IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,783

THOMAS KNIGHT, n/k/a
ASKARI ABDULLAH MUHAMMAD

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

Appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." Specific points raised in the intial brief but not addressed in the reply brief are not waived.

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT THE HEARSAY TESTIMONY OF DETECTIVE SMITH, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 16, AND 17, AND THE UNITED.STATES CONSTITUTION, AMENDMENTS VI, VIII, AND XIV.

The state contends that the appellant's arguments are procedurally barred, that the hearsay testimony was admitted in accordance with the death-penalty statute, and that any error was harmless. As set forth below, the arguments were preserved for review, the introduction of the hearsay testimony violated the rights guaranteed by the Confrontation Clause, and the error was prejudicial to the substantial rights of the defendant.

The Issues Were Properly Preserved for Review by Timely and Continuing Objection

The purpose of the contemporaneous objection rule is to place the judge "on notice that error may have been committed" and to provide him "an opportunity to correct it an an early stage of the proceedings." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). The objection must be timely and "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Id.* at 703; *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984).

These requirements were fully met by defense counsel's objections here: As soon as the prosecution attempted to elicit hearsay testimony from Detective Smith, defense counsel timely objected. (T. 2352). The trial court overruled defense counsel's objections that the hearsay

testimony violated his rights under the Confrontation Clause (T. 2352-53), that the testimony of former trial witnesses could not be introduced through Detective Smith without a showing that the witnesses were unavailable (T. 2362-64), that to allow Detective Smith to summarize the statements of the absent witnesses violated the defendant's confrontation rights and his right to due process (T. 2352-53, 2386-88), and that, even if the hearsay were admissible, the best evidence of what the witnesses said would be the transcript of the former testimony (T. 2352-53).

Moreover, the trial court granted the defense a continuing objection to Detective Smith's hearsay testimony (T. 2353), and stated that it would not entertain another objection to hearsay, since the Confrontation-Clause objection to this testimony had been ruled upon and the issue preserved for appeal (T. 2364). The trial court also made clear that it would make no distinction between categories of hearsay: All of the hearsay was coming in, regardless of whether or not it came within a recognized exception to the rule against hearsay. (T. 2353, 2364, 2386-87). In particular, all of the hearsay concerning the testimony of former trial witnesses was coming in, regardless of whether or not the former witness was available or unavailable. (T. 2364, 2386-87). The court had made all this abundantly clear before the introduction of the hearsay at issue here -- namely, the statements attributed to Detective Ojeda, the airplane pilot, the helicopter pilot, and the unidentified employees of the paper bag company who saw no bizarre behavior. In view of the court's rulings, there was no need to further object in order to preserve for review the issue of the inadmissibility of that hearsay testimony. The trial court was timely put on notice of the objection and of its grounds, and the court had ruled. Moreover, the court had granted a continuing objection and had specifically enjoined counsel not to raise the hearsay objection or Confrontation-Clause argument again. These issues were preserved for review.

The granting of a continuing objection to a line of testimony preserves for review issues of admissibility that are within the scope of the objection. 75 Am. Jur. 2d *Trial* § 402 (1991); *see Smith v. State*, 699 So. 2d 629, 645 (Fla. 1997) (despite lack of contemporaneous objection, prosecutor's use of codefendants' confessions against defendant required reversal of the penalty phase, "in light of the continuing objection" given to the defendant on the use of the confessions and the cumulative impact of the prosecutor's argument); *Hayes v. State*, 660 So. 2d 257, 261-62 (Fla. 1995) (erroneous introduction of collateral crime evidence required reversal where the trial judge recognized a continuing objection by the defendant to preserve the issue for appellate review).

Moreover, it is well-established that "there is no need to make further obviously vain and futile objections once an issue has been clearly ruled on by the trial judge." *Thomas v. State*, 599 So. 2d 158, 159 n. 1 (Fla. 1st DCA 1992), *citing Mercer v. State*, 40 Fla. 216, 24 So. 154, 159-60 (1898) (when an objection to the introduction of incompetent evidence has been once properly taken and overruled by the court, it is not waived by failure to object when such evidence is introduced through subsequent witnesses) *and Webb v. Priest*, 413 So. 2d 43 (Fla. 3d DCA 1982) (party not required to renew his objection each time in what would have been an obviously futile gesture). *Accord Hopkins v. State*, 632 So. 2d 1372, 1376 (Fla. 1994) (objection during pretrial hearing, and unsuccessful request for continuing objection made during the trial testimony of the first of six state hearsay witnesses, put trial court on notice of potential error in admitting hearsay statements of child sexual battery victim, and, although counsel did not continue to object after the first witness, the issue was preserved for appeal); *Rodriguez v. State*, 494 So. 2d 496, 498 (Fla. 4th DCA 1986) (issue of improper comments on silence was preserved -- where counsel unsuccessfully objected to comments elicited from one witness, but failed to object when corroborating comments were elicited

from second witness, and did not object to prosecutor's capitalizing on comments in closing argument -- because, having sustained an adverse ruling on his objection to the first witness's testimony, further objection would have been fruitless); *Thompson v. State*, 615 So. 2d 737, 744 (Fla. 1st DCA 1993) (objection to *Williams* rule evidence properly preserved by filing motion in limine and renewing objecting before the witnesses took the stand; "Knowing that the trial court considered such evidence to be admissible, it was not necessary for counsel to continuously object.").[1]

Here, not only did the court overrule defense counsel's objection to the introduction of hearsay through Detective Smith, the court also granted a continuing objection to that testimony, and explicitly admonished the defense not to object again on the same grounds because the issue had been ruled upon and preserved for appeal.

Detective Smith's testimony began with a review of his background and his duties on the cold case squad. (T. 2341-49). He then explained that he had reviewed certain reports, transcripts, and other documents regarding the present case. (T. 2349-51). As soon as the prosecutor attempted to elicit hearsay testimony, defense counsel promptly objected. The grounds stated were that permitting the introduction of hearsay, and allowing the detective to summarize what other persons

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[1]*See also Cox v. State*, 563 So. 2d 1116, 1117 (Fla. 4th DCA 1990) ("Once the trial court found this evidence [concerning a fight] admissible, any continued or further objections to evidence of the fight would have been fruitless."); *Donaldson v. State*, 369 So. 2d 691, 694 (Fla. 1st DCA 1979) (after initial objection to collateral crimes evidence was overruled, "constant objection to the testimony each time offered would be useless" since the trial court's view was that such evidence was proper, and "it was not necessary to continuously object" to each question eliciting such testimony in order to preserve the issue for review); *Howard v. State*, 616 So. 2d 484, 485 (Fla. 1st DCA 1993) (defendant who unsuccessfully sought to exclude certain evidence before trial preserved issue for review; "Although appellant did not object to the testimony when it was actually offered, we consider that it would have been a useless act for appellant to have done so, because the court had just minutes before ruled that the evidence was admissible. It is well established that the law does not require a futile or useless act.").

had said, violated the defendant's right of confrontation guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution. (T. 2352-53). The defense also stated that it was objecting for the further reason that the best evidence of what the witness had said would be the transcript of the former testimony. (T. 2352).

The trial judge overruled these objections and, noting counsel's Confrontation Clause argument, granted the defense a continuing objection to hearsay introduced through Detective Smith:

> THE COURT: * * * I will accept this objection as a continuing objection for all testimony from this witness referring to what other people told him or anything that is hearsay." (T. 2353).

