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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,133

ALBERT COOPER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." All other citations are as in the initial brief. Specific points raised in the initial brief but not addressed in the reply brief are not waived.

ARGUMENT

I

THE TRIAL COURT ERRED IN ADMITTING THE DEFENDANT'S CONFESSION IN EVIDENCE, WHERE THE DEFENDANT HAD FAILED TO VALIDLY WAIVE HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, BECAUSE OF THE FAILURE OF THE POLICE TO ADEQUATELY WARN AND APPRISE THE DEFENDANT OF THOSE RIGHTS.

In the State's response to the defendant's claim regarding the inadequacy of the *Miranda* rights read to the defendant, the State mischaracterizes the defendant's argument as one which hinges on the failure of the police to "track" the language in **Miranda v. Arizona**, 384 U. S. 436, 86 S. Ct. 1602 (1966). (Answer Br. p. 30). In fact, the defendant does not claim that the constitutional rights read to him were inadequate because they did not precisely conform with the language utilized in *Miranda*. Instead, they were constitutionally deficient because they **completely** failed to inform the defendant that he had the right to consult with an attorney prior to the onset of interrogation by the police.

Both the United States Supreme Court and this Court have recognized that the right to consult with an attorney prior to the onset of questioning is an essential component of the right to counsel and the privilege against self incrimination embodied in the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution. In **Miranda v. Arizona**, the United States Supreme Court said:

> "...the need for counsel to protect the Fifth Amendment privilege comprehends **not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning** if the defendant so desires."

86 S. Ct. at 1625-1626. Thus, to assure that a defendant clearly comprehends his rights under the Fifth Amendment, the Court mandated that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer prior to questioning and to have the lawyer with him during questioning. 86 S. Ct. at 1626.

This Court has required no less for satisfaction of the requirements of Article I, Section 9. In both **Traylor v. State**, 596 So. 2d 957 (Fla. 1992) and **Thompson v. State**, 595 So. 2d 16 (Fla. 1992), this Court has held that prior to custodial interrogation, a suspect must be told that he has the right to consult with a lawyer before being interrogated and to have the lawyer present during interrogation. **Traylor**, 596 So. 2d at 966, **Thompson**, 595 So. 2d at 17-18. Deviation from these requirements would be deemed a violation of the Florida Constitution and would result in suppression of statements obtained as a result of the unlawful questioning process.

As the State correctly points out in its brief, no "talismanic incantation" is required to satisfy the requirements of the Constitution. (Answer Br. P. 32). However, in

Miranda v. Arizona, **supra**, the Court stressed that the above-quoted rights must be **clearly** related to the suspect:

> ..."the warnings required and the waiver necessary in accordance with our opinion today are, **in the absence of a fully effective equivalent**, prerequisites to the admissibility of any statement made by a defendant."

(Court's emphasis). 86 S. Ct. at 1629. As such, whether utilizing the language employed in *Miranda* or language that is its functional equivalent, the police must, with clarity, inform the suspect of his right to a lawyer for consultation prior to questioning **and** to the presence of a lawyer during questioning.

In this case, the Metro-Dade police merely informed the defendant that ..."If you want a lawyer to be present during questioning, at this time or any time hereafter, you are entitled to have a lawyer present." (T. 148-149, 172-173). This warning was plainly sufficient to notify the defendant that he had the right to the presence of a lawyer during **any** questioning session. As to the defendant's right to consult with a lawyer prior to questioning, the warning provided to the defendant was wholly inadequate.

In the two opinions from the United States Supreme Court upon which the State heavily relies, **California v. Prysock**, 453 U. S. 355, 101 S. Ct. 2806 (1981) and **Duckworth v. Egan**, 492 U. S. 198, 109 S. Ct. 2875 (1989), the police clearly informed the defendants involved of their right to pre-interrogation consultation with a lawyer and to the presence of a lawyer during questioning. In **Prysock**, the police told the defendant ..."**You have the right to talk to a lawyer before you are questioned**, have him present with you while you are being questioned, and all during the questioning. Do you understand this?"

101 S. Ct. at 2808. In **Duckworth**, the police informed the defendant that ..."**You have a right to talk to a lawyer for advice before we ask you any questions**, and to have him with you during questioning." 109 S. Ct. at 2877. While the language utilized in the cases did not "track" the precise language used by the Supreme Court in **Miranda**, the Court noted that the police were successful in clearly communicating to the defendants the essential requirements of **Miranda**, that the defendant could consult with a lawyer before being subjected to questioning and could have a lawyer present during questioning to assist him.

By contrast, the defendant was not told anything about his right to talk, consult with or seek the advice of a lawyer prior to questioning by the Metro-Dade Police. Instead, the police merely informed the defendant that he had the right to the presence of a lawyer while being questioned, at that time or during any future time. Plainly, the Metro-Dade officers failed to clearly apprise the defendant of his essential right to consult with a lawyer prior to questioning.

