IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES PATRICK BONIFAY,

Appellant,

v.

CASE NO.: 84,918

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA

Division "A"
Honorable Michael Jones, Presiding

* See Notice of Filing Amendment

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PRELIMINARY STATEMENT

In this brief, the Appellant, Mr. Patrick Bonifay, will be referred to by name or as the Appellant or Defendant. The Appellee will be referred to as the State.

Citations to the record on appeal will be made by the letter "R", and the appropriate page number. The transcript of the Penalty Phase hearings will be referred to by "TR", followed by the appropriate page number.

STATEMENT OF THE CASE

Appellant, James Patrick Bonifay, was originally convicted of first-degree murder, armed robbery, and grand theft, and was subsequently sentenced to death by the Honorable Lacy Collier on September 21, 1991. An appeal was taken, and following this Court's decision and mandate in Bonifay v. State, 626 So.2d 1310 (Fla. 1993), the penalty phase of the case was re-tried on October 17, 18, and 19, 1994, with the Honorable Michael T. Jones, presiding. Following the close of evidence, the jury was instructed, deliberated, and returned an advisory sentencing recommendation of death on a ten (10) to two (2) vote. (R-40). The foreperson was a former Assistant State Attorney. (TR-9-10).

On December 06, 1994, the Honorable Judge Jones pronounced sentence. The Judge considered three statutory aggravating circumstances, five statutory mitigating circumstances, and six non-statutory mitigating circumstances, imposed a sentence of death, and signed the appropriate orders to effect sentence. (R-100-115). This timely appeal followed. (R-116). The case is

therefore presently before the Court on Appeal from the penalty phase re-trial.

STATEMENT OF THE FACTS

The evidence at the penalty phase re-trial showed that in March 1990 Robin Archer was fired form his job in an auto parts store. The following January he convinced his seventeen-year-old-cousin, Pat Bonifay, to kill the clerk he apparently blamed for having him fired, one Daniel Wells. Archer told Bonifay to rob the store to cover up the motive for the killing, told him to wear a ski mask and gloves, and told him where the cash boxes and emergency exit were located. Bonifay asked for a friend, Kelly Bland to provide a handgun. Bland gave the gun to Archer who, in turn, gave the gun to Bonifay.

Bonifay enlisted two other friends, Cliff Barth and Eddie Fordham, to help him, and the trio went to the parts store just before midnight on Friday, January 24, 1991. Bonifay approached the night parts window and asked the clerk, who was Daniel Wells, for some parts. He could not go through with the plan, however, and the trio left. The following morning Archer harassed Bonifay about not killing the clerk. and the trio went back to the parts store that night. A different clerk, Wayne Coker, was working for Daniel Wells that night, however, and Bonifay and Barth each shot him once in the body from outside the store. They then crawled into the store through the parts window and broke open the cash boxes that Archer had told Bonifay about. During this time, the victim was lying on the floor begging for his life and talking

about his children. Bonifay told him to shut up and then shot him twice in the head. Bonifay and Barth then left the building and split the stolen cash with Fordham. The next day Archer refused to pay Bonifay because he killed the wrong person.

Bonifay later confessed at different times to Bland and Bland's girlfriend, Jennifer Tatum. Tatum informed the authorities, and Bonifay, Archer, Barth, and Fordham were arrested. Bonifay's trial followed, he was convicted, and the original advisory recommendation of death returned. Appeal, remand, and penalty phase re-trial was had, and the present appeal ensued.

During the penalty phase re-trial, the Defendant's expert psychologist, Dr. Larson, testified that the Defendant had a potential for rehabilitation. (TR-370-371). The court accepted Larson's testimony as establishing five statutory and six non-statutory mitigators. (R-104-110).

Throughout his opening and closing argument, the prosecutor made expansive biblical alliterations and references. (TR-411-413). He referred to the Defendant as a Judas figure (TR-435), and stated that the Defendant should be "exterminated." (TR-441). He insinuated that the Defendant should be weighed in the balances, rather than the facts. (TR-448, 450). He stated seven times that the Defendant's mitigating circumstances were "dust." (TR-431-432, 439, 447-449).

Prior to trial, the Defendant's counsel moved to keep out references to the victim's begging for life and calling for mercy on behalf of his wife and children, stating that such evidence

would be improperly considered as a "heinous, atrocious, and cruel" aggravator by the jury, and that the court was limited by this Court's prior ruling in the case. (TR-114-117). The court denied the motion, the prosecutor established the evidence several times through testimony and referred to it at least four times in closing argument. (TR-133, 417, 435, 442, 449). The prosecutor had previously established the "cold, calculated, and premeditated" aggravator throughout the evidential phase of the trial. (TR-throughout).

