IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,134

TIVAN JOHNSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR 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." Specific points raised in the initial brief but not addressed in the reply brief are not waived.

ARGUMENT

I.

APPELLANT'S CONFESSIONS TO THE BARKER MURDER AND WALKER MURDER, WHICH WERE INTRODUCED DURING BOTH THE GUILT AND PUNISHMENT PHASES, WERE ADMITTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. I, § 9 OF THE FLORIDA CONSTITUTION.

The state first appears to argue that *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), encompasses only a suspect's right to have counsel *present* during questioning, and not the distinct right to consult with counsel. Answer Br. at 26. In *Miranda* itself, however the Supreme Court held expressly "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer *and* to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, *this warning is an absolute prerequisite to interrogation.*" 384 U.S. at 471 (emphasis added). As emphasized in the initial brief, at 35 & n.19, numerous lower courts have held, consistent with *Miranda*, that the right to counsel encompasses both of these distinct rights.

The State nevertheless attempts to distinguish these cases, arguing that most of them have held that the right to the presence of counsel during questioning was not

encompassed by the right to consult with counsel. The State maintains that the converse is not true; that the right to presence *includes* the right to consult, because there "would be little point to having a lawyer present but for consultation." Answer Brief at 27. A reasonable layperson, however, could understand the right to have counsel "present" precisely as the Supreme Court described it in *Miranda,* 384 U.S. at 470 -- to have an attorney present as a witness, to deter police coercion, and to ensure the accuracy of any recorded statement. A reasonable lay person would *not* necessarily assume that the right to "presence" includes the right to consult with the attorney about whether or not to give a statement at all, about which questions to answer, or when to terminate the interrogation. *See People v. Snaer,* 758 F.2d 1341, 1343 (9th Cir.) (describing significance of consultation as distinct from presence), *cert. denied,* 474 U.S. 828, 106 S.Ct. 90, 88 L.Ed.2d 74 (1985).

While the State is correct that no court has reversed a conviction based on the precise grounds presented in this appeal, *Snaer* is the only case, to counsel's knowledge (other than the decisions in appellant's other case), that deals directly with a right to consult issue similar to the one presented here. The form at issue in *Snaer* stated "[y]ou have the right to consult with a lawyer *and* to have a lawyer present with you while you are being questioned." 758 F.2d at 1343 (emphasis added). The issue was whether the grammatically ambiguous "and" limited the right to consultation to the questioning itself. The Court of Appeals concluded that, while awkwardly worded, the form adequately conveyed the distinct right to consult with counsel, including prior to questioning. *Id.* The Metro-Dade form, in contrast, does not mention

the right to consult at all, *and* the grammatically ambiguous "at this time" suggests that even the presence of counsel is limited to "during questioning."

The State next suggests that the Supreme Court in *Duckworth v. Eagan*, 492 U.S. 195, 204-05, 109 S.Ct. 2875, 2881, 106 L.Ed.2d 166 (1989) and *California v. Prysock*, 453 U.S. 355, 361, 101 S.Ct. 2806, 2810, 69 L.Ed.2d 696 (1981), indicated that a *Miranda* warning form would be deficient only if it "involved misinformation as to when counsel would be available." Answer Br. at 26. In determining whether *Miranda* rights are "reasonably convey[ed]" to a suspect, *Duckworth,* 492 U.S. at 203, it is, however, equally unacceptable for a warning form to be misleading -- as the Metro-Dade form is -- regarding the *role* counsel is permitted to play. Both types of misinformation suggest improper limitations on the right to counsel, which are *more* misleading than simply advising a suspect that he has an unadorned "right to counsel." *See* Answer Br. at 28 (citing cases).

As-Applied Challenge

Third, the State maintains that, considered in the context in which they were administered, the warnings adequately advised Appellant of his right to consult a lawyer prior to questioning, because the Metro-Dade warnings informed Appellant that he had the right to have a lawyer present "at this time," and questioning "had not yet commenced when this advice was given to Defendant." Answer Br. at 26. In his as-applied challenge, however, Appellant vigorously disputes the factual assumption that questioning had not yet begun. When Detective Diaz advised Appellant of his *Miranda* rights in connection with this case, Appellant had already been questioned and

confessed to the Rudy's robbery and murder. During that interrogation, Detective Romagni had asked Appellant "background" questions and secured his agreement to give his side of the story, *before* advising Appellant of his *Miranda* rights.[1] The specific factual context of *this* case, in which Appellant was subject to continuous interrogation on two cases and questioning was initiated before Appellant was advised of his rights, did *not* reasonably convey to Appellant that he had the right to consult with counsel before answering questions but rather reinforced the implication that an attorney would simply *attend* the interrogation session that was already underway. Appellant's uncontroverted testimony to that effect is therefore entirely reasonable.