The State, however, maintains that "the warning given must be presumed to have conveyed to him [the defendant] the right to consult with an attorney." (Answer Br. p. 33). The State's contention, that a knowing waiver of an essential constitutional right must be presumed, runs contrary to years of established precedent from the United States Supreme Court. In **Barker v. Wingo**, 407 U. S. 526, 92 S. Ct. 2182 (1972), the Court stated:

> "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court

> has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023 (1938). Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights."

(Citations omitted). 92 S. Ct. at 2189. If there is a presumption to be applied, given the failure to clearly apprise the defendant of his right to consult with an attorney prior to interrogation, it is that the defendant should be presumed to have not adequately waived his rights to counsel under the Fifth Amendment and Article I, Section 9 of the Florida Constitution.[1]

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[1] The State correctly notes that the defendant has filed a federal habeas corpus petition raising the identical issue raised in Argument I of the instant appeal, in a challenge of his conviction in the Rudy's case. Cooper v. Singletary, No. 96-2422- Civ-King (S. D. Fla.). No ruling has been entered on the petition as of the date of the filing of this brief. The State also correctly points out that the co-defendant's claim on this issue has been denied by a federal magistrate. (Answer Br. p. 30). In his ruling, although the Magistrate found that the Metro-Dade warning form was adequate, the magistrate had serious "concerns" about its adequacy, that the claim presented by the co-defendant was a "close question" and that the Metro-Dade warning form should be revised "to more clearly warn of the right to consult with counsel before questioning" so as to "insure that all persons making statements are fully aware of their rights." Report and Recommendation of Magistrate at p. 6, 7, Johnson v. Singletary, No. 95-2646-Civ-Ungaro-Benages (S. D. Fla. June 25, 1996).

Obviously, the defendant takes issue with the conclusion reached by the Magistrate regarding the warnings necessary for an adequate waiver of Fifth Amendment rights. However, even if the Magistrate's interpretation of the requirements of the Fifth Amendment is correct, this Court may still find, under the provisions of Article I, Section 9 of the Florida Constitution, that the warnings given to the defendant were constitutionally inadequate. See, **Traylor v. State**, **supra**; **Skyles v. State**, 670 So. 2d 1084 (Fla. 4th DCA 1996); **Kipp v. State**, 668 So. 2d 214 (Fla. 2d DCA 1996).

On this record, there is simply an insufficient basis to conclude that the defendant had knowingly, intelligently and voluntarily waived his constitutional right to counsel in connection with the custodial interrogation process employed by the Metro-Dade Police. It was therefore error for the trial court to have denied the defendant's motion to suppress statements, grounded upon the defendant's invalid waiver of his constitutional rights under the United States and Florida Constitutions. Under the circumstances of this case, the admission of the defendant's statements in evidence constituted reversible error.

II

THE TRIAL COURT ERRED IN INFORMING THE JURY THAT THE DEFENDANT HAD COME TO THE ATTENTION OF THE POLICE ON AN "UNRELATED MATTER" AND IN PERMITTING THE STATE TO ELICIT TESTIMONY THAT THE DEFENDANT WAS QUESTIONED BY THE POLICE ON AN "UNRELATED MATTER", WHERE THE INSTRUCTION AND EVIDENCE WERE IRRELEVANT TO ANY MATERIAL FACT IN ISSUE AND SERVED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL, BY DEMONSTRATING ONLY THAT THE DEFENDANT POSSESSED A PROPENSITY TO COMMIT CRIME.

In its response, the State contends that a court instruction and the testimony of a police officer to the effect that the defendant had come to the attention of the police and had to be questioned on an unrelated matter, did not give rise to the inference that the defendant was involved in other criminal activity. (Answer Br. p. 36-40). Even if it did, the State argues, the evidence was relevant to establish the voluntariness of the defendant's statement given in this case. (Answer Br. p. 40-42). The State's arguments are both

factually and legally untenable.

As stated in the defendant's initial brief, to get the proper flavor of the evidentiary inference laid for the jury by the State, the Court must first consider the testimony of Detective Pascual Diaz, the lead detective in this case. Detective Diaz testified that it is the practice of the **homicide unit** to work in teams, with team detectives assigned different tasks by the lead detective. (T. 1495, 1496, 1499-1503). Detective Saladrigas testified that the "team" approach was used in the investigation of the "other matter." (T. 1525). Detective Saladrigas stated that after talking with several witnesses regarding the other matter, he found it necessary to talk to the defendant. (T. 1525). As a result, he also found it necessary to ask that team members locate the defendant and bring him to the police station for questioning.