The State also called the victim's widow, Ms. Sandra Coker, to the stand, and she offered improper victim impact evidence, referring to the problems and hurts that she had suffered after the murder. ((TR-329-331, 339). The Defendant objected and moved for a curative instruction, and the court gave one. (TR-333). The Defendant later moved for a mistrial, but the court denied it. (TR-339). The prosecutor later argued to the jury that the victim's last, dying thoughts were for his wife and children, and the Defendant cursed the victim and his family and killed the victim. (TR-449).

The jury was instructed, deliberated, and returned an advisory recommendation of death. (R-40). The court took the jury's advisory sentence under advisement, reviewed the record, and found the following aggravating circumstances: a) the murder had been committed in the course of a robbery [§921.141(5)(d), Florida Statutes]; b) the murder was committed for pecuniary gain [§921.141(5)(f), Florida Statutes]; and c) the murder was cold,

calculated, and pre-meditated [§921.141(5)(i), Florida Statutes]. (R-104-106).

The court found as statutory mitigation factors: 1) no significant criminal history [§921.141(6)(a), Florida Statutes](given very little weight); 2) the commission of the crime was under extreme mental or emotional disturbance [§921.141(6)(b), Florida Statutes](apparently given no weight); 3) the Defendant acted under extreme duress or substantial domination of another person [§921.141(6)(e), Florida Statutes](apparently given no weight); 4) the Defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law [§921.141(6)(f), Florida Statutes](given little weight); and 5) the Defendant's age [§921.141(6)(g), Florida Statutes](given some weight). (R-106-110).

The court found as non-statutory mitigators: 1) "The defendant experienced a less than ideal background" (some weight); 2) cooperation with law enforcement (no specified weight assigned); 3) potential for rehabilitation (some weight); 4) Defendant's remorse (some weight); 5) disparate co-defendant sentences (no weight). (R-110-113).

Finding that the mitigating factors did not outweigh the aggravating factors, and without stating precisely how they did not, the court imposed the death penalty. (R-114).

SUMMARY OF THE ARGUMENT

Upon advisement of the jury, the court did not properly evaluate the Defendant's factors in mitigation. Because the court failed to consider the Defendant's organic brain damage, it consequently assigned an improper weight to the Defendant's potential for rehabilitation and to the statutory mitigating factor of the Defendant's inability to appreciate the criminality of his acts or to conform to the requirements of the law. The court did not specify how it assigned weight to the mitigators, and it then compared the statutory and non-statutory mitigators to the aggravators without detailing the results of either the weighing or the comparison. This was improper under the Supreme Court's decisional guidelines for establishing a record that can be reviewed, and the case must be remanded for re-computation, re-evaluation, and resentencing.

The prosecutor improperly swayed the jurors' emotions by invoking the retribution of an angry God in his closing arguments; he implied that the Defendant was a Judas Iscariot or a King Belshazzar; he urged the jury to weigh the Defendant rather than evaluate the facts; he vilified the Defendant by urging the jury to "exterminate" him; the prosecutor appealed to the jurors' sympathies by putting on improper victim impact evidence; the prosecutor referred numerous times to the victim's begging for life, and all of these factors, whether viewed singly or combined, deprived the Defendant of a fair trial, and require reversal for a new penalty phase trial.

The court erred in allowing the "begging" testimony; the court erred in not granting *sua sponte* a mistrial for the prosecutor's "extermination" recommendation; and the court erred in not granting a mistrial for the improper victim impact testimony. All of these errors, whether viewed singly or combined, and when viewed with the overall conduct of the trial, deprived the Defendant of a fair trial, and require reversal for a new penalty phase trial.

ARGUMENT

ISSUE ONE

The Court failed to make a specific finding in its Sentencing Order regarding the weight of the Defendant's expert uncontroverted evidence of a pathological medical condition, and that the organic brain damage did not substantially impair or affect the Defendant's ability to appreciate the criminality of his acts, or to conform his conduct to the requirements of the law.