(T. 2353). These rulings, and in particular the granting of a continuing objection, clearly preserved for review the arguments that it was error to allow the introduction of hearsay in violation of the Confrontation Clause; that it was error to allow Detective Smith to summarize the statements of absent witnesses; and that, even if hearsay were admissible, only the transcript of the former testimony could be introduced, not Detective Smith's summaries of that testimony. Further objection on these grounds was unnecessary to preserve these issues for review. *See Thomas*, 599 So. 2d at 159 n. 1 (once the court has clearly ruled there is no need to make further obviously vain and futile objections); *Hopkins*, 632 So. 2d at 1376 (request for continuing objection put trial court on notice of potential error and preserved issue of admissibility of evidence); *see also Smith*, 699 So. 2d at 645, *Hayes,* 660 So. 2d at 261-62, *and* 75 Am. Jur. 2d *Trial* § 402 (continuing objection preserves issues within its scope).

In addition, although this was already within the scope of the trial court's ruling that hearsay would be admitted regardless of whether it came within an exception, the defense further objected that the testimony of absent trial witnesses could not be introduced without a showing that the

witnesses were unavailable (T. 2362-64). Contrary to the state's argument that the defense did not object to Detective Smith's testimony on the ground that the absent declarants were not shown to be unavailable (Answer Br. at 26-27), defense counsel timely objected on precisely these grounds. The first former witness whose testimony Detective Smith summarized, Mr. Marinek, was dead and was therefore unavailable. However, when the prosecutor began to elicit hearsay concerning the trial testimony of a second absent witness, Mr. Perry, defense counsel objected, stating that there was no evidence that Mr. Perry was dead or otherwise unavailable, and that Detective Smith should not be allowed to summarize "what everybody in this trial testified to." (T. 2362-63). This objection was made after the statements by the prosecutor and Detective Smith which, according to the state (Answer Br. at 26-27), indicated that all the absent witnesses were unavailable. Thus, contrary to the state's argument, the defense clearly did not acquiesce in the prosecution's representations and did not waive the requirement of a showing of unavailability.

In overruling this objection, the trial court made clear that its ruling that hearsay was admissible in this proceeding did not depend on the availability or unavailability of the declarants. The court also emphasized that it had already ruled on the Confrontation Clause argument and that it would not entertain another objection to hearsay:

> THE COURT: * * * I don't want to hear the same objection and be brought sidebar for the same objection. This is hearsay. It is hearsay. You have made your confrontation rule argument. I have accepted your objection, your [sic] object to all of it.
>
> I don't want another sidebar on the subject of hearsay. You have preserved your record. I have ruled. The Supreme Court has ruled on this issue.

(T. 2364). In view of these rulings, and of the continuing objection, further objection on

Confrontation Clause grounds to the hearsay statements of former trial witnesses who were not shown to be unavailable, was not only useless and unnecessary, it had been foreclosed by the court. Accordingly, the defense properly preserved for review the argument that the hearsay testimony regarding the statements at trial of former witnesses -- including Detective Ojeda, the airplane pilot, and the paper bag company employees -- violated the Confrontation Clause because the hearsay was not within a firmly-rooted exception and the state failed to demonstrate that the witnesses were unavailable. *See Thomas*; *Hopkins*; *Mercer*; *Rodriguez*; *Thompson*; *see Smith*; *Hayes*.

Defense counsel also made a further objection, namely that, in addition to being hearsay, the manner in which the detective was testifying -- jumping from the statements of one former witness to another, and between testimony and reports -- denied the defendant due process because it was impossible for the defense to keep track of what the detective was saying and to cross-examine him. (T. 2386, 2387-88). The court overruled the objection, reiterating its view that hearsay was admissible and that the procedure being followed had been approved by this Court:

> THE COURT: You seem to distinguish little hearsay, medium hearsay and big hearsay. This you believe to be big hearsay. There is no distinction. Hearsay is hearsay. You are right this is hearsay.
>
> Exactly the same thing was done in Clark versus State which can be found at 613 SS412 whereas concerned the prior convictions rather than bring in what the State did which is to bring in the eyewitness to the murder. They brought in a detective who testified about what everybody said at that trial.
>
> The Supreme Court said essentially there is no problem. It was the same thing that they found and held in Waterhouse versus State -- these are 1992 cases; these are not ancient cases -- 596 SS 1008. Tompkins versus State, Rhodes versus State.
>
> Again, it is the same thing. I know you do not like it. You

have made that clear.

(T. 2386-87). Clearly, the Confrontation Clause argument and other arguments had been ruled upon and reiterating them would be futile.[2] The issues were preserved for review without the need for further objection. *Thomas*; *Hopkins*; *Mercer*; *Rodriguez*; *Thompson*; *see Smith*; *Hayes*.

The state argues, nevertheless, that any claims with respect to the reports, especially of the helicopter pilot, as distinct from former trial testimony, are procedurally barred because defense counsel failed to object and, according to the state, did not assert that Detective Smith's summary had gone beyond what was presented at trial. (Answer Br. at 28). However, in the first place, counsel did assert, in obvious reference to the reports, that Detective Smith's testimony included matters not testified-to at trial. (T. 2417). In the second place, the trial court's rulings were not based on any distinction between hearsay based on reports and hearsay based on trial testimony; the court was well aware, before those rulings, that the prosecution was introducing both (T. 2349). In fact, the court made clear that it saw no distinction: It was in response to defense counsel's objection that Detective Smith was jumping from "this report to this testimony to that testimony" that the trial court stated that it recognized no distinction between "little hearsay, medium hearsay and big hearsay." (T. 2386). And, third, the argument that the testimony based on the reports was inadmissible because it was hearsay (indeed double hearsay) which was not shown to come within a firmly-rooted exception to the hearsay rule or to otherwise have particularized guarantees of trustworthiness, and therefore its introduction violated the rights guaranteed by the Confrontation

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[2]After the prosecutor's direct examination of Detective Smith, the court observed that it had "pulled a couple of other cases again on the subject of hearsay that you have objected to" and cited *Chandler v. State*, 534 So. 2d 701 (Fla. 1988). (T. 2425-26).

Clause, is an argument that was was clearly within the scope of the continuing objection, of the trial court's previous adverse rulings that all the hearsay was admissible without distinction, and of the trial court's injunction not to raise a hearsay objection or Confrontation Clause argument again. That counsel abided by the court's admonition does not procedurally bar the defendant from raising the issue on appeal. *See Thomas*; *Hopkins*; *Mercer*; *Rodriguez*; *Thompson; see also Smith*; *Hayes*.

The Hearsay Testimony Violated the Defendant's Rights Under the Confrontation Clause

The state does not deny that the Confrontation Clause applies to the penalty phase, or that Detective Smith's testimony regarding the statements of Detective Ojeda and the aircraft pilots was hearsay which was not within any exception, but argues that the hearsay was properly admitted because the defense was able to cross-examine the detective and thus had a fair opportunity to rebut his testimony in accordance with the death-penalty statute. (Answer Br. at 23, 25-26). Appellant answers:

First, as to the statements attributed to the helicopter pilot, the opportunity to cross-examine Detective Smith did not satisfy either the requirements of the Confrontation Clause or the statute's requirement of a fair opportunity to rebut. The helicopter pilot did not testify either at the original trial or at resentencing (T. 3558), and his statements were not within any exception to the hearsay rule. Introducing those statements through Detective Smith violated both the Confrontation Clause and the statute. *Rhodes v. State*, 638 So. 2d 920, 924 (Fla. 1994) (error to allow police officer's testimony regarding contents of doctor's report); *Gardner v. State*, 480 So. 2d 91 (Fla. 1985) (reversible error to allow officer to testify to statements made by accomplice who did not testify at trial and could not be confronted by defendant); *Proffitt v. Wainwright*, 685 F.2d 1227, 1250-55, *modified on reh'g*, 706 F.2d 311, 311-12 (11th Cir. 1982) (introduction of psychiatrist's report in

capital sentencing proceeding violated Sixth Amendment right to confrontation).