Harmfulness of the Error

Finally, the State asserts that even if Appellant's confession was not properly admitted, any error was harmless because of the physical evidence linking Appellant to the crime scene and Appellant's admission to Timothy Thanos that he had robbed a pawn shop and shot the owner. Answer Br. at 29-30. Appellant's defense at trial, however, was not that he did not shoot Barker but that the offense was third-degree murder. Appellant testified that he and Cooper accompanied a friend of Appellant's named Eric to the pawn shop to pick up some guns that Eric was going to sell for Barker. (T. 2064) Barker and Eric got into an argument, and Barker pulled his gun and

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[1]The State attempts to minimize the significance of this pre-warning agreement, suggesting it is acceptable police practice. Answer Br. at 29 n.3. Other officers testified at the suppression hearing, however, that they did not engage in this practice (T. 275), and the trial judge admonished Officer Romagni that speaking to a suspect for five minutes before administering warnings was not acceptable. (T. 228-29)

fired one or two shots. (T. 2069-71, 2075) Cooper, Appellant, and Eric all returned fire. (T. 2071-72, 2134) Appellant's testimony was consistent with other evidence presented at trial, including that (1) Barker regularly wore a gun while at work (T. 1224, 1291), and a pistol was found under Barker's body, but the police did not check Barker's hands to determine whether Barker had fired a weapon (T. 1481, 1492, 2030); (2) Metro-Dade criminologist Thomas Quirk believed that Barker had been shot by three rather than two guns (T. 2023-25); (3) there were three African-American men in the pawn shop when Benjamin Brown came in shortly before closing (T. 1386-87, 1389, 1391); and (4) Barker had not complied with record-keeping requirements for many of the guns in his store and did not have a license to sell automatic weapons, (T. 1328, 1500-01, 1509, 1861-62). Appellant testified that he had given a false statement to police because Eric had threatened to harm Appellant's mother. (T. 2075, 2095) The jury deliberated for eight hours before returning a guilty verdict. (R. 255-56, 261) Without Appellant's confession, the scales might well have tipped in favor of conviction of a lesser offense. Under these circumstances, the erroneous admission of Appellant's confession cannot be deemed harmless beyond a reasonable doubt.

III.

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTION TO INFORM JURORS THAT APPELLANT WAS IN CUSTODY ON "AN UNRELATED MATTER" AT THE TIME HE GAVE HIS CONFESSION TO POLICE.

The State first argues that it could not reasonably be inferred that the "unrelated matter" to which Detective Saladrigas' referred was another homicide. Answer Br. at 46-47. The State emphasizes that Detective Saladrigas testified that "[t]he department, as a rule uses" a team approach with a lead detective. (T. 1525) The word "department," however, is ambiguous and does not dispel the obvious parallel between Detective Saladrigas' description of the team approach and the *immediately preceding* testimony of Detective Diaz, describing the same lead detective/team approach used in the homicide division. (T. 1496)

The State further contends that, even if the jury did realize that the other matter was a homicide, the evidence was admissible to ensure that the jury would not infer that the police were engaged in misconduct during the 10-12 hour time lapse. Answer Br. at 47. Since the defense had agreed not to make any argument that would raise such an inference, however, the probative value of this testimony -- merely to provide factual context -- was substantially outweighed by the danger of unfair prejudice to the defense and was not admissible under section 90.403, Florida Statutes.[2]

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[2]Even "inseparable" crimes evidence must satisfy not only the relevance standard of section 90.402 but also the balancing test of section 90.403. *See Griffin v. State,* 639 So. 2d 966, 970 (Fla. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995); *Gorham v. State,* 454 So. 2d 556, 558 (Fla. 1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985).

The State finally answers that any error in allowing this inferential evidence of collateral crimes was harmless, because "[t]he only defense raised was a cockamamie story of self-defense." Answer Br. at 50. The Assistant Attorney General's personal opinion does not, however, satisfy the state's burden of establishing that an error was harmless beyond a reasonable doubt pursuant to *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). As noted above, the jury obviously did not regard this as an open and shut case since it deliberated for eight hours before returning a conviction. In these circumstances, the erroneous admission of other crimes evidence, strongly suggesting that the Appellant was a suspect in another homicide or serious offense cannot be considered harmless beyond a reasonable doubt.

IV.

BECAUSE JURORS REPEATEDLY SAW APPELLANT IN SHACKLES AND HANDCUFFS, THIS COURT MUST REVERSE HIS CONVICTIONS AND SENTENCES.

The State suggests that the defendant's appearance before the jury in shackles constitutes reversible error only if the defendant is shackled throughout the trial itself rather than while being transported to the courtroom. Answer Br. at 52. The Supreme Court has recognized, however, that a defendant's appearance before the jury in shackles is "inherently prejudicial" because it undermines the presumption of innocence, which is "basic to the adversary system." *Holbrook v. Flynn,* 475 U.S. 560, 567-68, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986); *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976). Whether the jurors' exposure to the defendant in shackles occurs inside or outside the courtroom, during

trial or not, it is the frequent "reminder of the accused's condition that is impermissible. *Williams*, 425 U.S. at 504-05. Indeed, contrary to the state's contention, requiring a defendant to walk past the jury in shackles can be a *more* visceral reminder of the defendant's status than his being shackled throughout the trial at counsel table, where his shackles are unobtrusive or obscured entirely from view. *Cf. Stewart v. State,* 549 So. 2d 171, 173-74 (Fla. 1989) (shackling of defendant not reversible error where jury never saw defendant walk in shackles and shackles were barely visible under table), *cert. denied,* 497 U.S. 1032, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990); *see also Derrick v. State,* 581 So. 2d 31, 35 (Fla. 1991) (noting efforts to hide shackles from jury's view); *Blanco v. State*, 603 So. 2d 132, 133 (Fla. 3d DCA 1992) (same).