In Larkins v. State, 20 FLW S228 (Fla. 1995), Opinion filed May 11, 1995, this Court recently reversed for resentencing a case wherein the trial court had not expressly evaluated each mitigating circumstance so that this Court could "make a meaningful proportionality review." Id., at 230. Citing Ferrell v. State, 653 So.2d 367 (Fla. 1995), and Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court found that the trial court's summary rejection of expert evidence of mitigating circumstances, including organic brain damage, caused reversal for reevaluation and resentencing.

In the sentencing order here, the trial court considered several psychological factors regarding Defendants' mental and emotional state cited by Defendant's expert, but failed to cite the organic brain damage and its possible impact as establishing the Defendant's capability to appreciate his criminal conduct or conform to the law.[1] This mitigator was established by Dr.

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[1] In Larkins, this Court found that the lower court did not specify whether and how the expert's testimony as to organic brain damage failed to establish any mitigating circumstances. Here, the Court considered several factors from Dr. Larson's testimony regarding the Defendant, such as verbal and applied or performance intelligent quotients, attention deficit syndrome, dysthymic disorder, personality disorder, negative self-image, childhood abuse, and history of depression and suicide, but did not discuss the organic damage as the possible cause of any of the above. As

Larson's uncontradicted testimony, and the court failed to acknowledge it, or to indicate the relative weight this particular mitigator should have merited individually with the organic damage's inclusion.

Neither did the court address the placement of this firmly established mitigator in the mitigation hierarchy, especially as affecting the overall weight of the other statutory and non-statutory mitigators, and certainly as how the mitigators would have compared with the aggravators. (R-108-110). Ironically in fact, the court specifically found that Larson's testimony **did not** establish the mitigator, and that even if it was established, it was "entitled to little or no weight." (R-110).[2]

In short, this Court cannot evaluate from the record whether the trial court considered the impact of the organic brain damage as a cause of, or whether, it may have substantially impaired or affected the Defendant's ability to appreciate the

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in Larkins, the lower court here did not discuss whether and how the organic brain damage testimony factored into the establishment of the statutory mitigator, or how that mitigator, if it was once established, may have counterbalanced any aggravators.

[2] As this Court said in Ferrell, "[t]he sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant . . . ." Id. at 371. "Once established [by the greater weight of reasonable evidence], the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process **must be detailed** in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review." Id. (emphasis supplied).

criminality of his acts, or to conform his conduct to the requirements of the law. The trial court further did not state its findings on this factor in its sentencing order as required by Larkins, Ferrell, Campbell, and other foundational precedent. This was error.

Therefore, in light of the lower court's sentencing omissions, and on the basis of the authorities cited above and other arguments and authorities contained in this brief, infra, at a minimum this case should be remanded for a re-evaluation and re-weighing of mitigating and aggravating circumstances.

ISSUE TWO

> The evidentiary record of enumerated mitigating circumstances and their weight in comparison to the aggravating circumstances does not support the Court's sentence of death, and the evidence does not otherwise support the findings and/or conclusions of this court.

Because the lower court failed to consider uncontradicted, probative, record evidence of a statutory mitigating circumstance and its component, as indicated in Issue One, above, it cannot be said as a matter of law that the court's sentence is supported by substantial, competent evidence which properly excluded all other evidence and weight of mitigating factors. It further cannot be established from the record whether and to what degree the mitigating circumstances were properly compared against the aggravating circumstances.

Overall, the trial court considered the existence of five statutory mitigating circumstances and six non-statutory mitigating factors, in comparison with three statutory aggravating

circumstances. As aggravating circumstances, the court found that evidence established: a) the murder had been committed in the course of a robbery [§921.141(5)(d), Florida Statutes]; b) the murder was committed for pecuniary gain [§921.141(5)(f), Florida Statutes]; and c) the murder was cold, calculated, and pre-meditated [§921.141(5)(i), Florida Statutes]. (R-104-106).

The court found the following statutory mitigation factors: 1) no significant criminal history [§921.141(6)(a), Florida Statutes](given very little weight); 2) the commission of the crime was under extreme mental or emotional disturbance [§921.141(6)(b), Florida Statutes](apparently given no weight); 3) the Defendant acted under extreme duress or substantial domination of another person [§921.141(6)(e), Florida Statutes](apparently given no weight); 4) the Defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law [§921.141(6)(f), Florida Statutes](given little weight); and 5) the Defendant's age [§921.141(6)(g), Florida Statutes](given some weight). (R-106-110).