Second, the requirements of the Confrontation Clause are not satisfied by an opportunity to cross-examine the person through whom the hearsay testimony is introduced. Such a cross-examination can only test the accuracy with which the hearsay is reported, not the reliability or credibility of the declarant. Thus, in *Gardner*, this Court held that it was error to allow an officer to testify about a co-defendant's statements because, even though the defendant obviously had an opportunity to cross-examine the officer, he could not cross-examine the declarant. 480 So. 2d at 94. Hearsay is generally introduced through someone who takes the stand and can be cross-examined. If that were enough to make it admissible, both the rule against hearsay and the application of the Clause to hearsay would be pointless. In fact, the Clause requires more. It envisions

> "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Ohio v. Roberts, 448 U.S. 56, 63-64 (1980), *quoting Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Permitting the state to substitute someone else for the declarant, and thereby evade his face-to-face confrontation, is directly contrary to the purpose of the Confrontation Clause and "calls into question the ultimate 'integrity of the fact-finding processes.'" *Roberts*, 448 U.S. at 64, *quoting Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The constitutional preference for face-to-face confrontation is also not satisfied by providing an opportunity to "rebut" the hearsay. The Clause requires, not merely an opportunity to rebut (a

minimal due process requirement guaranteed by the Fourteenth Amendment, *see Gardner v. Florida*, 430 U.S. 349 (1976)), but an opportunity to confront the declarant before the triers of fact. Absent proof of "particularized guarantees of trustworthiness," hearsay which is not within a firmly-rooted exception is inadmissible because it is "*presumptively* unreliable." *Idaho v. Wright*, 497 U.S. 805, 818 (1990); *Roberts*, 448 U.S at 66. As the proponent of the evidence, the state has the burden of overcoming that presumption. When the hearsay consists of former testimony of absent witnesses, the state must also demonstrate that the witnesses are unavailable. 448 U.S. at 66. If the state fails to meet these burdens, the evidence is inadmissible, 448 U.S. at 66, regardless of whether the defense is given an opportunity to present evidence of its own, *see Wright*, 497 U.S at 820 (hearsay "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial").

In order to introduce the helicopter pilot's statements, the state needed to call the pilot himself, or show particularized guarantees of trustworthiness. In order to introduce the testimony of the absent witnesses who had testified at trial, the state needed to demonstrate that those witnesses were unavailable. *Roberts*. The prosecution failed to meet any of these requirements of the Clause. The introduction of this hearsay was constitutional error and undermined the integrity of the fact finding process.

Third, unlike in *Chandler v. State*, 534 So. 2d 701 (Fla. 1988), the issues raised at resentencing were not resolvable merely by referring to the cold record of a previous proceeding, and could not be reduced to the question of whether the former witnesses had testified "consistent with

what the detective stated." 534 So. 2d at 703.[3] Here, cross-examination of Detective Smith could not fulfill the purposes of confrontation because what was at issue was not merely the detective's accuracy as a reporter but the reliability and credibility of the declarants themselves. The detective knew nothing about the statements other than that they were in the particular documents, or portions of documents, that the prosecutor had asked him to read; he had no personal knowledge either of the accuracy or completeness of the writings. Cross-examination of the detective could only test his general ability to memorize or recite (which was of no independent relevance whatever) or the accuracy of his recitation, it did nothing to test the reliability and credibility of the declarants.

"[O]ne critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the factfinder." 448 U.S. at 63 n. 6. That goal required cross-examination of the declarants themselves face-to-face with the resentencing judge and jury who would determine whether the defendant should be sentenced to life or death. Such confrontation was certainly "critical" here. In light of the defense contention which Detective Smith's hearsay was introduced to controvert, namely, that the actions of the police, and especially of the aircraft, had "burned" or prematurely disclosed the surveillance, the absent police officers could not be considered purely disinterested witnesses, who merely related the facts of the case. They had every reason to be guarded and vague regarding certain actions -- such as flying about the area in a noisy helicopter -- which may have

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[3]The accuracy with which the hearsay was reported also appears to have been the only issue in *Clark v. State*, 613 So. 2d 412 (Fla. 1992) and *Waterhouse v. State*, 596 So. 2d 1008 (Fla. 1992). In *Clark*, the defendant's objection was to the lack of a fair opportunity to rebut the hearsay, 613 So. 2d at 415, and in both *Clark* and *Waterhouse*, this Court only discussed whether the hearsay was admissible under the death-penalty statute; neither case mentions the Confrontation Clause or its requirements, or the need to confront the declarants before the triers of fact. 613 So. 2d at 415; 596 So. 2d at 1016.

"burned" the surveillance in this highly-publicized case. And in fact the statements of the aircraft pilots, as related by Detective Smith, were extraordinarily vague regarding both the path taken by the aircraft and the times during which they were flying about the area searching for the Mercedes. The reported statements of the pilots did not indicate the time that either aircraft arrived in the area. The airplane pilot's statement that the aircraft were called to participate in the surveillance at "approximately 11:10, give or take 15 minutes" (T. 3554) results in a time range --10:55 to 11:25 a.m.-- that encompasses practically the entire period of surveillance.[4] The actions of the aircraft once they got to the area are also uncertain. According to Detective Smith, the helicopter was instructed to land after agents on the ground lost sight of the Mercedes (T. 3586-87), but it seems that the fixed-wing airplane continued to circle the area since it eventually spotted the Mercedes beside the canal. It is not clear from the reported statements exactly where the helicopter was when it was ordered to land. Nor is it clear what either aircraft was doing before that time. Since the aircraft were searching for the Mercedes, they presumably did not roam all over Dade County, but looked for it in the area where it was being followed by ground units. Flying about in this area of wide open spaces, looking for a vehicle whose exact location they did not know, clearly invited premature disclosure of the police presence, and that danger was obviously manifest to the officers on the ground: FBI agents on the ground directed the helicopter to land because they thought its loud noise and low altitude would "burn" the surveillance (T. 3556-57).

Under these circumstances, cross-examination of Detective Smith regarding what he had read

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[4]Agent Nelson testified that the Mercedes left the bank at 10:45 a.m., and then traveled 20 miles to south Dade (T. 2035-39, 2080, 2084, 2088-89). At about 11:35 a.m., the helicopter pilot reported that shots had been fired. (T. 2101-2).

in the transcripts and reports was completely inadequate to test the reliability of the statements or the credibility of the declarants. The officers had reason to be guarded and evasive on this subject; it was in their interest to be vague, and they were. The fact that the statements were offered to contradict the testimony of Agent Nelson (which was the basis for the defense hypothetical) is yet another reason why they could not be deemed so trustworthy that cross-examination of the declarants before the resentencing jury would be superfluous. *See Wright*, 497 U.S. at 821 (to be admissible, hearsay must be "so trustworthy that adversarial testing would add little to its reliability").

The absent officers' statements should have been subjected to the rigorous testing of cross-examination of the declarants face-to-face with the trier of fact, so that the judge and the jury could observe their demeanor and the manner in which they gave their testimony while they explained how their actions could not have "burned" the surveillance. The absence of proper confrontation at the resentencing proceeding violated the requirements of the Confrontation Clause and undermined the integrity of the fact-finding process. *See Roberts*, 448 U.S. at 63-64.

The Error in Admitting Detective Smith's Hearsay Testimony Cannot Be Deemed Harmless

In its sentencing order, the trial court found that Detective Smith's testimony controverting the facts of the defense hypothetical -- including his testimony that the police aircraft became involved only "at the very end of the pursuit" -- was "extremely significant" (R. 1544) and made "eminently clear" that the defendant was unaware of the police presence until after the murders (R. 1545). The court relied on that hearsay evidence to reject both of the statutory mental mitigators sought by the defense. (R. 1544-45, 1547-48). Accordingly, there can be no doubt that the hearsay contributed to the trial court's factual determinations and was prejudicial to the defendant. And, in view of its effect on the trial judge, and of the fact that the prosecutor relied upon this hearsay in

closing argument to the jury (T. 3782-84), it cannot be said that introduction of the hearsay was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967).