Moreover, while a brief and inadvertent exposure to the defendant in shackles may not require a mistrial, that is not an accurate characterization of what occurred in this case. Unlike the cases on which the State relies,[3] it was not in this case merely one or a few jurors who saw Appellant in handcuffs and shackles; nor did the jury have only a fleeting glimpse of Appellant in restraints on a single occasion. It was

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[3] *Neary v. State*, 384 So. 2d 881, 885 (Fla. 1980) (four jurors inadvertently saw defendant in handcuffs on one occasion); *Heiney v. State*, 447 So. 2d 210, 214 (Fla.) (some jurors may have seen defendant momentarily in chains while being transported to court room), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Hildwin v. State*, 531 So. 2d 124, 126 (Fla. 1988) (one juror inadvertently saw defendant being transported to court room in restraints), *aff'd on other grounds,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); *Jackson v. State*, 545 So. 2d 260, 265 (Fla. 1989) (jury inadvertently saw defendant in handcuffs, apparently on one occasion).

undisputed below that Appellant had been paraded past, apparently, the entire jury, which was gathered in the hallway, and that the same thing had occurred once *or twice* before. (T. 1985) While the State contends on appeal that the jury's exposure to the defendant in shackles was "brief," Answer Br. at 52, the prosecution made no such showing below. (T. 1985-86) There was, moreover, absolutely no reason for the jury to see Appellant in shackles since the Department of Corrections officers had previously been directed to bring the defendants to court in a timely fashion to avoid precisely this problem. (T. 1985)

For the reasons set forth in section I, *supra*, this error may not, contrary to the state's contention, be deemed harmless beyond a reasonable doubt.

V.

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO SUBMIT SPECIAL VERDICT FORMS REGARDING THE ALTERNATIVE THEORIES OF FELONY-MURDER AND PREMEDITATED MURDER.

The State responds to this issue by complaining that Appellant was not, in fact, acquitted of premeditated murder at the guilt-innocence phase of the trial. Answer Br. at 55. Appellant's claim, however, is that the jury was not *allowed* to acquit the defendant on one of two alternative theories of first-degree murder, even though the jury indicated by its question that it believed the prosecution had proved only one theory -- presumably felony murder -- beyond a reasonable doubt. Initial Br. at 54-55. This rises to the level of a due process violation because it allowed the state to avoid a collateral estoppel bar to relitigating in the penalty phase a factual issue that had been resolved against it at the guilt phase.

The evidence on which the state relies, Answer Br. at 55, as establishing the CCP aggravator -- the penalty phase testimony of Admonia Blount Coleman -- was introduced in an apparent effort to bolster the state's inadequate evidence of simple premeditation at the guilt phase.[4] By taking a second bite at the apple, the state did precisely what constitutional collateral estoppel principles would have prevented it from doing. *See Ashe v. Swenson,* 397 U.S. 436, 445-46, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469 (1970) ("whatever else that constitutional guarantee may embrace . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time") (citations omitted).

While the State asserts that Appellant's underlying collateral estoppel argument is without merit, Answer Br. at 54-55 n.13, it is virtually identical to the issue decided in *Delap v. Dugger,* 890 F.2d 285, 315-19 (11th Cir.), *cert. denied,*. 496 U.S. 929, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1989). The Eleventh Circuit held in *Delap* that, once the trial court acquitted the defendant of the felony-murder theory at his first trial, the prosecution was precluded from relying on the felony-murder aggravating circumstance in a later capital sentencing. *Id.* The only difference between this case and *Delap* is that Delap's first conviction had been vacated, and the subsequent sentencing was therefore the defendant's second. The state's argument here -- that collateral estoppel would not preclude the prosecution from relying on the felony-

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[4]At the penalty phase, Coleman testified that Appellant concurred in Cooper's plan to rob the pawn shop *and* kill the owner (T. 2902) At the guilt phase, however, Coleman could not recall what, if anything, Appellant had said in response to Cooper's comments about killing the owner. (T. 1584-85)

murder aggravator in a sentencing hearing held immediately following the defendant's acquittal of felony murder -- would lead to the anomalous result that a defendant could invoke collateral estoppel under *Delap* only if he received a new trial on other grounds.

VI. & VIII.

BECAUSE APPELLANT AND HIS ATTORNEYS WERE ABSENT FROM A "CRITICAL STAGE" OF THE SENTENCING PROCEEDING, WITHOUT A VALID WAIVER OF APPELLANT'S RIGHT TO COUNSEL OR RIGHT TO PRESENCE, THIS COURT MUST VACATE APPELLANT'S DEATH SENTENCE AND REMAND FOR RESENTENCING.

With respect to issues VI and VIII, the State does not dispute that Appellant did not validly waive either his own presence or that of his counsel during the testimony of co-defendant Cooper's mitigation witnesses. Rather, the State answers that (1) the testimony of Cooper's witnesses was not a critical stage of the joint sentencing hearing and (2) even if it was a critical stage, the absence of both Appellant and his attorneys was harmless error.

Critical Stage

The State maintains that Cooper's presentation of mitigating evidence was, in effect, an entirely separate sentencing proceeding that was "wholly without legal consequence for [Appellant]" and therefore was not a "critical stage" of appellant's trial. Answer Br. at 71-72. The State argues further that, even if Appellant and his counsel had been present, Cooper's eighth amendment right to individualized sentencing would have precluded appellant from joining the prosecution in cross-

examining Cooper's mitigation witnesses. Answer Br. at 72. Both assertions are erroneous.

