affected the balancing process. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

POINT XV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

As explained in the Initial Brief, with the elimination of the avoid arrest aggravator only one aggravator will remain and the death penalty cannot stand. Appellee has not disputed that if only one aggravator survives Appellant's sentence must be reduced to life.

Assuming arguendo that there are two aggravating circumstances in this case, Appellee relies on Wright v. State, 473 So. 2d 1277 (Fla. 1985) and Johnston v. State, 497 So. 2d 863 (Fla. 1986) to argue that death is proportional in this case. However, both of these cases are much more aggravated and have less mitigation. In both Wright and Johnson there was no mitigation present, whereas in this case there was considerable mitigation present (See Initial Brief at pages 63-66). In both Wright and Johnson there were three aggravators present including what has been considered as the most powerful aggravator -- HAC. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (in reducing sentence with 5 aggravators to life this Court noted that none of the factors was HAC).

Finally, Appellee refers to some of the cases cited in the Initial Brief and states that they are factually distinguishable. This statement is true, but it misses the point. The cases were cited for the general principle that there have been cases with more aggravator that have been reduced to life. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (5 aggravators). However, Livingston v. State, 565 So. 2d 1288 (Fla. 1988) is a similar case proportionality wise.

Livingston had two aggravators (including prior violent felony) and his crime was more serious than Appellant's.[33] The mitigation was very similar. Livingston's family life included severe beatings from his mother's boyfriend and motherly neglect. In this case, Appellant was severely beaten by his stepfather (R3036), including beatings with sticks and belts (R3033) and the stepfather even stabbed him R3151. Appellant's mother denigrated him (R3148) and was not able to help him (R3034). Livingston used drugs. There was evidence that Appellant used drugs and that the reason he had entered the Pezza residence was to obtain drugs R2377. Livingston's young age reflects an underdeveloped ability to solve problems that comes with maturity. While Appellant was not the same chronological age as Livingston, he possessed the same mitigation which immaturity causes -- he was never able to develop problem solving abilities R3032. This gave insight into the tragedies of his life R3051. Appellant also had other mitigation. See Initial Brief at 16-20, 63-66. Death is not proportional.

Appellant relies on his Initial Brief for further argument on the Points presented in this case.

Respectfully submitted,

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[33] Livingston entered a store and not only killed the female attendant, but he also victimized a second female by shooting her.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARA D. BAGGETT, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 21st day of November, 1995.

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Of Counsel