IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,371

WILLIAM LEE STRAUSSER, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT WILLIAM LEE STRAUSSER, JR.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 92-16860 CF10A
HONORABLE PAUL J. BACKMAN

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS AND AUTHORITIES

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

REFERENCES

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Initial Brief of Appellant:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, William Lee Strausser, Jr.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, The State of Florida.

Citations to the transcript of the trial proceedings contained in Volumes I through XIV, contained in pages 1 through 1842, and Volumes XV through XVI, containing all of the pleadings and other documents filed in this cause, contained in pages 1843 through 2214 will be indicated by an "R" followed by the appropriate page number (R).

Citations to Appellant's Initial Brief on Appeal will be indicated by an "AB" followed by the appropriate page number (AB).

Citations to Appellee's Answer Brief will be indicated by an "AEB" followed by the appropriate page number (AEB).

All emphasis indicated throughout this Brief has been supplied by undersigned counsel, unless otherwise stated.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING A CRUCIAL STATE EXPERT WITNESS FROM ABIDING BY THE RULE OF SEQUESTRATION, AND ALLOWING HIM TO COMMENT ON WILLIAM STRAUSSER'S CREDIBILITY AS A WITNESS DURING TRIAL?

II. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING OTHER CRIME EVIDENCE?

III. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING A 23 YEAR OLD LAY WITNESS TO GIVE AN OPINION CONCERNING WILLIAM STRAUSSER'S SANITY AT THE TIME OF THE OFFENSE?

IV. WHETHER WILLIAM STRAUSSER'S CONFESSION WAS GIVEN VOLUNTARILY BASED UPON THE TOTALITY OF THE CIRCUMSTANCES?

V. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE STATE TO INTRODUCE IMPROPER EVIDENCE IN VIOLATION OF WILLIAM STRAUSSER'S RIGHTS UNDER THE FLORIDA AND FEDERAL CONSTITUTION?

VI. WHETHER THE JURY HAD A REASONABLE BASIS FOR RECOMMENDING A LIFE SENTENCE, THUS PRECLUDING THE JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION?

VII. WHETHER PROPORTIONALITY REVIEW REQUIRES REVERSAL OF THE JUDICIAL OVERRIDE?

SUMMARY OF ARGUMENT

The trial court reversibly erred in exempting a crucial State expert witness from abiding by the Rule of Sequestration without conducting an appropriate hearing and by allowing the expert to comment on William Strausser's credibility and truthfulness while testifying as a witness during trial. Over defense objection, State expert Dr. Walczak was permitted to testify during the State's rebuttal case that during William Strausser's testimony the doctor believed Strausser's eyes dilated when he lied, a fact which the doctor deemed very important. The doctor stated that the dilation of the eyes was like a "lie meter." Clearly, the expert was expressing an improper opinion of the veracity and truthfulness of William Strausser's trial testimony. The doctor testified that viewing William Strausser's testimony at trial was the first time he thought of the importance of William Strausser's eyes dilating.

Dr. Walczak's testimony was far from harmless. On the contrary, this case involved a "battle of the experts." Expert defense evidence supported William Strausser's insanity defense and expert State testimony was to the contrary. Dr. Walczak's testimony annihilated William Strausser's credibility as a witness and apparently "tipped the scale," in favor of guilt. Interestingly, Dr. Walczak's testimony was based upon his brief interview with William Strausser, which lasted less than one (1) hour.

Likewise, the trial court reversibly erred in allowing

evidence concerning William Strausser's arrest and prosecution for the felony of interference with child custody and evidence of Elec Trubilla being found in his underwear in William Strausser and his wife's bed by police. The State provided the defense with no notice of its intent to rely upon the evidence pursuant to § 90.404, Fla. Stat. William Strausser contends that even had proper notice been given, the evidence of his felony arrest and the arrest of his wife for interference with child custody surrounding Elec Trubilla, and insinuations that William Strausser sexually abused Elec, were neither supported by the evidence nor probative in light of their prejudicial effect.

Sub judice, the central issue to be decided was William Strausser's sanity at the time of the offense. A court-appointed defense expert, Dr. Appel, testified that William Strausser was not sane at the time of his involvement with 14 year old Elec Trubilla during this incident. Dr. Appel was the most knowledgeable expert witness and had spent the most time professionally with William Strausser. Dr. Appel based her opinion of insanity, inter alia, upon William Strausser's extensive history of mental illness, including prior suicide attempts. In support of the State's contention that William Strausser was indeed sane at the time of the offense, two expert witnesses testified on behalf of the State during their rebuttal case. Over defense objections, 23 year old lay witness, Lloyd Pryor was likewise permitted to testify as to William Strausser's sanity at the time of the offense. Lloyd Pryor testified that in

his opinion William Strausser knew right from wrong at the time of the murder. Lloyd Pryor based his opinion upon a phone call he received from William Strausser in excess of seven (7) hours after the incident. Clearly, Lloyd Pryor was not an expert witness. The opinion testimony concerning the ultimate issue in the case was thus inadmissible. William Strausser contends a new trial is necessitated.