On these facts, the State's claim that the record does not support the notion that the jury was informed or led to believe that the defendant had adverse contact with law enforcement defies comprehension. (Answer Br. p. 39). The police are in the business of investigating criminal activity. After talking with several witnesses, a police officer decided that it was necessary to question the defendant regarding another matter. Officers were sent out to pick up the defendant and bring him to the station for questioning. The only rational conclusion that the jury could draw from these facts was that the defendant was the subject of another **criminal** investigation. And, given that the "team" approach is utilized in the investigation of homicides and that the defendant was brought to the police station by members of Detective Saladrigas' team, they may well have concluded that the defendant was the subject of a homicide investigation.

The State next contends that the evidence, even if probative of collateral criminal conduct, was admissible because it was relevant to prove the voluntariness of the defendant's statement. In assuming that the superficial relevance of the evidence ends the matter, the State ignores the provisions of Sections 90.401 and 90.403, Florida Statutes, and as a result, the defendant's central contention on this point.[2]

Section 90.401 provides that relevant evidence is evidence that tends to prove or disprove a **material** fact. Section 90.403 provides that relevant evidence is inadmissible if its probative value is outweighed by its prejudicial effect. The defendant had informed the court on several occasions that he would make no issue of the voluntariness of the defendant's statement, that the defendant would not contend that his statement was coerced and that he would make no issue of the time that he was in custody before he gave a statement to the police. (T. 633, 1184-1185, 1522-1523). Notwithstanding these pronouncements, the State was permitted to erect a "straw man", (its desire to prove the voluntariness of the defendant's statement), and then knock it down through the use of prejudicial evidence demonstrating that the defendant was occupied during his down time at the police station by a questioning session with the police on another matter.

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[2] The State's brief is completely silent on the impact of Section 90.403 on the admissibility of the evidence in question. Instead, the State relies on **Henry v. State**, 649 So. 2d 1361 (Fla. 1994), **Hunter v. State**, 660 So. 2d 244 (Fla. 1995) and **Griffin v. State**, 639 So. 2d 966 (Fla. 1994). In each case, the defendant committed multiple offenses and some aspect of the first offense was highly relevant to establish an essential element of the second offense. The offenses were deemed to be intertwined. In the present case, the offenses involved were not inseparable. The evidence regarding the questioning of the defendant on the other matter had very little if any relevance to any issue in dispute in the instant case. Instead, the prejudicial value of the evidence was the motivating factor for its introduction by the State.

The decisions in **Roberts v. State**, 662 So. 2d 1308 (Fla. 4th DCA 1995) and **Thomas v. State**, 599 So. 2d 162 (Fla. 1st DCA 1992), stand for the proposition that where there is no genuine dispute regarding a fact in issue, introduction of collateral criminal evidence to prove a material fact will necessarily have its probative value outweighed by the prejudicial effect of the evidence. Given that the defendant affirmatively took the position with the court that there was no dispute as to the voluntariness of his statement to the police, any limited probative value afforded by the description of his activities at the police station was far outweighed by the prejudicial effect of that evidence.

As such it was error for the trial court to have informed the jury and to have permitted the introduction of highly prejudicial evidence of police questioning of the defendant on a collateral matter. The defendant's convictions must be reversed for a new trial.

III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR SEVERANCE AND MISTRIAL, BASED UPON THE STATE'S INTRODUCTION OF REBUTTAL TESTIMONY AGAINST THE CO-DEFENDANT THAT IMPERMISSIBLY IMPLICATED THE DEFENDANT.

The State responds that the trial court did not err in denying the defendant's motion for severance made when the State sought to elicit the testimony of Renee Carey on rebuttal, because Carey's testimony would have been admissible against the defendant in a separate trial and because the trial court retained the discretion to determine the order

of proof at trial. (Answer Br. 45-46). Under the circumstances of this case, the State's arguments are plainly erroneous.

It is important to note that in its brief, the State completely ignored an essential fact that is central to the defendant's claim. That is, that the defendant did not put on a defense case. As such, after the State had rested its case in chief and the defendant had rested his case without offering any evidence, the defendant was entitled to assume that the State would not be permitted to introduce any further evidence implicating him before the jury. This is so because **the purpose of rebuttal evidence is to explain or contradict material evidence offered by the defendant.** **Kirkland v. State**, 86 Fla. 64, 97 So. 502 (1923) and **Britton v. State**, 414 So. 2d 638 (Fla. 5th DCA 1982).

While as a general rule the trial court does retain discretion in determining the order of proof to be presented at trial, that discretion does not extend to permit the State to offer proof in rebuttal in a criminal case, where the defendant has not put on a case of his own. In both of the cases relied upon by the State in its brief, **Williamson v. State**, 92 Fla. 980, 111 So. 124 (1926) and **Britton v. State**, **supra**, the State was entitled to put on evidence in rebuttal that may not have strictly rebutted evidence elicited in the defense case, because the evidence would have been admissible in the State's case-in-chief. The key to both of those cases was that **there was a defense case to rebut**. In this case, by contrast, there was no defense case presented by the defendant. Once the defense had rested, the State's window of opportunity to present evidence against the defendant should have been closed.