First, the proceedings below cannot fairly be characterized as two separate sentencing hearings. Appellant and his co-defendant were sentenced, over Appellant's objection, by one jury in a single sentencing hearing. Although the jury deliberated on Cooper's sentence and returned a sealed verdict before it heard Appellant's case in mitigation, this awkward arrangement achieved none of the benefits of severance or dual juries with respect to appellant. The State presented its evidence against both defendants at once, including, over appellant's objection, Cooper's statement to police that appellant had ordered him to shoot the Rudy's victim. Moreover, contrary to the state's implication, Answer Br. at 72, the trial court never instructed the jury that it should disregard the testimony of Cooper's mitigation witnesses when sentencing Appellant. The sum total of the judge's remarks are as follows. At the outset of the sentencing proceeding the judge said:

> Normally, we would be trying Mr. Cooper today and you would not see Mr. Johnson or Mr. Johnson's lawyers. In order to try to and speed this up certain of the testimony you would hear in both of their cases is the same. So, rather than hear it twice as to both we have all agreed that you can hear it once today. Therefore, we may be able to save a lot of time next week when we do not have to go through this. *So, when you see the defendant [and] his lawyers walk out of here that means we have completed the testimony in which you can hear as to both of them. Then we will continue with Mr. Cooper and they will no longer be necessary.*

(T. 2520) When Appellant and his attorneys left the courtroom before Cooper called his mitigation witnesses, the judge said:

> Ladies and gentlemen of the jury, as I told you before, Mr. Johnson and his attorney have left. *We are only going to proceed regarding Mr. Cooper.* There is one or two matters that we are going to have to take up that involve Mr. Johnson, but they will be tomorrow and the lawyers and the defendant will be back tomorrow. *Right now, we are just dealing with Mr. Cooper.*

(T. 2667). These remarks obviously were not intended as a limiting instruction but rather to explain that appellant and his counsel were absent because their presence was (in counsel's erroneous view) unnecessary. The trial court did not instruct the jury at any other point in the proceedings to disregard the testimony of Cooper's witnesses in sentencing appellant. Thus, there was no assurance that the testimony of Cooper's witnesses would "pertain solely to . . . Cooper's sentence."[5] Answer Br. at 72. Nor can the testimony of Cooper's witnesses -- who claimed that Appellant had led Cooper into a life of drug use and crime -- be reasonably characterized as *irrelevant* to Appellant's sentence, Answer Br. at 72, since Appellant claimed as a mitigating circumstance that he had been dominated by Cooper. As to Appellant, there was no legal or practical difference between the procedure the trial court employed and a fully joint sentencing, in which the jury was free to consider the co-defendant's evidence, as well as the prosecution's, in deciding Appellant's sentence.[6]

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[5]Even if a limiting instruction *had* been given, it would not be an adequate substitute for Appellant's constitutional right of cross-examination, which his attorneys effectively forfeited by their absence. *See Cruz v. New York,* 481 U.S. 186, 193-94, 107 S.Ct. 1714, 1719, 95 L.Ed.2d 162 (1987); *Bruton v. United States,* 391 U.S. 123, 137, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968).

[6]As to Cooper, the sentencing was effectively separate because Appellant's counsel did not cross-examine Cooper's witnesses, and the jury decided Cooper's sentence before it heard Appellant's mitigating evidence.

While the State correctly points out the serious eighth amendment difficulties posed by a joint sentencing (which was one of Appellant's arguments for severance), Answer Br. at 72, its contention that codefendants therefore cannot cross-examine each other's mitigation witnesses is legally untenable. Clearly, if codefendants *are* sentenced jointly, the Confrontation Clause requires that they be able to cross-examine any witness, whether called by the state or a codefendant, who testifies adversely to their position.[7] *See Espinosa v. State*, 589 So.2d 887, 892 (Fla. 1991) (no error in refusing to grant severance where defendant was able to cross-examine co-defendant at penalty phase),*cert. granted, rev'd on other grounds,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) ; *see also State v. Nieves,* 534 A.2d 1231, 1232-33 (Conn.App. 1987), *cert. denied,* 540 A.2d 74 (Conn. 1988) (defendant has the right to "cross-examine any witness who offers testimony adverse to him," including a co-defendant or co-defendant's witnesses) (collecting cases); *Eder v. People,* 498 P.2d 945, 946-47 (Colo. 1972) (defendant had right to cross-examine co-defendant's witness whose testimony strengthened inference of defendant's guilt). Indeed, this Court has held that, when co-defendants take conflicting positions in a joint sentencing regarding their relative culpability, the jury should "determine the truth of the matter," after the defendants have confronted and cross-examined each other's witnesses,

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[7]The trial judge apparently understood this to be the case, since he remarked that, if they had been present, Appellant's counsel could have cross-examined Cooper's witnesses. (T. 3152)

"thus affording the jury access to all relevant facts." *Espinosa,* 589 So. 2d at 892 (quoting *McCray v. State*, 416 So.2d 804, 806 (Fla.1982)).