William Strausser's confession to law enforcement officials in Chicago, Illinois was violative of his Fifth, Sixth, and Fourteenth Amendment rights predicated upon a lack of voluntariness based upon the totality of the circumstances. Law enforcement officials knew or should have known of William Strausser's longstanding history of mental illness. Law enforcement officials were advised of William Strausser's fragile mental condition by the Defendant's wife at the time of the statement. William Strausser was limping and on crutches, having broken his ankle. Law enforcement was made aware of the fact that William Strausser was ingesting pain medication. After being questioned "off the record" for in excess of two hours, the police officers took a lengthy recorded statement from the Defendant. The recorded statement was inconsistent in material respects from William Strausser's trial testimony. Based upon the totality of the circumstances, William Strausser's statement was not given voluntarily, nor were his waiver of the right to counsel and his right not to incriminate himself made freely and voluntarily. Based upon the United States and Florida

Constitutions, the statement should have been suppressed.

The trial court reversibly erred in allowing the State to introduce improper evidence in violation of William Strausser's rights under the Florida and Federal Constitutions. First, the trial court erred in denying William Strausser's right to confront Elec Trubilla's out-of-court statements. Elec Trubilla had placed a 911 telephone call to the police after his father's death. It was neither an excited utterance nor a spontaneous statement: it was a lie. This taped statement was played to the jury without providing William Strausser an opportunity to cross-examine Elec Trubilla. Similarly, during the penalty phase of the proceedings, a lengthy sworn statement of Elec Trubilla was played to the jury. Although hearsay is admissible in penalty proceedings if deemed reliable, the State is not permitted to violate the Defendant's right to confront his accusers. In this case, via allowance of the 14 year old's out-of-court statements, William Strausser's State and Federal constitutional rights were violated.

Additionally, the trial court erred in allowing State witness, Lloyd Pryor, to read to the jury portions of letters sent to him by William Strausser. The letters were never admitted into evidence. Accordingly, the prejudicial material should not have been permitted. The trial court likewise abused its discretion in allowing the jury to view an inflammatory videotape which was cumulative and prejudicial. Further, the trial court erred in denying William Strausser's attempt to

exclude two jurors for cause. Based upon the cumulative effect of the errors at trial, William Strausser's rights to a fair trial and to due process of law were violated.

Clearly, the jury had a reasonable basis for recommending a life sentence. The jury was well aware of substantial mitigating circumstances of the case, and recommended life despite rejecting William Strausser's insanity defense. The trial judge's override of the jury's recommendation without the benefit of a presentence investigation report, and the death sentence imposed, must be vacated. Several mitigating factors were presented and proven by William Strausser. Neither of the aggravating factors relied upon by the trial court outweighed the statutory and non-statutory mitigating factors. William Strausser contends that the trial court's override of the jury's recommendation of life imprisonment was improper, since all twelve (12) jurors properly relied upon both statutory and non-statutory mitigating factors in deciding to recommend a life sentence based upon the totality of the circumstances. Further, based upon the totality of the circumstances, compared with other capital cases, death in this case cannot pass proportionality review. William Strausser's co-defendant, Elec Trubilla, who was primarily responsible for his father's death, has been granted clemency by the Governor. William Strausser should not be put to death by electrocution. At a minimum, the sentence imposed should be reversed, and the Appellant sentenced to a term of life imprisonment.

ARGUMENTS

I. THE TRIAL COURT REVERSIBLY ERRED IN EXCLUDING A CRUCIAL STATE EXPERT WITNESS FROM ABIDING BY THE RULE OF SEQUESTRATION AND ALLOWING HIM TO COMMENT ON WILLIAM STRAUSSER'S CREDIBILITY AS A WITNESS DURING TRIAL.

Conspicuously absent from the Answer Brief of Appellee is any mention of the improper testimony permitted to be elicited from the State's expert witness, Dr. Michael Walczak, concerning the central issue in this case: William Strausser's sanity at the time of the offense (R 1393). No where does the State address William Strausser's lead argument in support of a new trial: the improper testimony that the doctor had the ability to ascertain when William Strausser was telling the truth and when he was lying by looking into his eyes. Dr. Walczak was permitted to testify that William Strausser's eyes were a "lie meter."

William Strausser asserts that the trial court reversibly erred in allowing a crucial State witness, Dr. Michael Walczak, to violate the Rule of Sequestration by sitting in the courtroom during William Strausser's testimony and thereafter allowing him to comment on the Defendant's testimony when called in rebuttal. An objection was timely lodged (R 1193-97). The rule of sequestration had been invoked (R 536). No hearing was conducted concerning the State's violation of Florida and Federal sequestration law. William Strausser contends the error prejudiced the crux of the defense which surrounded his insanity at the time of the offense, thereby violating his State and Federal rights to due process of law and to a fair trial.