What the trial court found to be "extremely significant," the state now asserts to be harmless. First, the state argues that the hearsay attributed to the officers, and in particular the statements attributed to the helicopter pilot, was merely cumulative to the non-hearsay testimony of Agent Nelson. (Answer Br. 28-29). However, since this hearsay was in fact introduced for the purpose of contradicting Agent Nelson's testimony (upon which the defense hypothetical was based) it manifestly could not be considered cumulative. It was not merely a defense contention, but Agent Nelson's testimony, that the aircraft were participating in the surveillance well before the Mercedes came to its last stop: According to Agent Nelson, the aircraft were already in the air while the Mercedes was still proceeding down the expressway (T. 2089), and they were in the air when the Mercedes stopped at a vacant lot and the occupants got out for a few minutes (T. 2092). It was to contradict these statements made by Agent Nelson that the state called Detective Smith to testify that, according to the pilots of the aircraft, they did not arrive on the scene until the very end, when the defendant was already running away. The "discrepancies" between the defense hypothetical and Detective Smith's hearsay testimony, which the court found "extremely significant," were in fact discrepancies between that hearsay and Agent Nelson's testimony. Far from being cumulative to Agent Nelson's testimony, the hearsay testimony of Detective Smith was introduced to rebut it.

The state points out that Agent Nelson testified that the defendant was not aware of the surveillance. That testimony, however, only refers to the time that Agent Nelson was able to observe the defendant, which it appears from his testimony was at the beginning of the surveillance, when

the vehicles left the downtown area and proceeded down the expressway. (T. 2083, 2087-88). Agent Nelson did not claim that he had personal knowledge that the defendant was unaware of the surveillance throughout. To the contrary, he testified that he "could not see him at all times." (T. 2083, 2087). He completely lost sight of the Mercedes at least twice toward the end of the surveillance. When he did have it in sight, his vehicle was not always following closely, even while they were still on the expressway. (T. 2082-83). Once they proceeded to the undeveloped area of south Dade, with its "wide open spaces" (T. 2044), it was evidently more difficult to maintain a close, unobtrusive surveillance. Indeed, the judge observed that it was probably because the ground surveillance units stayed too far back that they ended up losing sight of the Mercedes. (R. 1543-44).

The state further contends that the statements attributed to the helicopter pilot were also cumulative to the testimony attributed to Detective Ojeda and to the airplane pilot. (Answer Br. at 29-30). In the first place, however, this hearsay testimony likewise violated the Confrontation Clause. And, in the second place, neither Ojeda's former testimony nor the testimony atttributed to the airplane pilot addressed what the helicopter had been doing before it arrived at the area of the canal. Agent Nelson testified that the helicopter had been participating in the surveillance at the time of the stop at the vacant lot, where the occupants got out for a few minutes. (T. 2092). However, according to the hearsay testimony of Detective Smith, the helicopter pilot was instructed to land because the noise of the helicopter might "burn" the surveillance and he did not see the Mercedes until after it was already parked beside the canal. This hearsay was not cumulative. It was the main reason for calling Detective Smith in rebuttal.

Second, the state argues that there was no prejudice because Detective Smith's testimony recounted the events surrounding the murder, and, but for this being a resentencing, the jury would

have heard this testimony in the guilt phase. (Answer Br. at 23). As to the helicopter pilot's statements, that argument is manifestly wrong since the helicopter pilot did not testify at the original trial (T. 3558), and the hearsay statements attributed to him were inadmissible in either phase. As to the former testimony of absent witnesses, the state's argument simply ignores the nature of the error. The question here is not whether the state should be permitted to present the facts of the case, but whether it should be allowed to do so by means which violate the Confrontation Clause. The constitutional preference for face-to-face confrontation is not satisfied by the fact that the declarants testified in another proceeding before a different judge and jury. *Roberts*. While a resentencing is not a retrial of the defendant's guilt or innocence, it is a "completely new" penalty-phase proceeding. *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990), *citing King v. Dugger*, 555 So. 2d 355 (Fla. 1990). The new judge and jury must resolve for themselves the factual issues bearing on aggravation and mitigation, and in litigating those issues the defendant was entitled to the same constitutional protections as in the initial proceeding. Drawing out "discrediting demeanor to be viewed by the factfinder," 448 U.S. at 63 n. 6, was just as "critical" a goal of cross-examination, *id.*, at resentencing as at the original proceeding, and it could not be accomplished without confronting the declarants themselves before the resentencing judge and jury.

This Court's decision in *Lawrence v. State*, 691 So. 2d 1068 (Fla. 1997), upon which the state relies in its harmless error argument, only discusses the statutory requirements for the admission of hearsay, and does not address the requirements of the Confrontation Clause. Moreover, unlike in *Lawrence*, where the hearsay actually supported the mitigating factors for which Lawrence advocated, *id.* at 1074, here, the hearsay was introduced to rebut the defense case in mitigation, and was relied upon by the court in rejecting the statutory mental mitigators and the testimony of the

defense experts. (R. 1544-45, 1547-48). The court found the hearsay to be "extremely significant" (R. 1544). Its admission into evidence cannot be deemed harmless beyond a reasonable doubt.

Detective Smith's Conclusions Regarding the Company Employees' Testimony

As to Detective Smith's testimony that, upon reviewing the testimony of the paper bag company employees, he found no evidence that the defendant acted in a bizarre or unusual manner, the state contends that there was no Confrontation Clause violation because one of the employees (Mr. Marinek) was dead and thus unavailable. (Answer Br. at 31-32). However, Detective Smith's testimony did not refer solely (if at all) to Mr. Marinek, who was the comptroller of the company and would have had no contact with the defendant, but to "other employees." (T. 3559). There was no indication that these "other employees" were dead.

The state also argues that the issues were not preserved for review because of counsel's failure to object. However, this testimony came within the continuing defense objection recognized by the trial court, and the court had made it clear that it viewed all the hearsay as admissible, regardless of whether the declarants were alive or dead. (T. 2352-53, 2362-64, 2386-87). Moreover, defense counsel objected several times that Detective Smith should not be allowed to summarize the testimony and statements of absent witnesses, and that the best evidence of former testimony would be the transcript itself. These objections were overruled. (T. 2352-53, 2362-64, 2386-87). Thus, both the Confrontation-Clause argument and the objection to the detective's summarizing were preserved for review without the need for further objection. *Thomas*, 599 So. 2d at 159 n. 1; *Hopkins*, 632 So. 2d at 1376; *Mercer*, 24 So. at 159-60; *Rodriguez*, 494 So. 2d at 498; *Thompson*, 615 So. 2d at 744; *see also Smith*, 699 So. 2d at 645; *Hayes,* 660 So. 2d at 261-62; 75 Am. Jur. 2d *Trial* § 402.

As to the state's argument that section 90.956, Florida Statutes provides for the summarizing of testimony (Answer Br. at 26), appellant answers that the state made no attempt to follow that rule, which requires timely written notice of intent to use a summary and further requires that the summary be made available in advance. § 90.956, Fla. Stat. (1995); Charles W. Ehrhardt, *Florida Evidence*, § 956.1 at 778-79 (1996 ed.).

Finally, the state argues that Detective Smith's inferences were simply common sense (Answer Br. at 32). However, factual inferences and conclusions were for the trier of fact to make, not Detective Smith. Before the prosecution could argue, as it did (T. 3841-42), that the defendant's behavior in the days before the crime had not been bizarre or unusual, it had to first establish the facts supporting such a conclusion through the testimony of competent witnesses, not by offering an opinion that a review of the hearsay showed no evidence of unusual behavior. The fact finders were supposed to be the judge and the jury, not Detective Smith.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE'S PRINCIPAL WITNESS, DETECTIVE SMITH, TO REMAIN IN THE COURTROOM THROUGHOUT THE RESENTENCING PROCEEDING, IN VIOLATION OF THE RULE OF WITNESS SEQUESTRATION, SECTION 90.616, FLORIDA STATUTES.