Instead, the trial court determined that the State would be permitted to elicit the testimony of Renee Carey because it rebutted the testimony of the co-defendant, Tivan Johnson. When it became apparent that the attempt at "rebuttal" would be accomplished through the use of self-incriminating statements of the defendant, the defendant moved for a severance. (T. 2197). The trial court erroneously denied the defendant's motion.

The State contends that the trial court did not err because the defendant's statements to Renee Carey could have been used against the defendant if the defendant had been tried separately from the co-defendant.[3] To reach the State's conclusion, this Court must simply ignore what occurred at the trial below.

In this case, the State rested its case-in-chief without calling Renee Carey to testify. The defendant was then charged with the responsibility of making a fundamental decision in his defense. That decision concerned whether to testify in his own defense and whether to put on any witnesses as part of a defense case. In making that strategy decision, the defendant had to necessarily consider the evidence already elicited by the State and any potential rebuttal evidence the State may have been able to present by virtue of a defense presentation. In this case, the defendant elected not to testify and not to present any defense witnesses. As stated earlier, in making that decision, the defendant was entitled to assume that the State would be foreclosed from presenting any additional evidence implicating him on the charges. However, due to the trial court's ruling, that

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[3] In **Espinosa v. State**, 589 So. 2d 887 (Fla. 1991), the case chiefly relied upon by the State, this Court found that in determining whether a severance is appropriate, the Court should consider whether evidence used against a defendant in a joint trial would be admissible against him in a separate trial.

assumption was not realized. Only by virtue of his joint trial with the co-defendant was the State permitted to present the testimony of Renee Carey on "rebuttal". As a consequence, the defendant's decision not to testify was compromised, to the benefit of the State. Had the defendant been tried separately, when the defense rested its case, the State would have been forced to stick by its decision not to call Renee Carey in its case-in-chief. In a separate trial, the "rebuttal" testimony of Renee Carey would not have been admissible against the defendant.

As it turned out, the defendant's right to a fair trial was unnecessarily sacrificed in the name of rebuttal testimony that did not rebut anything. Initially, the State sought to call Carey to rebut Johnson's claim that he had not told Carey that he had robbed a pawn shop. (T. 2122, 2140-2143). At some later point, the State realized that Carey had never claimed that Johnson had told her about the pawn shop robbery. Instead, the State sought to have Carey testify that the defendant had told her about the robbery in the presence of Johnson, in the hopes of establishing Johnson's admission by silence. (T. 2193-2195, 2199). In fact, as Carey testified, Johnson was not present when the defendant allegedly made several incriminating statements about the robbery. (T. 2230-2235). The net result of the trial court's ruling permitting Carey's testimony was that the State was wrongfully permitted to introduce highly prejudicial evidence against the defendant in "rebuttal", even though the defendant had not put on a case and evidence did not rebut a thing.

Under the circumstances of this case, it was reversible error for the trial court to have denied the defendant's motions for severance and mistrial. A new trial for the

defendant is required.

V

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT THEY MUST RECOMMEND THE DEATH PENALTY SHOULD THEY FIND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES, IMPROPERLY INVADED THE PROVINCE OF THE JURY AND VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM CRUEL OR UNUSUAL PUNISHMENT, AS GUARANTEED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The State initially responds to the defendant's claim regarding the court's erroneous instructions on the death penalty, that the claim was not properly preserved. (Answer Br. p. 50-52). A review of the record plainly demonstrates that the defendant properly objected to the court's instruction, that the trial court understood the objection, disagreed with the defendant's position and overruled his objection. As such the defendant's claim was properly preserved.

When the trial judge informed the jury that they must return a recommendation of death if they found that the aggravating circumstances outweighed the mitigating circumstances, the defendant immediately interposed an objection. In addition to the exchange quoted in the State's brief, defense counsel stated:

> "Judge, I object to what you instructed the jury because I think what Mr. Von Zamft is telling them is it's their decision as triers of fact in the jury room to decide the aggravating and mitigating factors. **Your instruction is they must find a certain way. That is incorrect.** (T. 688).

The Court responded:

> "Mr. Masztal, I don't know how long you've been practicing law, if you can say you haven't tried many cases. **It's denied.....but don't tell me that I can't tell them what the law is. Don't tell me that's not the law because that is the law."** (T. 688).