At bar, William Strausser was examined by two (2) State experts prior to trial. Dr. Walczak chose to only meet with William Strausser on one (1) occasion for a brief interview. Dr. Walczak should not thereafter have been permitted to sit in the courtroom during the Defendant's testimony and testify concerning his observations of the Defendant while testifying. Nor should the doctor have been allowed to tender his opinions relative to the alleged inconsistencies between William Strausser's sworn trial testimony, his brief conversation with the doctor while in the jail, and police reports.

Below, the objectionable portion of Dr. Walczak's testimony was not directed to William Strausser's sanity at the time of the offense, but toward the Defendant's veracity and credibility at trial. Dr. Walczak began testifying concerning examples he believed pointed out the differences or inconsistencies between William Strausser's testimony at trial, and what he allegedly told Dr. Walczak during the one (1) hour interview (R 1375). The defense objected (R 1376). A side bar hearing was conducted. The defense stated:

> Judge, the purpose of Dr. Walczak sitting in was to determine if, of course, in fact his testimony was - Mr. Strausser's testimony would aid and assist him in rendering an opinion to the court. It was not to re-testify as to what he believed the testimony of Mr. Strausser was. And what concerns me is his recollection of it is unreliable and, in fact, he is giving misinformation right now.
>
> (R 1377).

The State agreed to "rephrase the question." (R 1378) The court instructed the prosecutor to "Keep him out of testifying as to what he believes was forthcoming." (R 1378)

Thereafter, the following transpired:

Q. (Mr. Morton) Tell us what Mr. Strausser, as best as you can recall and any notes or information you may have, actually told you about what he remembers happening on August 18 of 1992, the day of this homicide. What did he tell you?

A. A lot of what he said was what he - he never admitted or stated to me that he had a memory problem. That is important. He never stated to me that any information he was giving me - it was based on things he had learned from the police department from the court or from the proceedings. The information I believed I was getting was information that he was giving me unbias, so to speak. The --

Q. Just tell us what he told you about what happened that day in your interview with him.

A. Okay. The information - one of the things that stood out in my mind was the glasses. He had told me almost in bravado like statement, and you have to understand the tone of what he said was very important. For example, when I first came in and evaluated him, I had a little bit - I just had an hour of time and I asked him questions very bluntly.

One of the questions I asked him, I said are you a homosexual. He stated no originally. I was confused by that. I looked at my records because there was a statement from the mental facility that stated he had homosexual relations with the victim. And when he saw me go over that piece of information, he started to speak extremely fast, started to ramble and <u>his eyes dilated</u>.

<u>Well, I am not one to look a gift horse in the mouth. I mean, I saw this guy as having a meter, a lie meter</u>. He then said, oh, no,

I had relationships with so and so, and he started very quickly and his eyes dilated every time I asked him questions. By the time I left, his eyes were about this big (indicating) and he was rambling, so I felt he had information about the individual. That gave me a sense of what was going on. His tone of his voice was very important.

(R 1378-79)[Emphasis added].

Thereafter, when asked a crucial question concerning his opinion of whether William Strausser was suffering from a mental disease, illness, or infirmity, or defect which affected him to the extent that he did not know what he was doing or the consequences of what he was doing, the following ensued:

A. I believe he knew what he was doing. I believe he knew the difference between right and wrong.

Q. Tell us why?

A. Well when I was evaluating him, one of the things that happened is I realized that he caught on or he believed that I was not believing his story, and --

MR. BARON: Objection, judge.

THE COURT: Sustained.

(R 1383-84).

During cross-examination, in an attempt to diffuse Dr. Walczak's testimony, the defense questioned as follows:

Q. Now you mentioned on a number of occasions in your direct testimony about Mr. Strausser's eyes dilating at the time you spoke with him?

A. That's correct.

Q. That's fairly important to you? It was, wasn't it?

A. Probably because of the fact that I did my dissertation on psychopathy and psychophysiological measurements. And since I believed that I was dealing with an anti-social personality, which is another way of saying psychotic, I believed this was my dissertation standing right in front of me.

(R 1393).

When pressed by defense counsel, the doctor acknowledged that the alleged eye dilation was important to his opinion. The doctor had omitted that from his report, as evinced by the following:

Q. (Defense counsel): Do you have it written anywhere?

A. Actually, I did - it did not come into my mind until I sat in the courtroom that day.

Q. Well, this is a very important fact that you did your dissertation on that you called a lie meter that was right in front of you. It didn't come to light until you were in the courtroom just a few days ago; is that your testimony?

A. That's correct.

(R 1393).