The state argues that witness sequestration is entirely within the trial judge's discretion, citing cases which apply the common-law rule of sequestration. (Answer Br. at 34-35). The state's argument overlooks the fact that the common-law rule has been superseded by section 90.616, Florida Statutes, which was enacted in 1990 and adopted by this Court as a rule of court insofar as it deals with procedure. Ch. 90-174, § 2, Laws of Fla.; *In re Florida Evidence Code*, 638 So. 2d 920 (Fla. 1993); *see* Charles W. Ehrhardt, *Florida Evidence*, § 616.1, at 477-78 (1996 ed.). Decisions

which apply the former common-law rule that sequestration of witnesses is a matter for the discretion of the trial judge -- such as *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *Stano v. State*, 473 So. 2d 1282 (Fla. 1985), *Randolph v. State*, 463 So. 2d 186 (Fla. 1984), and *Burr v. State*, 466 So. 2d 1051 (Fla. 1985) -- are no longer controlling.

Under section 90.616, sequestration is demandable as a matter of right: A court "shall" order the sequestration of witnesses at the request of a party, unless the party requesting that the witness be permitted to stay demonstrates that one of the exceptions provided by section 90.616 applies. To the extent that the court retains discretion, it is with respect to the determination of whether the witness fits within one of the exceptions; if, as here, none of the exceptions apply, the party invoking the rule has a right to have that witness excluded. Ehrhardt at 478, 480-81; *cf. Strausser v. State*, 682 So. 2d 539, 541 (Fla. 1996) (no abuse of discretion to permit expert to remain in the courtroom where the court may reasonably have concluded that his presence was essential to the presentation of the cause under section 90.616(2)(c)).

Here, the prosecution had to show that Detective Smith's presence was "essential to the presentation of the [state's] cause." § 90.616(1), Fla. Stat. (1997). The prosecutor's assertion that the detective was familiar with the files was manifestly insufficient to show that he was "essential" (it was not even accurate: the detective admitted that he only read the portions of the transcripts that the prosecutor gave him to read (T. 2459)). The fact that the detective was not an ordinary witness but simply the mouthpiece of the prosecution, and that his acquaintance with the facts varied with the prosecutor's needs in light of the testimony of other witnesses, did not exempt him from the rule. The rule is *intended* to prevent the shaping of testimony in response to the testimony of other witnesses. John Henry Wigmore, *Evidence in Trials at Common Law*, § 1838, at 461 (1976 ed.).

III.

THE PROSECUTION'S RELIANCE ON THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS TAINTED THE VALIDITY OF THE JURY'S RECOMMENDATION AND UNDERMINED THE RELIABILITY OF THE SENTENCING HEARING, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The state argues that the prosecutor's closing argument was a proper comment on the defendant's past conduct and did not suggest that the defendant would kill in the future. (Answer Br. at 35, 41-42). The state overlooks the fact that before rhetorically asking what punishment is appropriate for someone who can "kill, and kill and kill again," the prosecutor emphasized that according to all the experts the defendant was homicidal and always would be: "They say that is all him, today, yesterday, *tomorrow, forever*" (T. 3773-74). This comment explicitly referred to future conduct, and was followed by the rhetorical question asking how somebody like that, who can "kill, and kill and kill again," should be punished. The urging of future dangerousness as a reason to impose the death penalty could hardly be more obvious. It was also completely deliberate, as evidenced by the fact that the prosecutor carefully laid the groundwork for just such a comment in cross-examination of the defense experts (T. 2354-55, 3096), and that it reappears as a constant theme throughout the prosecutor's closing argument, which repeatedly insisted that there was no evidence that the defendant had been rehabilitated or was no longer dangerous (T. 3787-89, 3823, 3865-66, 3873-74). The closing argument concluded with the prosecutor congratulating the jury on the fact that they had before them the ideal death penalty case, one in which the defendant was homicidal and always would be:

> When you came here the first day as jurors and were qualified, I'm sure that through each and every person's mind you said something to yourself like this; you know, if I have to listen to a death penalty case, I hope that at least it is one where the crimes are really awful, really brutal without any conscience.
>
> Maybe, in addition, I would like to hear that the man has a long criminal history; *there is no hope for rehabilitation; that he will never change; he has never changed and he will always be the same.*
>
> [DEFENSE COUNSEL:] I am going to object over no aggravating ---
>
> THE COURT: Overruled.
>
> [PROSECUTOR:] That *when in 1970, they wrote down in the report he is homicidal; he wants to kill to see the blood; that I know what kind of person that is; that it won't be a close question* because if I have got to do this, as difficult as it is going to be, at least let me convince myself in my mind that I have got the right person for the right crime with the right history; that all the factors come together because if I do believe in the death penalty at all it has got to be for this type of person, for the person who is the worst of the worst.

(T. 3873-74).

While counsel did not contemporaneously object to every comment, counsel did object (T. 3874) and also moved for a mistrial (T. 3876). His objection was overruled, and the motion was denied. (T. 3874, 3876). This sufficiently preserved the issue for reveiw.

The state also argues that the prosecutor's remarks were a proper response to the defense efforts to show that the defendant suffered from a chronic condition which was not within his control. (Answer Br. at 40-41). However, defense evidence in support of the statutory mental mitigators does not give the state license to urge future dangerousness as a reason to impose the death penalty. *See Walker v. State*, 22 Fla. L. Weekly S537, 542 (Fla. Sept. 4, 1997) (asking defense expert whether defendant "may kill again" was wholly improper and in no way related to probing

expert's opinion that defendant's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense). That is precisely what the prosecutor did here. The prejudice to the defendant is manifest from the nature of the comments themselves, and from the deliberate manner in which they were worked into the prosecutor's closing and foreshadowed in cross-examination. The prosecutor evidently believed that these comments would sway the jury, indeed, he chose to conclude on this note. As correctly stated in the defense motion for mistrial, the prosecutor "repeatedly . . . argued in effect that the jury should recommend death because of the continuing and future dangerousness of the defendant which is clearly not the aggravating circumstances in Florida." (T. 3876). That motion was well taken and should have been granted.

IV.

THE TRIAL COURT'S REFUSAL TO DETERMINE AND INSTRUCT THE JURY THAT IF SENTENCED TO LIFE, THE SENTENCES WOULD BE CONSECUTIVE, WITH MINIMUM MANDATORY TERMS TOTALING FIFTY YEARS, PRECLUDED THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE, UNDERMINED THE RELIABILITY OF THE SENTENCING PROCEEDING, AND DENIED THE DEFENDANT DUE PROCESS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV.

The state argues that under this Court's decision in *Walker v. State*, 22 Fla. L. Weekly S537 (Fla. Sept. 4, 1997), a trial judge "cannot determine, in advance of the penalty phase, whether it would impose concurrent or consecutive sentences, if a defendant was sentenced to life." (Answer Br. at 42-43). However, here, unlike in *Walker*, the defendant was not asking for a determination in advance of the penalty phase, but only in advance of submitting the matter to the jury. His motion was considered at the charge conference, after all the evidence had been presented. (T. 3736-40).

Nor was the motion asking, as appears to have been the case in *Walker*, for a determination which would have foreclosed the death penalty in the event of a jury recommendation of life. The request was for a determination that if death were not imposed the life sentences would be consecutive. Such a determination gives rise to no inconsistency with the jury override provision -- only the most lenient penalty, namely, concurrent life sentences, would have been foreclosed, not death -- and the judge had all the information he needed make that determination.