Since, as *Espinosa* and *McCray* make clear, a co-defendant's mitigating evidence may be considered against the defendant in a joint sentencing, and is therefore subject to cross-examination by him, the presentation of such evidence must be considered a "critical" stage of a sentencing proceeding in which no severance has been granted. *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992) ("crucial stage" of prosecution is any stage that may "significantly affect the outcome" of the proceedings); *see also United States v. Wade,* 388 U.S. 218, 226-27, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967) ("*in addition to counsel's presence at trial,* the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial") (emphasis added). Because it is undisputed that appellant did not validly waive either his own presence or his right to counsel with respect to this critical stage of the proceedings, both the absence of appellant and his counsel was error.

Harmless Error

Relying on *Satterwhite v. Texas,* 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), appellee asserts that the absence of counsel from a critical stage of the proceedings is not per se reversible error but rather is subject to harmless error analysis. Appellee construes *Satterwhite* too broadly. *Satterwhite*'s specific holding is simply "that the *Chapman* harmless error rule applies to the admission of psychiatric

testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith.*" *Satterwhite,* 486 U.S. at 258. In so holding, the Court rejected the defendant's analogy to conflict-of-interest and absence-of-counsel situations, emphasizing that the effect of the sixth amendment violation at issue -- the failure to notify defense counsel of a compelled psychiatric examination -- was "limited to the admission into evidence" of the psychiatrist's testimony. *Id.* at 257. The impact of erroneously admitted evidence is generally apparent from the record and has traditionally been subject to harmless error analysis. *Id.* at 257-58. Where there is a conflict of interest, however, or the defendant is denied counsel during a critical stage of the trial or capital sentencing proceeding itself, the error is one of omission rather than commission -- what was *not* done, rather than what *was* done. *Id.* The impact of the error therefore "cannot be discerned from the record" and "any inquiry into its effect on the outcome of the case would be purely speculative." *Satterwhite*, 486 U.S. at 256.

While lower courts have divided on whether the absence of counsel from a critical stage is subject to harmless error analysis, they agree that reversal is required where, as here, counsel is absent during the presentation of evidence that inculpates the defendant. Thus, most of the cases refusing to apply harmless error analysis have, like this case, involved counsel's absence during damaging testimony. *See Carter v. Sowders,* 5 F.3d 975, 979 (6th Cir. 1993) (absence of counsel and defendant from video-taped deposition to perpetuate testimony per se reversible error), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1867, 128 L.Ed.2d 487 (1994); *United States v. Taylor,* 933 F.2d 307, 312 (5th Cir.) (refusal to appoint counsel for sentencing per se reversible

error even when standby counsel appointed), *cert. denied,* 502 U.S. 883, 112 S.Ct. 235, 116 L.Ed.2d 191 (1991); *Green v. Arn,* 809 F.2d 1257, 1263 (6th Cir.) (counsel's absence from taking of evidence on defendant's guilt per se reversible error), *vacated on other grounds*, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987), *reinstated*, 839 F.2d 300 (6th Cir. 1988); *McKnight v. State,* 465 S.E.2d 352, 354 (S.C. 1995) (defense counsel's absence during victim's testimony and part of cross-examination conducted by defendant was per se reversible error); *People v. Margan,* 554 N.Y.S.2d 676, 679 (N.Y. App. 1990) (counsel's absence from portion of government witness' testimony per se reversible error). And courts that have found counsel's absence to be harmless have emphasized that the result would have been different if the attorney had missed testimony inculpatory to the defendant -- as occurred here -- or if multiple defendants had been pursuing antagonistic defenses -- as was also true at the penalty phase of this case.[8] *See Vines v. United States,* 28 F.3d 1123, 1129 (11th Cir. 1994) (counsel's absence from testimony of two government witnesses who did not inculpate defendant was harmless); *United States v. Morrison,* 946 F.2d 484, 502-03 (7th Cir. 1991) (defense counsel's absence during cross-examination of government witness by co-defendants was harmless where

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[8]In *Stein v. State,* 632 So. 2d 1361, 1365 (Fla. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994), this Court held, without legal analysis, that counsel's absence from part of a suppression hearing was harmless where the co-defendant's attorney was handling the presentation of evidence. This case is distinguishable because, as discussed above, Appellant's interests were plainly at odds with those of both the state (which sought to portray the two defendants as equally culpable in order to secure death sentences against both) and his co-defendant (who sought to mitigate his own sentence by portraying Appellant as the dominant figure).

defendants not pursuing antagonistic defenses and absence from direct testimony of two other witnesses harmless where it did not concern defendant).[9]

The State nevertheless claims that Appellant's counsel could not have added anything to the prosecution's own cross-examination and rebuttal of Cooper's claim that he was dominated by Appellant. It is well-established, however, that the government's cross-examination of a co-defendant's witnesses is not an acceptable substitute for the defendant's own right of cross-examination. *Toolate v. Borg,* 828 F.2d 571, 572 (9th Cir. 1987); *see also United States v. Zambrano,* 421 F.2d 761, 762-63 (3d Cir. 1970); *Nieves,* 534 A.2d at 1232-33; *Eder,* 498 P.2d at 947. Moreover, as noted in Appellant's initial brief, at 69, 86, Appellant and his counsel would have been in a position to cross-examine Cooper's witnesses more effectively, and to different ends, than the prosecution. The prosecution's interest in rebutting the substantial domination mitigator was limited to establishing that the defendants were equals. Since the State was also seeking the death penalty against Appellant, it manifestly did *not* share Appellant's interest in going further and establishing that Cooper was, in fact, the more culpable party. Nor did the prosecution have any interest in countering or objecting to negative innuendo about Appellant's character,