Non-statutory mitigators were: 1) "The defendant experienced a less than ideal background" (some weight); 2) cooperation with law enforcement (no specified weight assigned); 3) potential for rehabilitation (some weight); 4) Defendant's remorse (some weight); 5) disparate co-defendant sentences (no weight). (R-110-113). Finding that the mitigating factors did not outweigh the aggravating factors, and without stating precisely how they did not, the court imposed the death penalty. (R-114).

In Santos v. State, 591 So.2d 160 (Fla. 1993), this Court considered whether the trial court improperly denied evidence that established statutory and non-statutory mitigating factors other than those that appeared in the court's sentencing order. The Court noted evidence of two statutory mitigators, which were considered but rejected by the lower court, and one non-statutory mitigator not considered.[3] Finding that mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence, this Court recited its three-part test for weighing mitigating circumstances, stating

> [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

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[3] The Santos Court found two statutory mitigators not considered by the trial court, i.e., "influence of extreme mental or emotional disturbance," and "substantial impairment in [Defendant's] capacity to conform his conduct to the requirements of the law." §921.141(6)(b),(f), Fla.Stat. (1987). Id., at 164. The Court also found evidence suggesting that Santos lived in an **"abusive environment as a child,"** a valid nonstatutory mitigating factor. Id., citing Carter v. State, 560 So.2d 1166 (Fla. 1990); and Brown v. State, 526 So.2d 903 (Fla. 1988), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988)(emphasis supplied). Here, although the record clearly established the Defendant's "abusive environment as a child," the court apparently minimized this factor by calling it "a less than ideal family background," and giving it "some weight." (Sentencing Order, R-110).

Santos, at 164. (internal citations omitted).

The Santos Court then discussed the United States Supreme Courts' ability and willingness to "[delve] deeply into the record" in capital cases to examine whether unconsidered mitigating factors exist, whether they were properly weighed by the trial court, and whether mitigating evidence has been ignored. Id., at 164, citing Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). Finding that the trial court did not properly evaluate and weigh the uncontroverted evidence of statutory and non-statutory mitigators, the Santos Court reversed with instructions.

Here, the lower court evaluated the evidence of statutory and non-statutory mitigators, but as recited under Issue One, above, for instance, the court did not fully evaluate each mitigation factor sufficiently enough to consider the weight of the mitigator. Further, the trial court did not evaluate the overall weight of each of the mitigating circumstances and their combined weight in counterpoise against the aggravating circumstances. Given the court's deficiencies in evaluating, weighing, and comparing the mitigating versus aggravating circumstances, the case must be remanded for a sentencing re-hearing.

ISSUE THREE

The evidence does not support the Court's conclusion that the Defendant is not capable of rehabilitation.

Dr. Larson testified that even though the Defendant was compulsive, he had some good intellectual abilities, that "he tries to improve himself" and that he had a lot of characteristics indicating a potential for rehabilitation. (TR-370-371). The

record indicates that Dr. Larson perhaps did not elaborate as fully as he otherwise would have as to the rehabilitation issue, because either the question was not well put to the witness, or he misunderstood the question. (TR-370). Defendant's counsel asked the witness whether the Defendant "was worthy of rehabilitation," rather than asking the witness to fully explain the Defendant's psychological potential for rehabilitation, and Dr. Larson initially stated that a consideration [of "worthiness"] was within the province of the jury. (TR-370).

Thereafter, in somewhat truncated fashion, the Doctor gave his evaluation of the Defendant's abilities, but he did not, for instance, discuss the Defendant's organic brain damage and its limitation or impact on rehabilitation (or whether and how it may have affected his judgment on the evening of the murders, as well), or the necessity for continuing psychological treatment and its prospect for success, or what the overall rehabilitative potential of the Defendant actually was. His answer cannot therefore be considered comprehensive on the issue, and should have been amplified by question from either counsel or the court. As a result, it cannot be said from the evidence that the Defendant does not have a potential for rehabilitation, and the court's failure to assign more than "some weight" to this mitigator was error.[4]

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[4] As argued under Defendant's Issue Four, infra, the trial prosecutor urged that the God of the Old-Testament should be appeased by putting the Defendant to death. God's grand scheme to rehabilitate or redeem the world would have required other actors, however, if Moses, David, and the Apostle Paul, for instance, had been put to death for the murders they committed.

ISSUE FOUR

The prosecutor's repeated biblical alliterations, references, analogies, comparisons, invocation of Godly judgments, and request for the jury to "exterminate" the Defendant inflamed the emotions and prejudiced the jurors' sensibilities by urging them to abdicate their own responsibility to weigh the evidence under the law, and to instead, weigh the Defendant.