Moreover, contrary to the state's assertion that the trial judge "cannot" make such a determination, this Court's decision in *Walker* makes clear that the judge has the discretion (and thus necessarily the authority) to do so. 22 Fla. L. Weekly at S542-43 ("denial of all aspects of Walker's claim was an appropriate exercise of discretion").

In addition, contrary to the state's suggestion (Answer Br. at 43), in the present case, there is no need to speculate concerning the impact upon the jurors of the fact that Mr. Muhammad would be eligible for parole in just three years if the sentences were not made consecutive. During voir dire examination prospective jurors repeatedly voiced their concern about just such a possibility, and expressly stated that it would affect their ability to recommend a life sentence. (T. 894-95, 897-901, 912-17, 968-70, 1015-18, 1716-20). And that was before the prosecutor, deliberately exploiting and magnifying the jurors' concern, told them that they were about to recommend a sentence for someone who can "kill, and kill and kill again" and should consider that all the experts believed the defendant would always be homicidal, "today, yesterday, tomorrow, forever" (T. 3773-74).

The trial court's telling the jury that he could impose consecutive sentences did not allay these concerns, since he made it very clear that concurrent life sentences were also a possibility. Indeed, prospective jurors continued to raise the issue until the judge terminated the discussion with

the statement: "Folks, as concerns sentencing, as he [the prosecutor] has said, as I have said, the bottom line is I will decide what the sentence is." (T. 1720). The court's dialogues with the jurors on this subject concluded as follows:

> [PROSPECTIVE JUROR CHIDEKEL]: * * * I guess I need more information as to what it means. What does 25 years really mean? Does it really mean 25 years?
>
> THE COURT: Yes.
>
> MS. CHIDEKEL: Okay. Can you tell me if he was found to serve consecutively or concurrently?
>
> THE COURT: No. Is that going to affect your ability to decide this case?
>
> MS. CHIDEKEL: Well, it would mean in fact if I voted for him to be life imprisonment he might get out in three years by one of the things. Is that correct?
>
> THE COURT: Whatever happened in the penalty proceeding 24 years ago or 22, however many years ago. It does not affect us here. As I indicated, on each murder count is separate.
>
> There is a possible death penalty on each which can run concurrent or consecutive. There is a minimum penalty which I have just described for you. It can run concurrently or consecutively. That is where we are.
>
> MS. CHIDEKEL: So we can in fact vote to do it consecutively?
>
> THE COURT: No. That is up to me.
>
> MS. CHIDEKEL: We can recommend --
>
> THE COURT: Your recommendation goes only as to whether death should be imposed or whether life should be imposed beyond that, the legislature leaves that to the judge.
>
> Can you follow that? Will that be a bother for you? Will that

be a problem for you?

MS. CHIDEKEL: Well, it seems to be a little bit of a bother since I keep talking about it.

THE COURT: Is Judge Sorondo a bleeding heart liberal or is he a real stiff sense [sic] [sentencer?]? Is that what you would be thinking?

MS. CHIDEKEL: No because I am a bleeding heart liberal. In fact, I want to make sure that I'm not but yet I'm a reasonable person and don't feel somebody should be -- murder somebody and get out in three years.

I have a lot of questions about that which may or may not be answered.

THE COURT: All right. Mr. Laeser, will follow-up on this. Folks, as concerns sentencing, as he has said, as I have said, the bottom line is I will decide what the sentence is.

(T. 1718-20).

The "bottom line" to the jury was that a life recommendation might actually result in release within three years. To leave the jurors with that impression was an abuse of discretion. Once all the evidence had been presented, there could no longer be any reason to be coy about the possibility of concurrent sentences. Moreover, as the trial court acknowledged, in discussions outside the presence of the jury, there was no possibility that the defendant would be released in three years and it would be "disingenuous" to suggest such a thing. (T. 3419). Yet by refusing to determine whether concurrent sentences would be imposed, the trial court allowed the jurors to believe that a life recommendation might lead to just such a result. The prospect of being responsible, even indirectly, for releasing a murderer so soon gave pause even to a self-described "bleeding heart liberal." The concern of the death-qualified panel was surely no less. The court's refusal to grant the defendant's

motion precluding that possibility denied the defendant due process and a reliable sentencing determination.

V.

THE TRIAL COURT'S INSTRUCTION THAT THE DEFENDANT'S ABSENCE AT TRIAL WAS THE RESULT OF HIS MISCONDUCT IN THE COURTROOM, AND THAT THE DAILY DELAYS WERE CAUSED BY THE NEED TO REASSESS HIS WILLINGNESS TO BEHAVE, DENIED THE DEFENDANT DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The state argues that review of the trial court's instructions to the jury regarding the defendant's absence at the proceedings is procedurally barred because, according to the state, the defense did not object when the jury was instructed during voir dire, and according to the state, the mid-trial instructions to which the defense did object added nothing that was not within the initial instructions. (Answer Br. at 45, 50, 52-53). As set forth below, there is no procedural bar.

When the matter was discussed during voir dire, defense counsel objected to instructing the jury that the defendant was voluntarily absenting himself, asserting that the defendant's behavior was not willful. (T. 371). The court stated that the alternative was to instruct that the defendant had been disruptive and incapable of conducting himself in an appropriate manner in the courtroom. (T. 371-72). Counsel again stated that the defense did not concur that the defendant was responsible for the way he was acting and therefore did not believe his absence was voluntary. (T. 372-73). The court then instructed the jurors that the defendant was absent because he was unable to conduct himself appropriately. The instruction to the first group of prospective jurors was as follows:

During this proceeding, Mr. Muhammad is not here because

> he has been unable to conduct himself in a manner consistent with appropriate courtroom decorum and consequently I have removed him from the courtroom.
>
> We will -- I will speak with him each day in the morning to see if that condition will change.

(T. 382). The second group of prospective jurors was instructed as follows:

> Mr. Muhammad is not with us because his conduct is such that we cannot do a trial because of his misconduct in the courtroom. Accordingly, I have excluded him from the proceeding.

(T. 1158). These instructions, while prejudicial to the defendant because they informed the jurors that he had been disruptive, at least did not tell them that the court had concluded that his behavior was willful. The midtrial instruction, however, which was given over defense counsel's objection (T. 2419-24), explicitly told the jurors that it was "obvious" to the court that the defendant was "unwilling" to behave appropriately and that he would "not conform to accepted courtroom behavior." (T. 2454-55). The instruction also told the jurors that the court had come to the same conclusion every day since the proceedings began and that the delay to which the jurors were subjected every morning was because this happened every day. (T. 2454-55). The court stated:

> The second thing is Mr. Coachman's question of yesterday inquiring about why the defendant is not present or whether or not the defendant would join us at any time. I feel compelled to give you a more clear response because this is not the first time that that question has been asked.
>
> This trial began on Tuesday, January 23. That is when jury selection began. That is a week from this Tuesday.
>
> **Every morning at 9:30, I bring Mr. Muhammad into the courtroom. That is why we never begin at 9:30, even though I ask you to be here at 9:30. Every morning I speak with him and every morning he directly or indirectly indicates that he will not conform to accepted courtroom behavior.**
>
> **I have invited him to sit quietly and consult with his attorneys and it is obvious to me that he is unwilling to do that,** so the decision to exclude him is not something that was done at the

> beginning of the trial and then forgotten. It is revisited every single day at 9:30 in the morning.
>
> **We did the same thing this morning which explains the delay, and obviously my decision has been the same.** That is as much as I can explain about it, but I wanted you to know in any event any of you had doubts in your mind. This is something that is reconsidered every day at 9:30 in the morning.

(T. 2454-55). Contrary to the state's assertion that this conveyed nothing that was not already in the initial instructions (Answer Br. at 53), in this instruction the court added, first, that it was "obvious" to the court that the defendant was "unwilling" to behave appropriately, second, the fact that the misconduct was ongoing, and third, that this resulted in the daily delay experienced by the jurors. As the trial court recognized, this midtrial instruction was given over defense objection (T. 2425); moreover, defense counsel had previously made clear, when the instruction given during voir dire was discussed, that the defense objected to telling the jury that the defendant's behavior was willful. These arguments were preserved for review.