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[9] Other cases in which counsel's absence has been held harmless have involved stages of the trial that are far less critical than the presentation of incriminating evidence. *See United States v. Osterbrock,* 891 F.2d 1216, 1218 (6th Cir. 1989) (absence of counsel from return of jury verdict harmless where jury polled); *Siverson v. O'Leary,* 764 F.2d 1208 (7th Cir. 1985) (absence of counsel from jury deliberations and return of verdict is subject to harmless error analysis); *Vileenor v. State,* 500 So. 2d 713, 714 (Fla. 4th DCA 1987) (counsel's absence during giving of jury instructions harmless where counsel had agreed to instructions during charge conference).

which simply bolstered the state's case with "evidence" the state itself would never have been allowed to present.

Further, since Appellant knew Cooper and his own relationship with Cooper better than the prosecutors did, Appellant and his counsel could have questioned Cooper's witnesses more effectively regarding issues such as Cooper's drug use and when it began; whether Cooper had engaged in illegal activity with others before or after he met Appellant; and the dynamics of Cooper's relationship with Appellant or other friends -- which would have undermined their testimony that Appellant was responsible for Cooper's downfall.[10] The absence of both appellant and his counsel was not, therefore, harmless. *See United States v. Thomas,* 953 F.2d 107, 110 (4th Cir. 1991) (absence of defendant and his counsel from *in camera* examination of defendant's former attorney to determine waiver of privilege was not harmless where cross-examination by defendant and his counsel might have persuaded trial judge that attorney-client privilege had not been waived); *Savino v. State,* 555 So. 2d 1237, 1238 (Fla. 4th DCA 1989) (defendant's absence during witness' testimony, which "deprived him of his right to confront her and to confer with his counsel during cross

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[10]The state's suggestion that Appellant could have recalled and examined Cooper's witnesses during his own presentation of evidence, Answer Br. at 74, fails to consider that, since Appellant and his counsel were not present for the relevant testimony, they had no idea what was said or by whom and therefore would be ill-equipped to conduct such an examination. Appellant should not in any event have been required to re-call Cooper's witnesses as his own and then treat them as hostile. *Cf. Zambrano,* 421 F.2d at 763 (defendant did not waive objection to trial court's refusal to allow him to cross-examine co-defendant by declining to call co-defendant as his own witness).

examination," was not harmless), *quashed on other grounds,* 567 So. 2d 892 (Fla. 1990); *Ingraham v. State,* 502 So. 2d 987, 988 (Fla. 3d DCA) (defendant's absence from examination of jurors could not be deemed harmless where defendant had first-hand knowledge of relevant facts and could therefore have assisted his counsel), *review denied,* 511 So. 2d 999 (Fla.1987); *Waters v. State,* 486 So. 2d 614, 615 (Fla. 5th DCA) (defendant unable to adequately confront witnesses where shackles prevented him from seeing exhibits referenced in witness' testimony), *review denied,* 494 So. 2d 1153 (Fla.1986).

Finally, the State maintains that, since the trial court concluded that the substantial domination mitigating circumstance did not apply to Appellant, and because the jury recommended death by an 8 to 4 margin for both defendants, "it must be presumed that" the jury also concluded that Cooper and Appellant were equally culpable. Answer Br. at 74-75. Since the jury makes no written findings regarding the mitigating circumstances it finds applicable to a defendant's case, it is pure speculation to impute the trial court's reasoning to the jury. It is, moreover, constitutionally impermissible to rely on the trial court's order to obscure the impact of an error on the jury as co-sentencer. *Espinosa v. Florida,* 505 U.S. 1079, 1082, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992).

The state's attempt to characterize the testimony of Cooper's mitigation witnesses as insignificant and the jury's recommendation of death as inevitable is, moreover, belied by the record. The jury in this case recommended death by only a two-vote margin. The trial judge characterized the mitigating circumstances -- which

the State tries to trivialize on appeal -- as "significant." (R. 640) This evidence established that, despite Appellant's success in the Boy Scouts -- which had been the focal point of his life -- Appellant fell into a downward spiral when it appeared that he would not obtain a permanent job with the Boy Scouts. (T. 3270-71) He entered into a serious relationship, which he was not mature enough to handle, and later married the young woman when she falsely claimed to be pregnant. (T. 3219-20, 3296) Just three months before these offenses, Appellant was hospitalized after a suicide attempt prompted by a fight with his girlfriend. (T. 3271-72) He received no follow-up counseling or medication. (T. 3275)

The testimony of Cooper's mitigation witnesses was the *only* evidence presented at this trial to suggest that Appellant dominated Cooper. Appellant's confession, and the testimony of Admonia Blount Coleman both stated that Cooper had planned the pawn shop robbery. (T. 1580, 1820) Both Cooper and Appellant told the police that Cooper had opened fire on Barker at the pawn shop. (T. 1776, 1826) It was undisputed that Cooper alone shot Walker. Thus, apart from the testimony of Cooper's mitigation witnesses (and Cooper's self-serving confession to the Rudy's killing which was not, as discussed below, admissible against Appellant), the record evidence indicated that Cooper was the more culpable party in both the pawn shop and Rudy's homicides. In closing, Appellant argued precisely that point, contending that there was sufficient evidence of CCP only as to Cooper and emphasizing that Cooper initiated the shooting at the pawn shop and was the sole gunman at the Rudy's. (T. 3395-97) Appellant's counsel also emphasized Appellant's severe

depression, low self-esteem, and previously exemplary behavior -- all of which reinforced the conclusion that Appellant was the less culpable party. (T. 3397-98) The jury was instructed on both the substantial domination *and* minor participation statutory mitigating circumstances as to Appellant. (T. 3402-03) Even if the jury did not find that the evidence rose to the level sufficient to support the statutory mitigating circumstances, it was entitled to consider Appellant's lesser culpability as nonstatutory mitigation.