Sub judice, the exemption of Dr. Walczak from the sequestration Order caused and exacerbated the error in permitting the improper testimony. Had it not been for the sequestration violation, no testimony concerning a "lie meter" would have been offered. Even had a sequestration violation not occurred, the testimony itself was highly improper and prejudicial, warranting a new trial. Dr. Walczak's testimony was "substantially affected" by the testimony of William Strausser at trial. The doctor admitted that his testimony differed from what

it would have been had he not observed William Strausser testifying during trial. Clearly, prejudice has been established.

In Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), the Florida Supreme Court discussed the test to determine prejudice, stating that the trial court must look to "whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." Id. at 336. Clearly at bar, Dr. Walczak's testimony was prejudicially tainted because of the sequestration violation.

Below, the central issue was sanity at the time of the offense. By testifying based upon his observations of William Strausser's eyes dilating, Dr. Walczak was able to comment on the accused's testimony and credibility, ignoring the very purpose of sequestration. It was improper, and constituted reversible error for the court to permit the State's expert witness to comment on the credibility and testimony of William Strausser. Credibility should have been the sole province of the jury. See State v. Camejo, 641 So. 2d 109 (Fla. 5th DCA 1994). Reversal is required.

II. THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING OTHER CRIME EVIDENCE.

As predicted, the State skirts the error complained of surrounding "other crime and bad act evidence," and its ramification upon the defense in restating William Strausser's argument and misinterpreting it to deal only with evidence of the victim's complaint against William Strausser (AB 46, n.6; AEB 35-45). The crux of the "other crime" evidence at issue surrounded a felony criminal prosecution, not a complaint by the victim as insinuated by the State. William Strausser was prosecuted by the State of Florida for interference with child custody contrary to § 797.03, Fla. Stat. Subsequent thereto, he was prosecuted for murder in the first degree. Although the State concedes on appeal that the evidence of the third degree felony was "not necessary to the prosecution...," the State nevertheless elicited the prejudicial testimony "to show a motive for the murder." (AE 40)

William Strausser asserts that the State of Florida's criminal prosecution against he and his wife for interference with child custody, temporarily distinct and separate from the incident which occurred on August 18, 1992, was not inextricably intertwined with the murder prosecution. Had the Grand Jury believed that the act of interference which occurred months earlier was part of this offense, the Indictment would have contained reference to the other felony incident, or at least have included the dates of the interference as part of the "plan, preparation, etc...." Even if the issue of interference with

child custody was legally relevant to the issue of motive, its probative value was far outweighed by undue prejudice, constituting and abuse of discretion in the admission of evidence relative thereto.

Contrary to the State's assertions, the error in allowing the improper evidence was not harmless beyond a reasonable doubt. Despite the State's repeated reliance upon State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), in this case a close question concerning sanity at the time of the offense was analyzed by the jury - the same jury that recommended life imprisonment.

The evidence surrounding the interference with child custody affected William Strausser's claims of insanity at the time of the offense, and did not properly reflect William Strausser's mental status on August 18. Rather than being a "chain in the link," of the prosecution, William Strausser asserts that the improper evidence became a "feature" of the trial. Indisputably, the State failed to provide notice of its intent to rely on the evidence pursuant to § 90.404(2)(b)(1). Clearly, the evidence was not relevant to prove any material issue in the case.

Relevant evidence is defined as "evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. At bar the improper evidence insinuating sexual misconduct with Elec Trubilla, was

heightened by evidence that William Strausser and Allan Trubilla had engaged in homosexual relations. William Strausser asserts that this type of evidence unfairly prejudiced the jury and confused the issues. The evidence lacked relevancy.

The State's reliance upon Griffin v. State, 639 So. 2d 966 (Fla. 1994), in support of its contention that "the evidence relating to Allan Trubilla's complaint against Appellant for interference with custody was inextricably intertwined with the facts of the murder..." is misplaced (AEB 40). In Griffin, the defendant was charged with grand theft of a vehicle after breaking into the victim's hotel and stealing the car keys. The court determined that the victim's testimony suggesting that his hotel room had been burglarized, utilized by the State to show that Griffin had a propensity to burglarize hotel rooms did not fall within the Williams[1] Rule.

> It was not introduced by the State as similar fact evidence. The manner in which the car keys were taken was inextricably intertwined with the theft of the automobile, one of the charges before the jury.
>
> Id. at 969.

Factually and legally, evidence of the interference with the child custody charge, and insinuation of sex abuse committed by William Strausser should not have properly been before the jury.

The State's citation to Padilla v. State, 618 So. 2d 165 (Fla. 1993), is likewise misplaced. In Padilla, the Supreme Court held that the trial court's determination that a murder was

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[1]Williams v. State, 110 So. 2d 654 (Fla. 1959).

committed in a cold, calculated and premeditated manner was not supported by the nature of the event, requiring a new sentencing proceeding before a new jury. During the prosecution in Padilla, the State was allowed to present evidence that the defendant fired several shots at the victim's former apartment. The court found the evidence "clearly relevant" to establish the defendant's mental condition, and allowed the State to introduce the evidence to establish the defendant's mental State in order to prove premeditation. Id. at 169. The instant scenario is factually distinguishable.