This Court stated in Paramore v. State, 229 So.2d 855 (Fla. 1969), *vacated in part on other grounds*, 408 U.S. 935, 92 S. Ct. 2857, 33 L. Ed. 2d 751 (1972), "[c]ounsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men **as may be appropriate to the case.** This is a matter within the discretion of the trial judge . . . ." Id., at 860-861. (Citations omitted.) This Court also stated in Collins v. State, 180 So.2d 340 (Fla. 1965), "[t]he rule is clear against inflammatory and abusive argument - the problem is applying the rule to the particular facts at hand. The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear. . ." Id., at 342.

In this case, the prosecutor dedicated approximately two pages of the transcribed record to establish the biblical "weighed in the balances and found wanting" alliteration in the first few minutes of his closing argument. (TR-411-413). After insinuating that the Defendant should be compared to Belshazzar (worthy of immediate annihilation after being weighed?), he thereafter recommended that the jury put the Defendant into the scales and

weigh **him**, rather than weigh the mitigating and aggravating circumstances as the jury instruction requires. (TR-448, 450). He also somewhat subliminally referred to the Defendant as a Judas Iscariot figure, being bought for pieces of silver, and later, matter-of-factly stated that the Defendant should be exterminated. (TR-435, 441). Throughout his closing argument, the prosecutor also made approximately seven references to the Defendant's mitigating circumstances being no more than dust in the scales. (TR-431, 432, 439, 447, 448, 449).

The prosecutor's combined argument urged the jury to put the Defendant into God's scales, to treat him like a foreign despot about to be killed, to think of him like a Judas figure who had taken ounces of silver in exchange for the blood and crucifixion of an innocent man begging for his life, and as one who was worthy of extermination like a sub-human denizen of the night. These combined comments are not suitable to the facts of this case and crossed over the line from florid and into inflammatory. The prosecutor's arguments did not seek to invoke the jurors' moral authority from God, but rather inflamed the jurors to imitate God in His most retributive old-testament visitation.

Using biblical drama, the prosecutor posited the juror's intelligence and sense of fairness against the vengeful wrath of an angry God - what juror would risk standing before Him without condemning the Defendant? Would they dare have the blood of an

innocent man on them?[5] Even if the jurors did not perceive the prosecutor's divine admonitions for revenge, his grandiloquent prose encouraged them to lay the Defendant's sacrificial death at God's feet, and thereby usurped their personal responsibility to decide the issues under the law.

In short, the improper comments here required no contemporaneous objection, because they were unnecessary, inappropriate, and fundamentally denied the Defendant the right to a fair and impartial sentencing decision. Their combined inflammatory and abusive effect, taken with the other manifest error at the proceeding, requires a reversal and a new sentencing trial.

ISSUE FIVE

The Court erred in not declaring a mistrial when the prosecutor urged the jury to "exterminate" the Defendant.

Related to Issue Four, above, is whether the court erred in not declaring a mistrial because of the prosecutor's statement exhorting the jury to "exterminate" the Defendant. This failure is "plain error." In his dissenting opinion in Darden v. State, 329 So.2d 287 (Fla. 1976), Justice Sundberg stated

> "[i]t is the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty

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[5] The implication in the prosecutor's remarks is a slight variation on the venerated improper prosecutorial argument that if the defendant is set free in the community instead of punished now, he will commit more serious and heinous crimes later. Here, the prosecutor winds the jury up with the implication that unless the defendant is put to death, God will be set free on the jury later.

> is not to obtain convictions but seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. . . ."

Id., at 295 (Sundberg, J., dissenting opinion).

In Darden, a pre-Furman bifurcation decision (Furman v. Georgia, 488 U.S. 238, 92 S.Ct. 2726 (1972)), in a single episode the Defendant committed a heinous, atrocious, and cruel murder, attempted murder, and sexual assault while on furlough status from the Department of Corrections. At trial, the prosecutor had vilified the Defendant by repeatedly calling him an animal and suggesting that someone should shoot him or that the Defendant should have shot himself. Id. at 289, 290. Considering the prosecutorial misconduct issues on appeal, the Darden Court found that since defense counsel had also made "animal" references regarding the Defendant, that it would therefore have been "inappropriate to reverse the State's conviction because the prosecutor was making the same alleged errors as defense counsel." Id., at 290. Without reversing the case but condemning the remarks, the Court stated that "although the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility, in this particular case they amount to harmless error when the totality of the record is considered [overwhelming evidence of guilt] in these uniquely vicious crimes." Id.