Cooper's diametrically opposite contention that Appellant led *him* into a life of drug abuse and crime was, contrary to the state's contention, Answer Br. at 72 n. 17, pivotal to Cooper's case in mitigation. While one of Cooper's mental health experts testified on cross-examination that, based on the information available to him, Cooper was not under the domination of Appellant, (T. 2963), Cooper's other mental health expert testified at length that Cooper was susceptible to being led (T. 2678); that after Cooper moved out and went to live with Appellant, Appellant assumed a guiding role (previously occupied by Cooper's mother) as Cooper's surrogate frontal lobes (T. 2679-80); and that Cooper had committed crimes only under the influence of another person (T. 2683). This testimony was buttressed by that of Cooper's friends and family members that Cooper was a sweet, docile teenager until he began hanging out with Appellant (T. 2760-62, 2993-95, 3009); that they did not like Appellant and directed Cooper to stay away from him (T. 2754, 2756, 2998-99, 3009); that after Cooper began hanging out with Appellant he appeared to be using drugs and became loud and obnoxious (T. 2799, 2806, 2995, 3010); and that Appellant appeared to be

coaching Cooper to engage in illegal activity, (T. 2770). In his closing argument, Cooper's counsel stated expressly that "our theory of the mitigators go [*sic*] towards the domination that Tivan Johnson had over Albert Cooper" and proceeded to accuse Appellant of "turn[ing] Albert Cooper on to drugs," of lighting Cooper's fuse, and of psychologically manipulating both Cooper and the jury. (T. 3134-35)

Given the other evidence in this case, the testimony of Cooper's witnesses was potentially critical to the jury's resolution of Appellant's claim of lesser culpability. As discussed below, a severance should have been granted to prevent Cooper from becoming a second prosecutor against Appellant. Since there was no severance, however, it was essential that Appellant and his counsel be present to defend against Cooper's attacks. Their absence cannot reasonably be deemed harmless.

VII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO SEVER APPELLANT'S CAPITAL SENTENCING HEARING FROM CO-DEFENDANT ALBERT COOPER'S CAPITAL SENTENCING HEARING.

The State answers Appellant's *Bruton* claim with a footnote asserting that *Bruton* is inapplicable because the disputed confession did not relate to the murder for which the defendants were being sentenced, but to "a crime for which Defendant had already been convicted." Answer Br. at 80 n.21. This argument is utterly without merit. If *Bruton* objections were extinguished by conviction, then *Bruton* would not apply to the penalty phase at all. This Court, however, has held expressly to the contrary. *Roundtree v. State,* 546 So. 2d 1042, 1046 (Fla. 1989); *Walton v. State,* 481 So. 2d 1197, 1198-99 (Fla. 1986); *Engle v. State,* 438 So. 2d 803, 814 (Fla.

1983), *cert. denied,* 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984). Indeed, as *Roundtree* indicates, a *Bruton* violation is *more* likely to be harmful with respect to the penalty phase of the trial where issues of relative culpability -- not just criminal liability -- are of critical importance. 546 So. 2d at 1045-46 (noting that admission of co-defendant's confession, identifying defendant as triggerman, could be harmless as to conviction where defendant's own confession established guilt of felony-murder but could not be deemed harmless as to penalty phase). This court has, moreover, expressly applied these same Confrontation Clause principles to evidence regarding the prior violent felony aggravating circumstance -- not just to the principal offense. *Rhodes v. State,* 547 So.2d 1201, 1204 (Fla. 1989) (citing *Engle, supra*). Thus, as the State candidly acknowledged below, Cooper's confession was not admissible against Appellant under *Bruton*. (T. 2455) In this circumstance "severance is always required."[11] *McCray,* 416 So. 2d at 806; *cf. Espinosa,* 589 So.2d at 892

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[11]While the State makes no legal argument that Appellant's motion for severance was not properly preserved, it insinuates -- with selective citation to the record -- that the motion was a cynical gambit by defense counsel. Answer Br. at 60-61. Although defense counsel initially stated that he had no objection to Cooper's confession being admitted against defendant, the *prosecution,* which had initially raised the *Bruton* problem, properly asserted that "Mr. Johnson has to agree to that, too." (T. 2456-57) When the matter was taken up again three days later, defense counsel announced that Appellant would not agree to waive his objection to Cooper's statement. (T. 2473) Defense counsel then formally lodged an objection to the admission of Cooper's statement and, as the prosecution described in more detail its intention to use the Rudy's homicide to demonstrate Appellant's "propensity to commit violent crime," defense counsel moved for a severance, recognizing the full extent of the potential prejudice posed by Cooper's statement. (T. 2476, 2487-88) Consequently, while discussion of the severance issue was confusing, since *both* the prosecution and the defense changed their positions, it is not fair to infer bad faith on part of the defense, and the issue is fully preserved for appeal.