Contrary to the situation at bar, in Henry v. State, 649 So. 2d 1366 (Fla. 1994), the inextricably intertwined facts pertaining to a separate murder were permitted by the trial court and affirmed on appeal. "To try to totally separate the facts of both murders would have been unwieldy and likely to have led to confusion." Id. at 1368.

The other crime evidence presented in William Strausser's trial was clearly superfluous. It could easily have been separated out and omitted without effecting the State's case. The evidence did not "shed any light" upon William Strausser's sanity on August 18. The evidence was entirely unnecessary and extremely prejudicial. Reversal is required.

III. THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING A 23 YEAR OLD LAY WITNESS TO GIVE AN OPINION CONCERNING WILLIAM STRAUSSER'S SANITY AT THE TIME OF THE OFFENSE.

Twenty-three year old Lloyd Pryor's testimony concerning William Strausser's sanity at the time of the offense was neither based upon personal knowledge nor observation. See Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984). Nor was the testimony based upon any observations made by Lloyd Pryor. The testimony that William Strausser knew what he was doing at the time of the offense, went to the ultimate issue presented in the case. Lloyd Pryor was permitted to testify that William Strausser did not seem like himself and sounded over the phone to be "spaced out." Without any facts upon which to base his opinion (R 938). Lloyd Pryor opined that William Strausser knew that stabbing Allan Trubilla to death was wrong (R 938).

In light of the fact that Lloyd Pryor testified without personal knowledge and without the opportunity to observe William Strausser, and because any knowledge that he gained was not in a time period reasonably proximate to the time of the incident, it should have been prohibited from introduction. As stated in Cruse v. State, 588 So. 2d 983 (Fla. 1991):

> A non-expert is not competent to give lay opinion testimony based on his personal observation that took place a day removed from the events giving rise to the prosecution.
>
> Id. at 990.

See also Garron v. State, 528 So. 2d 353, 357 (Fla. 1988). In this case, not only was the telephone conversation temporarily removed from the events giving rise to the prosecution, the lay opinion testimony was neither based upon personal observation nor personal knowledge.

As correctly pointed out by the State, in Hansen v. State, 585 So. 2d 1056, 1058 (Fla. 1st DCA), review denied, 593 So. 2d 1052 (Fla. 1991), the First District Court of Appeal upheld the trial court's refusal to allow a lay witness to provide an opinion whether the defendant was sane at the time he committed a murder. The First District Court of Appeal stated:

> The trial court correctly ruled that while a proper lay witness may testify regarding mental condition, the question of whether a defendant knew the consequences of an act is not appropriate under Garron,[2] and Rivers.[3] Hanson cites no case that would allow lay testimony on such a fine aspect of the insanity defense. While Garron and Rivers allow, under certain specified circumstances, lay opinion as to 'sanity' it does not follow that a witness may testify to purely legal conclusions. The value of lay opinion as to sanity lies in the ability of the witness to effectively convey her impressions of the defendant's behavior. See Sec. 90.701(1), Fla. Stat. (1989)[lay opinion is proper where '[t]he witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting part.' (Emphasis supplied)]. We cannot agree that lay testimony on the ultimate fact of whether a

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[2]Garron v. State, 528 So. 2d 353 (Fla. 1988).

[3]Rivers v. State, 458 So. 2d 762 (Fla. 1984).

> defendant can distinguish right from wrong is an appropriate means for a witness to convey 'what he has perceived' to the jury.
>
> Id. at 1058-59.

Hansen supports William Strausser's claims of reversible error as a result of Lloyd Pryor's improper opinion.

Contrary to the State's bold assertions of harmless error, there is indeed a reasonable possibility that had Lloyd Pryor's improper opinion not been admitted, the Verdict would have been different (AE 50). Accordingly, such error cannot be construed as "harmless beyond a reasonable doubt" as argued by the State. Reversal and remand is required.

IV. WILLIAM STRAUSSER'S CONFESSION WAS NOT GIVEN VOLUNTARILY BASED UPON THE TOTALITY OF THE CIRCUMSTANCES; ITS ADMISSION VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 16, 17, FLORIDA CONSTITUTION.

Appellant, William Strausser relies upon the argument set forth in Argument IV of his Initial Brief of Appellant, as if set forth verbatim herein (AB 49-59). Based upon William Strausser's argument, and in light of law enforcement's knowledge of William Strausser's fragile mental condition and history of mental illness, after seeing him limping and on crutches, and upon learning William Strausser was ingesting mind altering pain medication, the officers knew, or should have known any waiver of his right to remain silent, right to counsel, and to due process of law would be scrutinzed. Nevertheless, the interrogation continued despite William Strausser's repeated proclamations of pain. Based upon a totality of the circumstances, the statement should have been suppressed. In light of this close case which pitted a "battle of the experts," as to William Strausser's sanity at the time of the offense, and ultimately resulted in a judicial override, the error in admitting William Strausser's taped statement is far from harmless. Reversal and remand is required.

V. THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE STATE TO INTRODUCE IMPROPER EVIDENCE IN VIOLATION OF WILLIAM STRAUSSER'S RIGHTS UNDER THE FLORIDA AND FEDERAL CONSTITUTION

The trial court committed reversible error in allowing improper evidence to be presented to the jury. The court denied William Strausser's right to confront Elec Trubilla's out-of-court statements, both during the guilt and penalty phases of these proceedings. Likewise, the court erred in allowing Lloyd Pryor to read portions of letters sent to him by William Strausser which were not admitted into evidence. Further, the trial court abused its discretion in allowing the jury to view an inflammatory videotape which was cumulative and prejudicial. Although not reversible in and of itself, William Strausser likewise contends that the trial court erred in denying his attempt to exclude two jurors for cause.

Based upon the cumulative effect of the errors set forth in Appellant's Initial Brief of Appellant and herein, fundamental error occurred requiring a new trial.

VI. THE JURY HAD A REASONABLE BASIS FOR RECOMMENDING A LIFE SENTENCE, THUS PRECLUDING THE JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION AND BARRING IMPOSITION OF A DEATH SENTENCE.

Twelve members of the Broward County community correctly and appropriately recommended life imprisonment for William Strausser as a result of his participation with Elec Trubilla in the death of Elec's father, Allan. The jury made an informed decision after carefully considering all of the evidence presented throughout trial and during the penalty phase proceedings. The Honorable Paul L. Backman, Circuit Court Judge, entered an Order overriding the jury's recommendation, sentencing William Strausser to death by electrocution. The Order was entered without the benefit of a presentence investigation.

A. The Trial Court Overrode The Jury's Penalty Decision Without The Benefit Of A Presentence Investigation Report.

The trial court's failure to require a presentence investigation report in this case constitutes error. In lodging this argument, Appellant is aware of cases such as Wuornos v. State, __ So. 2d __ (Fla. September 21, 1995)[1995 WL 555302], wherein this Court stated, "we do note that the trial court did not order a presentence investigation here. While we have encouraged such a practice we have not required it." 1995 WL 555302 *4.[4] Based upon the factual circumstances in this case,

[4]Concededly, neither the State nor the judge is required to prepare or consider presentence investigation reports in death penalty cases. Burch v. State, 522 So. 2d 810 (Fla. 1988). Nevertheless, trial courts may rely on presentence investigation reports. Young v. State, 589 So. 2d 721, 725 (Fla. 1991); Engle

failure to consider a presentence investigation report requires reversal of the judicial override.

The Florida Constitution imposes upon the Florida Supreme Court an absolute obligation of determining whether death is a proportionate penalty. Article I, § 12, Fla. Const.; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Farr v. State, 656 So. 2d 448 (Fla. 1995). In a specially concurring opinion in Farr, Justice Anstead stated:

> I concur in the result reached by the majority opinion, but I would go further and adopt a uniform rule that requires a presentence investigation and report in all capital cases. Our failure to adopt such a requirement is tantamount to inviting arbitrary decision-making at both the trial and appellate levels in a significant number of cases.
>
> Id. at 450.

Justice Anstead stressed the importance of informed decision making to the integrity of the judicial sentencing process, stating:

> Even under the present rule, I would expect that careful judges exercise their discretion and consistently order such investigations in all capital cases. Such investigations provide a minimum, yet substantial, standard for insuring that a sentencing court is informed on all relevant considerations prior to sentencing. The investigation also helps avoid many potential post-sentencing problems such as claims of ineffective assistance of counsel in sentencing. Primarily, however, a presentence investigation enhances the ability of the trial judge, and this court, to make reasoned and informed decisions about

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v. State, 438 So. 2d 803 (Fla. 1983), cert. denied 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984).

> the propriety of the imposition of the death penalty in particular cases.
>
> Id. at 450-451

In examining the necessity for a presentence investigation report, Justice Anstead cited the often quoted language from Justice Hatchett's opinion in Hargrave v. State, 366 So. 2d 1 (Fla. 1978), (Hatchett, J., concurring in part and dissenting in part), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979):

> In imposing sentence in a capital case, the fundamental respect of humanity underlying the Eighth Amendment requires the trial judge to take into consideration the character and record of the defendant as well as the offense for which he was convicted. Woodson v. North Carolina, supra [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)]. Practically speaking, at a time when state attorneys are seeking the means to pay witness fees for witnesses to travel from one county to another where there has been a change of venue, when public defenders are hard pressed to get funds for depositions, it is unrealistic to believe that a defendant facing sentence without the benefit of presentence investigation reports will be able to present to the sentencing judge out of state school records, health records, or other favorable information regarding his character and record.
>
> The rule as construed by the majority requires a presentence investigation report for all offenders under 18 years of age or convicted of a first felony offense, except those convicted of first degree murder. If presentence investigation reports are to be mandatory for anyone, surely they should be mandatory where one faces the ultimate penalty.
>
> Id. at 8; Farr at 451.