The instant case is readily distinguishable from the atrocious murder Darden committed and the Court's affirmation, in

that, procedurally, the guilt and penalty phases were not combined, and an "overwhelming evidence of guilt" in post-Furman cases does not necessarily mean that a death sentence is appropriate or forthcoming. Further, this Court has previously ruled as a matter of law that the instant murder was not "heinous, atrocious, or cruel," as in Darden, but only qualified to be considered as "cold, cruel, and pre-meditated." Bonifay, supra. Therefore, the State's "exterminate" rather than rehabilitate reference is all the more prejudicially important in the penalty phase after the Defendant has been convicted, because the State has only one unfulfilled goal left: the Defendant's death.

Also here, the State's attempted dehumanization of the Defendant is not unlike the prosecutor's characterization of the defendant in Stewart v. State, 51 So.2d 494 (Fla. 1951). The Stewart Court reversed the trial verdict because the Court found the prosecutor's remarks [gratuitously calling the Defendant a "fiend" and "maniac", and urging the jury to stop him now], dislocated

> "an environment reflecting the constitutional guarantees which constitute fair trial. Under our system of jurisprudence, prosecuting officers are clothed with quasi-judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. **The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.**

Id., at 495. (emphasis supplied).

In the instant case, a call to the jury to "exterminate" the Defendant was not florid argument. As in Darden and Stewart, this evocation was a demonstration of "prejudicial emotions"

designed to inflame the jury's passions against the Defendant. It was also a call for punishment by death by displaying a "vindictive" and "punitive" vilification of the Defendant. It was grounds for a mistrial, and it was the trial court's error not to grant it.

ISSUE SIX

> The Court erred in allowing the State to introduce evidence of the victim's begging for his life and referring to his wife and children, since this evidence was used to inflame the jury's emotions, appeal to their sympathy, and to tacitly urge them to find a "heinous, atrocious, and cruel" aggravator on facts which, absent the prejudicial references, were only supportive of the "cold, calculated and premeditated" aggravator.

This Court forbade the consideration at re-trial of the heinous, atrocious, and cruel aggravator by ruling as a matter of law that it was inapplicable under the facts. (Bonifay, supra, at 1313. Counsel for the Defendant specifically moved to keep evidence of it out in the re-trial. (TR-114-117). In opening, throughout the evidentiary phase of trial, and in final argument, however, the State repeatedly emphasized that the victim begged for his life for the sake of his wife and children. In closing argument, the State referred to the victim's begging at least four times, and finally urged the jury to "exterminate" the Defendant rather than rehabilitate him. (TR-133, 417, 435, 442, 449; 441).

The introduction of this evidence was not required for the State to establish the "heightened premeditation" aggravator. All that is required to establish heightened premeditation are facts that prove the murder was committed in a cold fashion, i.e., that it was the product of calm and cool reflection; that the

defendant had a careful plan or prearranged design, and that the Defendant exhibited a higher degree of premeditation than what is normally required in a premeditated murder. (TR-470)(from Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings - Capital Cases, F.S. 921.141, pg. 74-80).

Here, the evidence irrefutably established heightened premeditation without the inclusion of the victim's begging and purported references to his family prior to death.[6] For instance, the State had established the solicitation and conspiracy between Archer and the Defendant; the State had proved that the Defendant planned and organized the robbery and murder on promises and information furnished by Archer; the State had proved the Defendant went to the store to commit the murder; and the State proved that the Defendant did in fact, fire the murderous shots into the victim. (TR-throughout).

Superfluous to prove this aggravator, and inadequate as a matter of law to prove the heinous, atrocious, and cruel, aggravator, the State nevertheless brought this prejudicial evidence forward to inflame the jury's indignation and wrath against the Defendant so as to return an advisory sentence of

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[6] Following the sentencing hearing, Defendant's counsel proffered to the Court a deposition of Mr. Jerry Walker, an individual believed to have been on the telephone with the victim at the time the Defendants entered the store. Therein, Mr. Walker reports that he did not hear gunshots, he heard comments such as "let's get the hell out of here," but he did report hearing the victim begging for his life, or the victim's comments about the victim's wife or children. (R-49-50; Deposition of Jerry Walker, May 16, 1991, pg. 6-9, 11-12, 18). The telephone receiver was found next to the victim's mouth.

death. This was improper, and as anticipated by Defendant's counsel, it proved to be quite effective for the State. The court's denial of Defendant's motion to keep it out was error, and the cause should be reversed for a penalty phase re-trial on this ground alone.