The state argues that there was no prejudice because the jurors were told by the court and the prosecutor that the defendant's absence was not an aggravating circumstance. However, the instruction to which the state refers was given during voir dire (T. 1809-10), at which point the jurors had not yet been told that the court had concluded that the defendant was willfully misbehaving, or that his willful misbehavior was the cause of the daily delays.[5] And, while the prosecutor did tell the jurors that the defendant's absence was neither an aggravator nor a mitigator, the prosecutor also took the opportunity to observe that the daily misconduct was something that the defendant "chooses

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[5]It also was not particularly effective, even at that point. Despite the instruction, one prospective juror stated that it bothered her that "we are all going through this for his benefit and he can't even behave himself to sit here" (T. 1810-11), although she "could get over it" (T. 1812).

to do" and to emphasize that the judge had decided to exclude him. (T. 3815). This, and the court's comment (in response to a defense objection) that this was consistent with the court's instructions (T. 3815), reminded the jurors that the court itself had concluded that the defendant was willfully misbehaving. At this point, the jurors already knew, from Dr. Miller's testimony, that the misconduct in question had triggered a court-ordered examination whose conclusion, obviously accepted by the court, was that the defendant had been "malingering." (T. 3519-20). The jurors would shortly hear from the prosecutor that they should reject the defense expert testimony because of the defendant's status as a "malingerer." (T. 3856-57). From the court's instruction, the jurors could only conclude that the court itself considered the defendant to be a malingerer. The instruction was not harmless, it destroyed the impartiality of the proceeding.

Blaming the defendant for all the delays was also severely prejudicial. The state's assertion that the court observed that the delays only lasted ten minutes (Answer Br. at 51) is incorrect. The court's statement that the jurors would not be upset "as long as they get their ten minutes" (T. 2425) refers to the ten-minute break given to the jurors during the proceedings, not to the length of the early morning delay (T. 2413-14). In fact, except for one day when the jury had to wait only 15 minutes, the delays ranged from 30 minutes to over an hour, for reasons that had nothing to do with the daily colloquy with the defendant, which was usually brief. On one occasion, despite the brevity of the colloquy with defendant (just over three pages of transcript), the proceedings before the jury began over two hours late. These delays, endured daily over a period of two weeks, were not trivial in themselves and were made less bearable by the information that they were caused, not by the necessarily imperfect turning of the wheels of justice, but by the willful misbehavior of the person whose punishment the jurors were there to recommend. The jurors would have to be superhuman

to accept with equanimity such an unnecessary, and deliberate, aggravation of an already unpleasant chore. Giving the jurors this personal reason to be angry at the defendant was particularly unfair because, as a matter of fact, on most days the vast majority of the daily delay had nothing to do with the defendant's colloquies with the judge, but resulted from the usual reasons for delay, namely, discussions of motions, objections, and witness scheduling.[6]

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[6]The morning proceedings before the entry of jurors may be summarized as follows:
-- January 24: colloquy with defendant; discussion of instruction and housekeeping matters; jury enters at 10:30 a.m. (one hour late) (T. 351-78).
-- January 25: colloquy with defendant; discussion of prosecutor's motion for *Faretta* hearing; defense counsel asks judge if he has prejudged mental mitigation; cause challenges; voir dire begins at 10:03 a.m. (33 minutes late) (R. 1286; T. 694-723).
-- January 26: very short colloquy with defendant; defense moves to strike previous day's panel; discussion of expert witnesses and discovery; voir dire begins at 10:03 a.m. (33 minutes late) (R. 1287; T. 1145-53).
-- January 29: very short colloquy with defendant; court calls witnesses regarding defendant's behavior while in jail; time jury enters not recorded (T. 1537-52).
-- January 30: short colloquy with defendant; discussion of instructions, exhibits, and deposition of Dr. Fisher; objection to placing magnetometers at door to courtroom; jury enters at 10:00 a.m. (30 minutes late) (1886-1903).
-- January 31: short colloquy with defendant; state objects to volume of discovery provided by defense; jury enters at 9:45 a.m. (15 minutes late) (T. 2138-51).
-- February 1: colloquy with defendant; discussion of defense request to see jail diary and of witness scheduling; jury enters at 10:40 a.m. (70 minutes late) (T. 2429-52).
-- February 2: evidentiary hearing regarding defendant's suicide attempt; discussion of instructions and of defense intent to elicit testimony as to impact of death penalty on defendant's sisters; jury enters at 10:25 a.m. (55 minutes late) (T. 2616-66).
-- February 5: colloquy with defendant; discussion of scheduling; jury enters at 10:40 a.m. (70 minutes late) (T. 2815-22).
-- February 6: colloquy with defendant; discussion of whether the defendant should be allowed to testify; discussion of limitations on Mr. Bernstein's testimony; jury enters at 10:10 a.m. (40 minutes late) (T. 3110-3136).
-- February 7: colloquy with defendant; discussion of proposed defense exhibits; discussion of argument regarding parole; removal of jurors Weldon, Zaribaf, and Cunningham; discussion of Dr. Miller's proposed testimony; jury enters at 11:40 a.m. (130 minutes late) (T. 3407-3501).
-- February 8: colloquy with defendant; charge conference; discussion of rules for argument; jurors enter at 10:06 a.m. (36 minutes late) (T. 3745-66).

VI.

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF DR. MILLER, WHO HAD BEEN APPOINTED SOLELY FOR THE PURPOSE OF EVALUATING APPELLANT'S COMPETENCE AND HAD NO OPINION AS TO HIS MENTAL STATUS AT THE TIME OF THE CRIME, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII, AND XIV.

The state argues that arguments VI(A)-(C) were not preserved for review because, while defense counsel objected to Dr. Miller's testimony on the ground that Dr. Miller had only seen the defendant to determine whether he was competent, counsel did not specifically mention the confidentiality provisions of Fla. R. Crim. P. 3.211(e), or the Fifth and Sixth Amendments. (Answer Br. at 54). Although defense counsel did not mention the Fifth or Sixth Amendments, counsel did specifically object on the ground that Dr. Miller's involvement, both in 1991 and 1996, had been for the sole purpose of evaluating the defendant's competence and the defense had not expected him to be called to testify before the jury. (T. 3491). This sufficiently apprised the court that it was error to allow the information obtained by Dr. Miller in his 1996 competency examination to be used for any purpose other than to determine the defendant's competence to proceed, which, as defense counsel also brought to the court's attention, was irrelevant to the issues before the jury. The court could not have been uncertain as to which limitation upon the use of such information was being violated; the rule is simple, explicit, and direct: the information obtained "shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant." Fla. R. Crim. P. 3.111(e).

The state also argues that the defense opened the door to the use of the information obtained

by Dr. Miller. (Answer Br. at 56-58). First, it should be noted that no defense expert testified before the jury regarding the defendant's present competence to stand trial, nor did the defense rely in any way upon Dr. Miller's 1996 competency examination. There was no valid reason at all for mentioning the 1996 examination. Second, as to the 1991 examination, appellant submits that the requirements of section 90.403 are not abrogated simply by invoking the concept of "opening the door." Dr. Miller's testimony was at best marginal and cumulative. Dr. Toomer had already acknowledged in cross-examination that Dr. Miller thought the defendant was "faking" (T. 3073-74). Dr. Miller's testimony did not rebut the observations made by the defense experts when they interviewed the defendant -- Dr. Miller stated that he was only able to conclude that the defendant was malingering on the two occasions that he saw him, but could not say what he had done at other times (T. 3520) -- nor did it rebut the conclusions of the defense experts regarding the defendant's mental state at the time of the offense, since Dr. Miller had no opinion to offer on that subject.