In Tillman v. State, 591 So. 2d 167 (Fla. 1991), the defendant pled guilty to first degree murder pursuant to a plea agreement, and, following a hearing before a jury, was sentenced to death. On appeal, the Supreme Court affirmed his conviction, vacated the sentence and remanded for resentencing. At the penalty phase on remand, the defendant was again sentenced to death. On appeal, the Supreme Court held that based upon the "scant factual record available" meaningful review of the "totality of the circumstances" could not be conducted. As the Court could not possibly determine whether death was an unusual punishment when compared with other death penalty cases, as required by the Florida Constitution, Article I, § 17, the death sentence was vacated.

William Strausser contends that the court's failure to order or review a presentence investigation report in this case precludes proportionality review, requiring vacation of the death penalty a resentence of to life imprisonment without parole for 25 years.

B. The Evidence In Support Of Mitigation Justified Imposition Of A Life Sentence; Reasonable People Can, And Do Differ As To The Mitigating Evidence Presented; Proportionality Review Requires Reversal And Remand.

William Strausser asserts that his death sentence is disproportionate in this case because of the mitigating evidence introduced. Considering the totality of the circumstances in this case, and comparing it with out capital cases, a proportionality review requires reversal of the judicial

override.

The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishment. Article I, §§ 9, 17, Fla. Const. Proportionality review also arises in part by the mandatory, exclusive jurisdiction of the Florida Supreme Court over death appeals, pursuant to Article V, § 3(b)(1), Fla. Const. The purpose of the special grant of jurisdiction was:

> To insure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction.

Tillman at 169.

William Strausser suggests that several mitigating circumstances established below provided a reasonable basis for the jury's life recommendation. As far as statutory mitigators, William Strausser had no significant history of criminal activity and was under the influence of extreme mental or emotional disturbance when he assisted Elec Trubilla[5] in murdering his father.

William Strausser came from horrible family background; he was from a broken home. He suffered abuse at the hands of his stepfather. William Strausser had a history of depression,

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[5]Elec Trubilla was sentenced to life imprisonment by the trial court. Elec Trubilla was subsequently granted clemency by Governor Lawton Chiles. William Strausser suggests this impacts upon the proportionality review this Court must engage in.

suicidal idealizations and attempts, and was receiving treatment. William Strausser expressed remorse for the murder. He had a good work history. William Strausser's trial behavior was excellent. William Strausser confessed when returning to the United States to surrender. William Strausser rendered community services and assisted Lloyd Pryor, Peggy Strausser, and Mary Smith with support. He has great parenting skills and is a good husband, thus establishing "good man" mitigation. Clearly, mitigating circumstances provided the jury with a basis for their recommendation of life imprisonment.

Recently, in Terry v. State, ___ So. 2d ___ (Fla. January 4, 1996)[21 Fla. L. Weekly S9], the Florida Supreme Court dealt with an analogous case wherein the trial court found two (2) aggravators, no statutory mitigators, and the trial court had rejected Terry's minimal non-statutory mitigation. Nevertheless, based upon proportionality review, the Florida Supreme Court reversed the death sentence and concluded that:

> ...this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.
>
> Id. at S12.

In Terry, the Florida Supreme Court stated:

> Our proportionality review requires us to 'consider the totality of the circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.' Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this

> decision, we are also mindful that '[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation.' State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).
>
> Id.

Interestingly, in Terry, Justice Grimes concurred in part and dissented in part, holding that:

> In setting aside the death penalty, I believe the court is impermissibly substituting its judgment for that of the jury and the trial judge.
>
> Id. at S14. [Emphasis added]

In this case, each of the twelve (12) jurors believed that life imprisonment was an appropriate penalty based upon their view of the aggravating and mitigating evidence, as well as their life experiences. It was the thirteenth juror, the trial judge, who impermissibly substituted his judgment for that of the jury. The circumstances herein do not meet the test laid down in State v. Dixon, 283 So. 2d 1 (Fla. 1983), "to extract the penalty of death for only the most aggravated, the most indefensible of crimes." Id. at 8; Terry at S13.

Likewise, Justice Grimes' concern that Terry was the first in which the death penalty was set aside on grounds of proportionality where there were two (2) statutory aggravating circumstances, and only minimal non-statutory mitigation supports William Strausser's contentions of error in overriding the jury.

While William Strausser acknowledges that the court does not simply engage in a comparison between the number of aggravating and mitigating circumstances, the court below found two (2) aggravating circumstances, one statutory mitigating circumstance, and numerous non-statutory mitigation which easily justified the jury's recommendation.