(severance not required where no evidence introduced at trial that was not admissible against each defendant separately).

In contending that the admission of Cooper's confession against Appellant was harmless, the State asserts that Appellant's claim that he did not intend for Walker to die is simply "unworthy of belief," noting that Appellant was convicted of first-degree murder by a jury that did not hear Cooper's confession. Answer Br. at 81. As in *Roundtree*, however, Appellant's own confession to the Rudy's robbery established felony-murder liability -- even assuming that Cooper alone decided to kill Walker. The state's suggestion on appeal that the circumstances of the prior felony were irrelevant to Appellant's capital sentencing is even more fatuous. This Court has held that "it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction" to "assist[ ] the jury in evaluating the character of the defendant and the circumstances of the crime." *Rhodes*, 547 So.2d at 1204. As Appellant pointed out in his initial brief, at 78, the prosecution presented detailed evidence regarding the circumstances of the Rudy's killing in order to add weight to the prior conviction aggravator. (T. 2523-2655) Appellant was similarly entitled to rely on the fact that Cooper was the triggerman in the Rudy's homicide to lessen the force of the prior felony conviction as an aggravator. Cooper's confession, claiming that appellant had ordered the killing, obviously had the opposite effect.[12]

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[12]The state's contention that a jury would have inevitably found that Appellant intended to kill Walker because Appellant resented Walker's racist attitudes, Answer Br. at 81, grossly exaggerates the record. In his recorded confession, in response to leading questions, Appellant acknowledged that Walker was "a little on the prejudiced

Yet, Cooper was not subject to cross-examination regarding his self-serving statement. The fact that the prosecution did not refer expressly to Cooper's version of events in its closing argument against Appellant is immaterial. Cooper's confession negated the mitigating effect of Appellant's statement and bolstered the prosecution's efforts to depict the two men as equally culpable.[13]

The State similarly claims that the defendants' antagonistic penalty phase defenses did not require a severance because there was no danger that the jury would have difficulty "distinguishing the evidence relating to each defendant's acts" and "apply[ing] the law intelligently and without confusion to determine the individual defendant's [sentence]." *McCray,* 416 So.2d at 806. In fact, however, a joint sentencing with antagonistic theories of mitigation presents a very substantial danger of confusion. While, as noted in the initial brief, at 79, each defendant has an absolute eighth amendment right to identify his co-defendant as the more culpable party, competing claims of domination are likely to elicit negative character evidence (as occurred here) that is not relevant to any aggravating circumstance and would not

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side" and that it bothered him "[a] little bit" that Walker made him scrub the baseboards in the restaurant. (T. 2609-10) Similarly, the purported inconsistency between Appellant's statement that Cooper was pointing the gun at Walker's head as they entered the freezer and the Medical Examiner's testimony that Walker was kneeling when shot in the back of the head, is ambiguous at best and hardly establishes Appellant's intent to kill. Answer Br. at 81.

[13]*Grossman v. State,* 525 So. 2d 833, 838-39 (Fla. 1988), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), on which the State relies is readily distinguishable. In *Grossman,* the defendant's own statement emphasized his dominant role in the murder whereas Cooper's statement differs materially from Appellant's regarding whose decision it was to shoot Walker.

be independently admissible against the co-defendant. The danger that one defendant's mitigation will become improper nonstatutory aggravation against the other warrants severance.[14] *See Foster v. Commonwealth,* 827 S.W.2d 670, 682-83 (Ky. 1991), *cert. denied,* 506 U.S. 921, 113 S.Ct. 337, 121 L.Ed.2d 254 (1992). As discussed in the preceding section, given the narrow margin by which the jury recommended death and the substantial mitigating evidence presented below, the state's attempt to characterize the death recommendation in this case as inevitable is simply not credible.

IX.

THIS COURT SHOULD REFORM APPELLANT'S DEATH SENTENCE TO A SENTENCE OF LIFE IMPRISONMENT BECAUSE THE IMPOSITION OF CAPITAL PUNISHMENT IN THIS CASE WOULD BE DISPROPORTIONATE

The state's answer repeatedly states that the trial court found the "killing a policeman/witness elimination aggravating circumstance." Answer Br. at 85, 86. That aggravating circumstance was not at issue in this case. (R. 632)

XI.

CAPITAL PUNISHMENT, AT LEAST AS PRESENTLY ADMINISTERED, VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

None of the cases cited in the state's answer address the precise constitutional challenge presented in this appeal. This claim is also not procedurally barred since,

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[14]As addressed in the preceding section, the trial court did not, contrary to the state's implication, Answer Br. at 80, instruct the jury to *disregard* Cooper's evidence in sentencing defendant. Nor would such an instruction, if given, be effective.

contrary to the state's assertion, it does not require the resolution of any factual matters and is a constitutional claim of the most fundamental nature.

CONCLUSION

For the foregoing reasons, and those stated in Appellant's initial brief, Appellant's convictions and sentences must be reversed and the case remanded for a new trial. Alternatively, Appellant'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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded *by hand delivery* to Assistant Attorney General RANDALL SUTTON at the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131, this 24th day of December 1996.

Christina Spaulding

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