The state further argues that the defendant was not prejudiced because Dr. Miller's testimony did not materially add anything. (Answer Br. at 58). While Dr. Miller's testimony was actually irrelevant and cumulative, it was nonetheless highly prejudicial. In using it to argue that the defendant had always been a malingerer, not only could the prosecutor point to the fact that Dr. Miller was "court appointed, appointed by the judge" (T. 3857), his argument was powerfully bolstered by the fact that the judge had evidently accepted Dr. Miller's conclusions concerning the 1996 examination, namely, that the defendant's present courtroom behavior constituted malingering of mental health symptoms.

IX.

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR AND RELIABLE SENTENCING HEARING BY THE PROSECUTOR'S IMPROPER ARGUMENT, COMMENTS, AND INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL FACTS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The state asserts that "the first mention of a prior death sentence having been imposed was elicited by defense counsel, thrqugh its cross-examination during the State's case in chief." (Answer Br. at 68). The record reflects, however, that defense counsel's question did not call for a mention of the death sentence; that fact was gratuitously added by the state's witness, Captain Jarvis:

> Q. You were not aware [in 1980] of whether or not there were any type of medical records or any type of reports in this man's file that would tell you you ought to be careful with him before the Burke murder?
>
> A. No, ma'am. Other than the fact that he was on death row.

(T. 2286). This unsolicited comment from the state's witness was the basis for the court's allowing the prosecutor to use the fact that the defendant had been sentenced to death in questioning the defense experts. (T. 2544).

The state also contends that there was no mention of an unsuccessful appeal or clemency proceeding. (Answer Br. at 68). The record shows that the prosecutor made a point of the fact that the defendant had been represented by CCR, whom he described as the lawyers who represent a defendant "after he has had an appeal" (T. 2540), and that clemency is requested "after it has gone through the entire court process, to the governor or the cabinet" (3059-60). That the defendant's clemency petition had been rejected was obvious from the fact that a resentencing proceeding was

being held at all. It is clear that, as a result of the prosecutor's efforts, the jury was well aware of the fact that a previous judge and jury, at least one appellate court, and the Governor thought a death sentence was appropriate.

Regarding the questioning of Dr. Toomer, it is true that, as the state notes (Answer Br. at 70-71), undersigned counsel for appellant erroneously stated that the prosecutor's question regarding the defendant having done some "really bad things" to be sent to reform school at age nine was addressed to Dr. Toomer. The question (to which a defense objection was sustained) was actually directed to Dr. Carbonell, who testified before Dr. Toomer. The question was: "In your experience as a psychologist, you know that in order to get sent to Okeechobee Boys School at the age of nine, the youngest person to ever by sent, he had to do some really bad things before he got there?" (T. 2885). Regardless of who this question was directed to, however, the misconduct was in the subsequent insinuation, through questioning of Dr. Toomer, that the "things" the defendant had done as a child may have included such crimes as arson, rape, cruelty to animals, or physical cruelty to people (T. 3082-85), when, in fact, the record reveals that the defendant's offenses as a child were property crimes which began as an effort to provide for his mother and sisters. The prosecutor's unfounded insinuations that there was something more to the juvenile record than had been disclosed were highly prejudicial, particularly in view of the prosecutor's argument that the defendant "was the bad seed, the bad kid from day one" (T. 3822), the "worst of the worst;" "[h]e always was and according to the doctors he always will be" (T. 3823), and that "a certain type of evil became Thomas Knight" (T. 3872).

The state further argues that the prosecutor's appeal to the sympathies of the jury (T. 3795) was simply an isolated comment. (Answer Br. at 72). However, a comment which is preceded, as

this one was, by the prosecutor's admonition that this is what the "big decision" in the case "really is," hardly qualifies as isolated, or as a mere aside. The "big decision" according to the prosecutor was whether the defendant's life had more value than that of Sidney Gans, Lillian Gans, and Richard Burke. (T. 3795). The prosecutor went on to ask the jury in effect to show the defendant the same mercy as he had shown the victims:

> But the big decision really is, does his life have more value than Sidney Gans', more value than Lillian Gans', more value than Richard Burke's?
>
> How do we value these lives? There were no hearings with jurors to evaluate aggravating and mitigating factors for these three innocent victims.
>
> The defendant, alone, made a decision he was going to be their judge, their jury and ultimately their excutioner, and yet he asks you to find mitigation in his life for his character to justify excuse, explain, what he has done to these poor people.

(T. 3795). The state in its brief has not attempted to justify this argument. The prosecutor himself emphasized its importance. It went to the foundation of case, egregiously misstating the very basis upon which the jury should decide the matter of life or death. This comment, together with the other improper questioning, commentary and argument engaged in by the prosecutor (Initial Br. at 71-72), and the prosecutor's urging the jury to recommend death because the defendant would always be homicidal (claim III), constituted fundamental error which denied the defendant due process and a reliable sentencing proceeding.

XV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, SECTION 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

B. The Trial Court Erred in Finding the HAC Aggravating Circumstance and the Court's Reliance on an Incident that Never Happened Seriously Undermined the Reliability of the Sentencing.

The state notes that the HAC aggravator was upheld on previous appeal. (Answer Br. at 81). That fact, however, does not preclude reconsideration of the aggravator on appeal from resentencing. *See King v. State*, 514 So. 2d 354, 360 (Fla. 1987) (reconsidering aggravator of creating great risk of death to many persons). Since the initial appeal in this case, this Court has made clear that it is not simply the fact of an abduction, but the fear of impending death, which justifies application of the HAC aggravator, *see Robinson v. State*, 574 So. 2d 108, 112 (Fla. 1991); *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996), and that speculation regarding the victim's perceptions during the abduction is not a proper basis for a finding of HAC, *Hartley*, 686 So. 2d at 1323 ("Speculation that the victim *may* have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor.").

Here, the record indicates that the victims expected to be released once they had been taken to a sufficiently remote location. Mr. Gans' instructions to the FBI not to take any action outside the bank, which was evidently their best opportunity to do so (they were even able to walk by the car) has no other reasonable interpretation. Even the trial court's order, despite continual speculation about what the victims must have been thinking, acknowledges that this must have been Mr. Gans' hope when he returned to the car. (R. 1524). The importance that the ficitious racking of the gun at

the first stop had to the trial court's findings is clear from the sentencing order: According to the court, this was "the final, definitive evidence of the defendant's intentions." (R. 1525).

The state apparently suggests that the short ride between the first and second stops should not weigh heavily in the analysis (Answer Br. at 83). The sentencing order, however, makes clear that the error had a decisive impact on the trial court's thinking. The court stated:

> That moment must have been horrifying for the Ganses. The apparent loading of the weapon was the final, definitive evidence of the defendant's intentions. Still, the defendant to prolong their agony by telling them to get back into the car and continue to drive. No reasonable person in the Gans' place could have thought anything other than that they were being driven to their deaths. The thought of never returning to their families, the thought of never seeing their beloved children and grandchildren again, the anticipation of a horrible and painful death. These must have been the final thoughts that filled the minds of Sydney and Lillian Gans as they took their last ride in an automobile.

(R. 1525). Moreover, as set forth in the initial brief, the erroneous impression which this fictitious incident produced upon the judge inevitably affected its other findings regarding the defendant's intent and mental state. The court viewed this incident as the "final, definitive evidence of the defendant's intentions." (R. 1525). Its reliance on this incident which never happened fatally undermines the reliability of its sentencing decision.

CONCLUSION

For the foregoing reasons, and those set forth in the appellant's initial brief, appellant's sentences of death must be vacated and the cause remanded for imposition of a life sentence or, in the alternative, 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 mail to the Office of the Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131 this 23rd day of March, 1998.

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