William Strausser asserts that the trial court did not make proper findings with regard to evidence presented concerning mitigating circumstances. Pursuant to § 921.141(6)(b), the testimony of Dr. Appel fully supported a finding that William Strausser's involvement in this offense occurred while he was under the influence of extreme mental and emotional disturbance. William Strausser produced evidence of more than the emotions of an average man, however inflamed. Duncan v. State, 619 So. 2d 279 (Fla. 1993). Likewise, the court failed to give sufficient weight to several of the non-statutory mitigators.

Comparing the case sub judice with those compared by the Court in Terry, the death sentence is clearly inappropriate herein. In Terry, the Supreme Court compared Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), and Thompson v. State, 647 So. 2d 824 (Fla. 1994) with Terry, which were each robbery-murder cases. In Sinclair, there was only one (1) valid aggravatory, no statutory mitigators, and minimal non-statutory mitigation. The Supreme Court vacated the death sentence. In Thompson, the death sentence was likewise vacated following a finding that there was only one (1) valid aggravator, and some significant non-statutory

mitigation.

When comparing this case to other capital cases, William Strausser asserts State v. Breedlove, 655 So. 2d 74 (Fla. 1995), supports his position and requires reversal of the death sentence imposed. Breedlove involved a stabbing which was determined to have been committed in a heinous, atrocious, or cruel manner. Two (2) other valid aggravating circumstances existed, including Breedlove's previous conviction of a violent felony. While Breedlove presented some testimony concerning possible psychological problems, the State experts testified that they found no evidence of organic brain damage or psychosis. Breedlove's death sentence was vacated.

In Morgan v. State, 639 So. 2d 6 (Fla. 1994), the Florida Supreme Court vacated the death sentence imposed despite finding two (2) factors in aggravation and mitigating circumstances. Morgan was only 16 at the time he committed the offense and had been sniffing gasoline on the day of the murder. Id. at 14.

As found in Nibert v. State, 574 So. 2d 1059 (Fla. 1990), even when a victim suffers multiple stab and defensive wounds, and death was heinous, atrocious, or cruel, mitigation, including diminished capacity may make the death penalty inappropriate. Likewise, in Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Florida Supreme Court held that where there is substantial mitigation, the death penalty is inappropriate even though a killing is heinous, atrocious, or cruel.

In Omelus v. State, 584 So. 2d 563 (Fla. 1991), the death

penalty was vacated despite the fact that the victim was stabbed 19 times and slashed 23 times, a total of 42 wounds on the body. He tried to defend himself and received cuts on his hands and wrists. He pled for his life, experiencing excruciating pain from the wounds and agony of drowning in his own blood. The jury recommended death by a vote of 8 to 4. The court noted that:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, giving the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an 8 to 4 vote, we must conclude this error is not harmless beyond a reasonable doubt...
>
> Id. at 567.

In Blakely v. State, 561 So. 2d 560 (Fla. 1990), the Florida Supreme Court found the death sentence was disproportional in a domestic dispute despite finding two (2) aggravating circumstances; heinous, atrocious, or cruel; and cold, calculated, and premeditated. In Smalley v. State, 546 So. 2d 720 (Fla. 1989), the Court held that substantial mitigation made the death penalty disproportional despite proof that the murder was heinous, atrocious, or cruel, when a 28 month old child died after the defendant struck the child repeatedly, dunked her head in water, and banged her head on the floor.

William Strausser submits that an analysis of other capital cases and in light of the fact that clemency was granted to the organizer of the incident (Elec Trubilla), and based upon the

totality of the circumstances, most specifically the jury's unanimous recommendation of life imprisonment, the judicial override must be vacated and this matter remanded.

CONCLUSION

William Strausser should not be sentenced to death by electrocution. Based upon errors at trial of constitutional dimension, William Strausser is entitled to a new trial, free from the errors asserted herein. Alternatively, the sentence imposed must be vacated and the jury's recommendation of life imprisonment followed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original plus seven (7) copies was furnished this **22nd day of JANUARY, 1996** to the Clerk of Court, Florida Supreme Court, 500 S. Duval Street, Tallahassee, FL 32399-1925 and copies furnished to: AAG CELIA TERENZIO, Office of the Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Bch., FL 33401 and WILLIAM LEE STRAUSSER, DC # 123740, UNION CORRECTIONAL INST., P.O. Box 221 Raiford, FL 32083, A-1NE4522-14.

RESPECTFULLY SUBMITTED,

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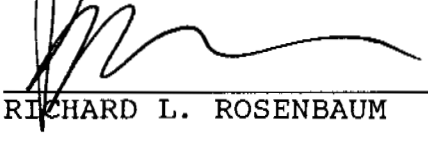

RICHARD L. ROSENBAUM

cc: Margaret Strausser