It is apparent from the exchange quoted above that the defendant properly objected to the court's instructions and that the Court did not share the defendant's view of the law. It is also apparent from the tone of the Court's ruling and its immediate denial of the defendant's objection, that any further objection or argument from the defendant would have been futile. Under the circumstances, the defendant sufficiently preserved his objection for appellate review. **Simpson v. State**, 418 So. 2d 984 (Fla. 1982); (contemporaneous objection and a court ruling overruling the objection is sufficient to preserve an issue for appellate review); **Hunt v. State**, 613 So. 2d 893, 898 n. 4 (Fla. 1992), **Spurlock v. State**, 420 So. 2d 875, 876 (Fla. 1982), **Thomas v. State**, 419 So. 2d 634, 636 (Fla. 1982); (record properly preserved where the defense has objected, the court understood the claimed error and ruled adversely to the defendant; a lawyer is not required to pursue a futile and useless course when the judge has announced that it will be fruitless).

The State additionally responds by characterizing the defendant's claim as one in which the defendant claims entitlement to an instruction on the jury's right to exercise it pardon power. (Answer Br. p. 53). The State concludes that since the defendant is not entitled to such an instruction, the court's instructions to the jury in this case were not error. (Answer Br. 53-55). In fact, the defendant does not claim that he was

entitled to an instruction on the jury's pardon power. Instead, the defendant does claim that the mandatory language used by the Court in its instructions, had the effect of commanding the jury to reach a particular result and therefore deprived the defendant of his right to an individualized sentencing determination by the jury.

In support of its argument, the State chiefly relies on the decision in **Saffle v. Parks**, 494 U. S. 484, 110 S. Ct. 1257 (1990). In **Parks**, the judge instructed the jury that they "must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence." The defendant contended that the instruction was erroneous because the Eighth Amendment required that the jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after his mititgating evidence. The Court rejected the defendant's claim because the Eighth Amendment only places restrictions on State rules precluding consideration of mitigating factors. The Eighth Amendment does not dictate to the State **how** a jury may consider mitigating evidence. It was therefore within the power of the State of Oklahoma to legislate sympathy and prejudice out of the formula by which a sentencing jury makes its sentencing determination.

In this case, the defendant does not contend, as **Parks** did, that he is entitled to some extra-record consideration beyond the statutory scheme set up by the Florida Legislature. Instead, the defendant's claim rests upon the fact that the court's instructions departed from Florida's capital sentencing scheme in a manner that served to deprive the defendant of his rights under the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

Florida's capital sentencing system was erected to guide the sentencer's

discretion in accordance with the requirements of the United States and Florida Constitutions. Although the Legislature statutorily created several aggravating and mitigating circumstances for the jury to consider in an effort to channel and focus jury discretion, the Legislature and this Court have never enacted or approved specific standards for balancing those aggravating and mitigating circumstances. In other words, no specific result has been mandated based upon a particular combination of aggravating and mitigating circumstances. Under Florida's scheme, the jury is told that they should weigh the aggravating circumstances against the mitigating circumstances. The instructions are silent as to what recommendation the jury should make based upon the result of the weighing process. That decision has been left to the discretion of the jury. The Legislature's decision to do so is consistent with the constitutional requirement that the jury's sentencing decision be an **individualized** determination. See, **Zant v. Stephens**, 462 U. S. 862, 103 S. Ct. 2733 (1983), **Jackson v. Dugger**, 837 F. 2d 1469 (11th Cir. 1988), **Peek v. State**, 784 F. 2d 1479 (11th Cir. 1986).

In this case, the trial court deviated from Florida's capital sentencing scheme and deprived the defendant of his constitutional right to an individualized sentencing determination, when he twice told the jury that they **must** return a death penalty recommendation if they found that the aggravating circumstances outweighed the mitigating circumstances. (T. 687, 689-690). The trial court's instructions unconstitutionally infringed upon the jury's discretion and denied the defendant his right to a jury sentencing recommendation that was untainted by unconstitutional jury instructions. This Court must vacate the defendant's death sentence and remand for a new sentencing hearing.

VI

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD ESTABLISHED THAT THE HOMICIDE HAD BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

As to Issue VI, the defendant relies on his Initial Brief for the argument on the merits as to whether the trial court had erred in finding that the evidence had sufficiently established the statutory aggravating circumstance under Section 921.141 (5)(I), Florida Statutes, that the capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification (CCP). (Initial Br. 60-65).

In its Answer Brief, the State argues that if the trial court had erred in finding the existence of the CCP aggravator, the error was harmless. In support of its argument, the State relies on **Hill v. State**, 643 So. 2d 1071 (Fla. 1994) and **Young v. State**, 579 So. 2d 721 (Fla. 1991).

In **Hill**, the defendant was originally sentenced to death by the trial court after the court found that the five applicable aggravating circumstances justified the death penalty. On appeal, this Court found the CCP aggravator inapplicable. However, since four aggravating circumstances remained, and the defendant's mitigating evidence was scanty, he had established that he was 23 years old at the time of the crime, was helpful to his parents and had a good work history, this Court found that the trial court's erroneous application of the CCP aggravator was harmless error.