ISSUE SEVEN

The State presented improper victim impact evidence and argument to the jury, the Defendant moved for a mistrial, and the Court erred in not granting it.

The State called as a witness Sandra Faye Coker, the decedent's widow. Ms. Coker responded to the State's questions by stating that her husband's death had caused "severe damage to my health." (TR-329). Ms. Coker continued, stating "I've nearly hemorrhaged to death, back in January. I've had to be put on high blood pressure pills, my thyroid is all messed up because of stress and just worry from all of this, how he was murdered." (TR-329). Counsel for Defendant objected at this point, arguing that victim impact evidence was limited to the "victim's uniqueness as an individual to the community [and not to the widow of the victim]." (TR-330) The prosecutor improperly argued that the testimony was relevant victim impact evidence to the family because every homicide is going to impact "certain members of the community, mainly their family." (TR-330). He further stated "obviously, we're talking about impact on the victim, that's why they call it victim impact." (TR-331). Responding to Defendant's objections, the Court attempted to fashion a curative instruction by stating to the jury "[m]embers of the jury, I hereby instruct you that you may

consider the previous testimony of Mrs. Coker only so far as it demonstrates the victim's, Mr. Coker's uniqueness as an individual human being and the resultant loss to the community's members by Mr. Coker's death. Thank you." (TR-333).

Following this theme, Ms. Coker continued to answer in a non-responsive manner on cross-examination by stating that, "I don't know if I'm allowed to say this or not . . . but when I lost my husband, it hurt so much that no matter what may come or may not come, nothing is going to help that area because you can't replace a human live, you know." (TR-335). Defendant's counsel later moved for mistrial on his earlier objection, which was denied. (TR-339).

In addition to the evidence presented through Ms. Coker, the prosecutor sought to elicit sympathy for the widow and her family by inflaming the jury's emotions against the Defendant in closing argument when he stated "[h]is [victim's] last thoughts, his last dying thoughts were for his wife and children." "And Bonifay cursed him and cursed **them** and then blasted him out into eternity, a man willing to kill for whatever was in that suitcase." (TR-449)(emphasis supplied).

It is well settled that closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." King v. State, 623 So.2d 486, 488 (Fla. 1993), quoting Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).[7] In

[7] *See*, also Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993) (murder conviction reversed for retrial due to cumulative effect of erroneous evidentiary rulings and improper prosecutorial

Bertolotti, the prosecutor made several improper arguments, one of which was a variation on the proscribed Golden Rule argument, inviting the jury to imagine the victim's final pain, terror and defenselessness.[8] The Bertolotti Court noted that the prohibition against inviting the jury to put themselves in the place of the dying victim has long been the law of Florida, and condemned the prosecutor's remarks. Id., at 133, *citing* Barnes v. State, 58 So.2d 157 (Fla.1951); Jennings v. State, 453 So.2d 1109 (Fla.1984), vacated on other grounds, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985). Finding that prosecutorial conduct alone in that case was not sufficient to reverse in light of the aggravation factors (defendant's prior convictions of three violent felonies; the murder occurred during commission of a robbery; and the murder was especially heinous, atrocious, and cruel - no mitigation factors), the Court nevertheless considered the prosecutor's conduct to be worthy of professional sanction.[9] Id.

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comment which deprived defendant of a fair trial); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993) (conviction reversed due to cumulative effect of closing argument "peppered with improper argument").

[8] The Bertolotti prosecutor argued, "[a]nd if that's not heinous, atrocious and cruel, can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life." Bertolotti, at 133, FN2.

[9] The Court stated that "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Id.

In the instant case, the prosecutor attempted to meld his previously elicited victim impact comments, which were in actuality, an invitation to the jury to sympathize with the **wife** of the victim and not the victim, with the simultaneous invitation to stand in the shoes of the dying victim and imagine that his last thoughts were of his wife and family. Since the evidence had conclusively proved that the murder had been carefully planned in advance, the argument was unnecessary to prove "heightened premeditation" or any other aggravator. Instead, the State used the argument to inflame the jury's passions against the Defendant to ensure a death recommendation.

In Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994), the First District Court of Appeal considered whether a prosecutor's closing argument contained improper, speculative references to what the victim's last words might have been. The Court found that the prosecutor's conjecture concerning the victim's dying words were harmful error within the contemplation of King and Bertolotti, supra. Reversing the verdict, the Court found that the prosecutor's activities and comments "were designed to evoke an emotional response to the crimes or to the defendant, and fall outside the realm of proper argument," and that the cumulative effect of the errors concerning the prosecutor's improper opening and closing arguments "were harmful within the contemplation of

State v. DiGuilio,[10] 491 So.2d 1129, 1138-1139 (Fla. 1986)." Id. at 1135.

In the instant case, we cannot know for certain what the victim's last words were, and certainly not his thoughts, and the evidence is furthermore inconclusive on this point.[11] However, there is clearly a reasonable possibility that the error of admitting this prejudicial evidence affected the jury's recommendation of death. Combined with the other prejudicial error that occurred here, it is a virtual certainty that the evidence prejudiced the jury. Moreover, it is the State's burden to prove that it did not. DiGuilio, supra.

In short, the prosecutor's speculation on the victim's final thoughts and his repeated reference to the victim's begging for himself on behalf of his wife and family, was inflammatory and prejudicial, and was an improper attempt to arouse sympathy for the victim and his family. Combined with his exhortation to "exterminate" the Defendant, indicated above, this was fundamental error. Under the foregoing authorities, the error was not cured by the court's instruction, was not harmless, and requires reversal.

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[10] "Improper prosecutorial comment is subject to a harmless error analysis, and will give rise to reversal of a conviction only if the comment is so prejudicial that it vitiates the entire trial. King v. State, 623 So.2d 486 (Fla. 1993); Watts v. State, 593 So.2d 198 (Fla. 1992), cert. denied, __ U.S. __, 112 S.Ct. 3006, 120 L.Ed.2d 881. "The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state." State v. DiGuilio, 491 So.2d 1129, 1138-1139 (Fla. 1986).

[11] Please, *see*, footnote 6, supra.

ISSUE EIGHT

The cumulative effect of the Court's combined errors was prejudicial and fundamental error, requiring review.

The cumulative effect of the errors in the re-trial concerning the prosecutor's improper opening and closing arguments; concerning his appeal to the jury's passions and emotions both for the victim and his family and against the Defendant; concerning the admission of improper victim impact evidence; concerning the court's failure to grant a mistrial for the "extermination" speech; and concerning the tacit doubling of aggravators by admitting evidence of the victim's begging for his life for the sake of his wife and children, were harmful within the contemplation of State v. DiGuilio, supra, and require a reversal and penalty phase re-trial.

CONCLUSION

Because the court failed to evaluate the Defendant's organic brain damage, it assigned an improper weight to the Defendant's potential for rehabilitation and his inability to appreciate the criminality of his acts or to conform to the requirements of the law. The court did not specify how it assigned weight to the mitigators, and it compared the statutory and non-statutory mitigators to the aggravators without detailing the results of either the weighing or the comparison. This was improper under the Court's guidelines for establishing a reviewable record, and the case must therefore be remanded for resentencing.

The prosecutor swayed the jurors' emotions by improper and prolonged references to God; he improperly compared the Defendant to undesirable biblical figures and asked the jury to "exterminate" him; he urged the jury to weigh the Defendant rather than evaluate the facts; he appealed to the jurors' sympathies by putting on improper victim impact evidence; and he referred numerous times to the victim's begging for life, all of which constitute prejudicial and reversible error.

The court erred in allowing the victim's "begging" testimony; in not granting *sua sponte* a mistrial for the prosecutor's "extermination" recommendation; and in not granting a mistrial for the improper victim impact testimony. All of these errors, whether viewed singly or combined, and when viewed with the overall conduct of the trial, deprived the Defendant of a fair trial, and require reversal for a new penalty phase trial.

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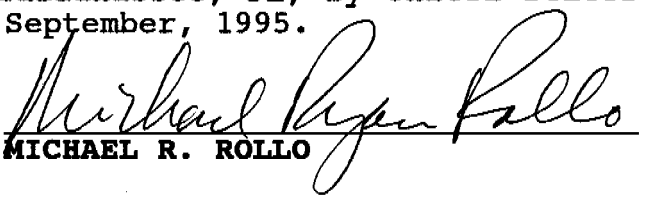
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard Martel, Assistant Attorney General of the State of Florida, the Capitol, Tallahassee, FL, by United States Mail, on this the ~~Fourth~~ FIFTH day of September, 1995.



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