In **Young**, the trial court sentenced the defendant to death after finding three

aggravating circumstances, including the CCP factor, applicable. On appeal, this Court found that the CCP factor did not apply. In determining whether the trial court's error was harmless, this Court found that the trial court's notation in its sentencing order, that any one aggravating circumstance outweighed the defendant's mitigation evidence (the defendant was involved in church and demonstrated an ability to conform to prison rules), was controlling. This Court found that the erroneous application of the CCP factor was harmless error and that the two remaining aggravating circumstances, balanced against the limited mitigation evidence presented, supported the trial court's sentence of death.

By contrast, in the present case, the trial court found that three aggravating circumstances, including the CCP factor were applicable. (R. 488-493). The trial court also found that one statutory mitigating circumstance applied, that the defendant had no significant history of prior criminal activity. (R. 494).[4] The trial court also found that non-statutory mitigating circumstances had been proven by the defendant, in particular, the defendant's low intelligence level and abusive childhood. [5] Nevertheless, the Court

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[4] As noted in Issue VII of his Initial Brief, it is not clear whether the trial court found that the statutory mitigating circumstance under Section 921.141 (6)(g), Florida Statutes, regarding the defendant's age at the time of the crime, was applicable. (Initial Br. p. 66). In the body of his sentencing order, the trial court found that "although the defendant was eighteen years old at the time of the crime the other factors as to his maturity outweigh his age and thus the court gives little weight to this mitigating factor." (R. 499). Later, the trial court noted that he had found only one statutory mitigating circumstance. (R. 500).

[5] The record reflected that the defendant's scores of 77 and 82 on IQ tests place him among the lowest 15 percentile in the country. (T. 2691-2695, 2927, 2928, 2932-2938). There was also substantial evidence of extreme physical abuse of the defendant by his father during his childhood. The defendant was frequently beaten by

determined that in the balance of aggravating and mitigating circumstances before the Court, the aggravating circumstances overwhelmingly outweighed the mitigating circumstances. (R. 500, 501).

In Issues VI, VII and IX of his Initial Brief, the defendant has challenged the correctness of the trial court's ruling regarding the applicability of the CCP factor, the trial court's failure to ascribe full weight to the statutory mitigating circumstance regarding the defendant's age at the time of the crime and the trial court's complete failure to address the defendant's drug problem in his sentencing order, respectively. Should the defendant prevail on these issues, the balance of aggravating and mitigating circumstances would be substantially altered. With two remaining aggravating circumstances to be balanced against two statutory mitigating circumstances, non-statutory mitigating circumstances and additional non-statutory mitigating circumstances not previously considered by the trial court in his sentencing order, it cannot be said that the trial court's errors were harmless beyond a reasonable doubt, i.e., that there is no likelihood that a different sentence could be imposed. **State v. DiGuilio**, 491 So. 2d 1129 (Fla. 1986). See also **Thompson v. State**, 647 So. 2d 824 (Fla. 1994) and **Crump v. State**, 622 So. 2d 963 (Fla. 1993). As such, this Court must vacate the defendant's death sentence and remand this cause for resentencing.

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his father; on one occasion, his father put a gun to the defendant's head and on another, his father rammed the defendant's head into a refrigerator. (T. 2731-2734, 2794, 2805, 3005). These acts of severe abuse, occurring during the years when the defendant's personality was being formed, caused Dr. Allan Levy, the State's psychologist, to opine that the defendant was beset with deep psychological and emotional problems at the time of the offense. (T. 2872, 2878, 2879).

VII

THE TRIAL COURT ERRED IN FAILING TO GIVE THE REQUESTED JURY INSTRUCTION ON THE STATUTORY MITIGATING CIRCUMSTANCE OF THE DEFENDANT'S AGE AT THE TIME OF THE CRIME AND IN FINDING THIS CIRCUMSTANCE INAPPLICABLE AND/OR OF NO WEIGHT IN THIS CASE, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS.

As to Issue VII, the defendant relies upon his Initial Brief for the argument on the merits as to whether the trial court erred in failing to ascribe full weight to the statutory mitigating circumstance of the defendant's age at the time of the crime. Section 921.141 (6)(g), Florida Statutes. (Initial Br. p. 66-70).

In response to the State's argument in its Answer Brief, that any such error by the trial court was harmless, the defendant adopts and reiterates his argument on harmless error made in Issue VI of this reply brief.

VIII

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY DURING THE PENALTY PHASE REGARDING AN IRRELEVANT ARREST OF THE DEFENDANT, THOUGH THE STATE'S USE OF A JAIL ADMISSION CARD, WHERE SAID EVIDENCE PERMITTED THE JURY TO CONSIDER WHAT CONSTITUTED A NON-STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its response to the defendant's argument on Issue VIII, the State contends

that it was permissible to introduce evidence of the defendant's arrest for an unknown offense on June 1, 1991. The State contends that this is so because the answers that the defendant gave on the jail intake sheet prepared in connection with that arrest were inconsistent with and therefore relevant to his claim that he had abused drugs. (Answer Br. p. 69-71). In support of its argument, the State relies upon **Wuornos v. State**, 644 So. 2d 1000 (Fla. 1994), **Wuornos v. State**, 644 So. 2d 1012 (Fla. 1994) and **Johnson v. State**, 660 So. 2d 637 (Fla. 1995). Each of the cases relied upon by the State are distinguishable from the instant case.

In the first **Wuornos** opinion, the State had used substantial evidence of collateral crimes in the guilt phase to rebut the defendant's claim that the charged homicide had occurred in self defense. This Court found that it was not error to introduce the same evidence in the penalty phase to rebut the defendant's claim that her inconsistent confessions were not the result of a fabrication. The State did not introduce evidence that **Wuornos** had been **arrested** on the collateral offenses.

In the second **Wuornos** case and in the **Johnson** case, the defendant had placed his/her character for non-violence in issue. In both instances, evidence of the defendant's prior violent acts were deemed to be relevant to rebut the defendant's claim. It is important to note that neither in **Wuornos** nor in **Johnson** did the State introduce evidence of the defendant's **arrest** for those collateral acts.

In the case at bar, the defendant did not place his character in issue. At issue was the defendant's abuse of drugs. While the defendant's statement made to authorities on June 1, 1991 was arguably relevant to that issue, the fact that the defendant

had been arrested and incarcerated on an unknown charge clearly was not. The prejudice resulting from the introduction of the evidence of the defendant's arrest and incarceration, clearly outweighed its probative value. The evidence of the defendant's arrest and incarceration should not have been admitted. Section 90.403, Florida Statutes.

In its brief, the State attempts to distinguish the cases relied upon by the defendant, **Geralds v. State**, 601 So. 2d 1157 (Fla. 1992) and **Hildwin v. State**, 531 So. 2d 124 (Fla. 1988), by stating that both cases dealt with whether the admission of evidence of a prior **conviction** was proper rebuttal evidence. (Answer Br. p. 70). While the **Geralds** case did involve the improper use of a defendant's prior convictions in a penalty phase, the **Hildwin** case did not. In fact, it is the **Hildwin** case that most glaringly illustrates the error in this case.

In **Hildwin**, the State sought to rebut the defendant's claim the he was not a violent person with evidence that a defendant had committed a sexual battery on a woman. This Court held that the evidence of the prior sexual battery was admissible for that purpose, *as long as the jury was not told that the defendant had been arrested or that there had been criminal charges arising from the prior bad conduct.*

In this case, as was stated earlier, the State could have tailored the evidence of an alleged inconsistent statement without bringing out the damaging and inadmissible aspect of the evidence, that the defendant had been arrested and incarcerated on an unknown criminal charge. The trial court, however, improperly permitted the evidence to be considered by the jury and improperly permitted the prosecutor to rely on the evidence in closing argument. Under the circumstances, the State's use of that evidence

fundamentally tainted the jury's sentence recommendation.

The defendant was entitled to have the jury's consideration limited to only the aggravating circumstances set forth in Chapter 921. With regard to prior criminal offenses, the jury may only consider a defendant's prior criminal activity if he has been convicted of a prior capital felony or felonies involving the use of violence. Section 921.141 (5)(b), Florida Statutes. Since the evidence of the defendant's arrest for an unknown offense clearly does not fall within the purview of that section, the jury should not have been permitted to consider what may only be deemed to be evidence of a non-statutory aggravating circumstance. **Miller v. State**, 373 So. 2d 882 (Fla. 1981).

The prejudice to the defendant from the admission of this improper evidence may have been further exacerbated by the jury's possible use of that evidence to negate the statutory mitigating circumstance that properly applied, the lack of a significant history of prior criminal activity. Section 921.141 (6)(a), Florida Statutes. Under the circumstances, the trial court's admission of the highly prejudicial evidence of the defendant's arrest on June 1, created the substantial risk that the jury's individualized sentencing determination was unfairly skewed toward a death recommendation. **Geralds v. State**, **supra**. Given the deference that the law accords a jury's recommendation, this Court must order that the defendant be afforded a new sentencing hearing before a new jury that can make a sentencing recommendation untainted by the admission of improper evidence.

IX

THE TRIAL COURT FAILED TO CONSIDER AND WEIGH NON-STATUTORY MITIGATING EVIDENCE IN ITS SENTENCING ORDER, THEREBY PROVIDING AN INADEQUATE BASIS FOR APPELLATE REVIEW AND DEMONSTRATING THE UNRELIABILITY OF THE COURT'S DECISION TO IMPOSE THE DEATH PENALTY, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Issue IX, the defendant claims that the trial court's sentencing order is inadequate because the trial court completely failed to evaluate the substantial evidence introduced regarding the defendant's drug use and to make findings on that evidence as a non-statutory mitigating circumstance. (Initial Br. p. 76-78). The State principally responded to the defendant's claim with two arguments: 1) the evidence introduced during the penalty phase regarding the defendant's drug abuse lacked credibility, and 2) the trial court had specifically found that the defendant was not impaired at the time of the crime. (Answer Br. p. 73).

In support of its first argument, the State spent three pages in its answer brief setting forth facts that purportedly support its contention that the defendant's drug abuse claim lacked credibility. (Answer Br. p. 73-76). The Attorney General, by making findings of fact and credibility decisions in his brief, endeavors to do what the trial judge failed to do. The problem with the State's contention is that **no such analysis exists in the trial court's sentencing order**, where it belongs. Contrary to the requirements of the Florida and United States Constitutions, the trial court completely failed to evaluate and make

findings on relevant mitigating evidence advanced by the defendant. **Eddings v. Oklahoma**, 455 U. S. 104, 102 S. Ct. 869 (1982), **Campbell v. State**, 571 So. 2d 415 (Fla. 1990).

In **Ferrell v. State**, 653 So. 2d 371 (Fla. 1995), this Court expressly set forth the trial court's obligations with regard to its evaluation of mitigating evidence proposed by the defense. This Court has required that the sentencing judge **expressly evaluate** in his/her sentencing order **each** statutory and non-statutory mitigating circumstance proposed by the defense. That evaluation must include a determination as to whether the mitigator is supported by the evidence, and if supported by evidence, the weight to be given the mitigating circumstance. The result of this process must be detailed in its written sentencing order.

In the present case, the trial court completely failed to mention any of the substantial evidence introduced by the defendant in support of his claim that he was afflicted with a drug problem, nor the evidence the State contends is in conflict with the defendant's claim.[6] The complete failure to evaluate this proposed mitigator was in contravention of the trial court's clear statutory and constitutional obligations. See Section 921.141 (3), Florida Statutes.

Despite the complete absence of any discussion of the evidence relating to the defendant's drug use, the State nevertheless claims that the trial court made the requisite finding on this mitigator when it concluded in its sentencing order that there "was

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[6] The evidence in support of the defendant's claim was set forth in the defendant's Initial Brief on p. 77-78 in footnote 22.

no credible evidence to show that the defendant was impaired in any manner." (R. 498). (Answer Br. p. 76). Taken in the context that the trial court's finding was made, the State's argument that the requirements of **Ferrell** have been met is patently absurd.

In addition to his claim of a drug problem, the defendant introduced evidence at the penalty phase that he suffered from organic brain damage. That evidence was primarily provided by Dr. Hyman Eisenstein. The trial judge, in discussing the evidence in support of the statutory mitigating circumstances under Section 921.141 (6)(b), (e), and (f), found that the opinion of Dr. Eisenstein was either not supported by the evidence or not as credible as the other psychological opinion provided to the court. (R. 495-498). It was as to the mitigating circumstance contained in Section 921.141 (6)(f), that the trial judge finally rejected the notion that the defendant suffered from frontal lobe disfunction or brain impairment. In the two sentences preceding the sentence quoted by the State in its brief, the Court stated, "there was no evidence to indicate that the defendant suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. (Citation omitted). The Court finds that Dr. Eisenstein's testimony was not credible." (R. 498). Placed in the appropriate context, the trial court's finding that the evidence was insufficient to demonstrate that the defendant was impaired, was simply the Court's conclusion that the defendant had not sufficiently proven that he suffered brain damage to the extent necessary to support the statutory mitigating circumstances.

The trial court's failure to evaluate and make findings on the relevant mitigating evidence dealing with the defendant's drug abuse precludes this Court from providing meaningful appellate review of the defendant's sentence. **Ferrell v. State**,

supra. In addition, given the notable absence of this non-statutory mitigating circumstance from the weighing process employed by the trial court, the sentence reached by the trial court in its weighing process must be deemed to be constitutionally unreliable. **Eddings v. Oklahoma**, **supra**. This Court must remand this cause for resentencing.

CONCLUSION

For the foregoing reasons, and those stated in the defendant's Initial Brief, the defendant's convictions and sentences for first degree murder, armed robbery and armed burglary must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before a jury.

Respectfully Submitted,

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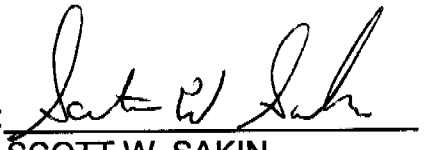
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this 12 day of December, 1996.

BY: _____
SCOTT W. SAKIN, ESQ.