IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

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I.

APPELLANT'S CONVICTIONS FOR MURDER MUST BE REVERSED BECAUSE SUBMISSION OF THIS CASE ON THE ALTERNATIVE FELONY MURDER THEORY CREATED A HOPELESS CONFLICT IN THE JURY INSTRUCTIONS, AS AN ESSENTIAL ELEMENT OF THE UNDERLYING FELONY WAS INTENT TO COMMIT MURDER, BUT THE JURY WAS TOLD THAT INTENT TO KILL WAS UNNECESSARY

The State does not dispute Appellant's fundamental proposition that the trial court's instructions on felony murder and premeditated murder were hopelessly in conflict with one another in this case. Instead, the State tries to re-cast Appellant's argument on this point to be one of harmless error not preserved below, and tries to use general principles of law applicable to other fact situations to justify the conflicting charges to the jury. Appellant's actual argument on appeal (not the argument as the State re-casts it) was preserved below, and the general principles of law which would warrant this felony murder charge in another case cannot rescue the harmfully-erroneous charge here.

Appellant will respond first to the State's argument on the substantive issue, then address the preservation and harmfulness questions. The instructions which were given to the jury confusingly dispensed with intent to kill as an element of murder, even though such intent was a necessary element of both premeditated murder and the only theory of felony murder which the State presented in this case.

Imagine a case in which the only crime charged was intentional homicide, yet the instructions to the jury dispensed with intent as an element. The charge to the jury in the present case was just as prejudicial as in that hypothetical case, because the only crimes

of murder with which the Defendant was charged (and on which the jury was instructed) required intent to kill; but the jury also was told that intent need not be proven to support the conviction. Intent was necessary to the State's murder case here, under either theory of murder. Therefore, to confusingly tell the jury that intent need not be established prejudiced Defendant in his defense.

The State's most superficially-attractive arguments on the merits of this issue are that intent to kill need not have been proven to support the underlying felony of burglary; and the corollary argument that other underlying felonies can support a felony murder conviction, without any showing of intent to kill as an element of those underlying felonies. Those are correct propositions of abstract law. However, neither proposition applies to the facts and posture of the present case.

It is immaterial that a different defendant in another case could be convicted of burglary, upon a showing of intent to commit a crime other than murder while within the dwelling, even where murder was the only crime alleged in the indictment which was intended. Burglary with intent to commit murder within the dwelling was the only underlying offense supported by the evidence and instructions in this case. It is immaterial that a different defendant could have been convicted of felony murder in connection with a crime other than burglary, such as the State's hypothetical convenience store holdup, without a showing of intent to kill, because Jesus Delgado was not charged with, nor proven to be involved in, such a holdup as the underlying felony.

The only underlying felony in this case was an alleged burglary. The only crime which the indictment alleged Mr. Delgado intended to commit within the Rodriguezes' dwelling was murder. The State in its brief correctly notes the general principle of law that

the prosecution may at trial offer proof of an underlying burglary with elements different from the elements charged. Appellant addressed this anticipated argument head-on in the Initial Brief, noting that "[t]he indictment would have been sufficient [insofar as it pleaded the underlying felony of burglary] if it had not charged that the crime Mr. Delgado intended to commit within the Rodriguezes' home was murder, as opposed to some other crime." Initial Brief at 24 (citing Toole v. State, 472 So. 2d 1174, 1175 (Fla. 1985)("essential element to be alleged and proven on a charge of burglary is the intent to commit an offense, not the intent to commit a specified offense therein")).

A defendant theoretically could be convicted of felony murder where the underlying burglary was committed with the intent to do something wrong other than killing within the structure, such as stealing money. (While it seems unfair to support a conviction of felony murder where the only proof of the crime intended within the structure was theft, while the only allegation in the charging instrument of any crime intended within the structure was killing, the law seems settled on that point, and Appellant will leave any challenge to that principle to others.) But, just as it is immaterial that Mr. Delgado theoretically could be convicted of felony murder during a convenience store holdup without proof of intent to kill (because that is not what happened in this case), it is immaterial that the State might have been able to prove the underlying felony of burglary without establishing intent to commit murder as the offense within the structure.

The only crime which the State's brief argues was possibly intended by Defendant within the dwelling, and which could support a burglary conviction (other than murder) is assault. See Answer Brief at 26-27. However, that argument, made as an afterthought for the first time on appeal, does not support Mr. Delgado's conviction for two reasons.

First, there was insufficient evidence at trial to support a conviction of burglary with intent to commit assault. Second, even if there were sufficient evidence to support a conviction of burglary with intent to commit assault, the jury was not so charged, and we cannot presume that such a conviction would have resulted from such a charge.

The State itself conceded below that it had to demonstrate that Mr. Delgado intended to commit murder, to establish that he committed burglary in the Rodriguezes' home. The trial court and the parties during the charge conference discussed the requested instructions and the evidence supporting them.

Starting at the bottom of page 1383 of the transcript, defense counsel predicted problems for the State in taking the inconsistent position that the jury could be charged on two murder theories, noting that premeditated killing was an essential component of the only underlying felony which the State theorized had occurred. The discussion continues onto the top of page 1384, where the trial court started to note that premeditated killing was an essential element of the State's felony murder theory, and the State interrupted the judge and completed the sentence for him, which locked-in the State's position.

The judge started to articulate his understanding that it was the State's position that intent to kill was an essential element of the State's case of burglary as the underlying felony, stating "but then for felony murder--." The prosecutor completed the judge's thought by interrupting the foregoing quoted sentence, agreeing that to prove Defendant guilty of the underlying felony of burglary and felony murder as charged, "[h]e would have had to have premeditated to kill at the time of the event." Tr.1384.

The State cannot now be heard to say that there was evidence of intent to commit an assault during the alleged burglary, when the State took a contrary position below. And

even assuming that there was evidence which supported the State's theory that murder was the intended underlying offense to support the burglary, we cannot simply assume that such evidence likewise would support assault as the underlying intended offense.

Assault cannot be a necessarily-included lesser offense of murder (according to the definition of that crime given by the State in footnote 8 of page 27 in the Answer Brief), because that definition includes "an intent to threaten or intimidate the victims." Murder does not include the elements of intent to threaten or intimidate the victims. One can intend to commit murder (and be convicted of that crime), while intending that the victim remain wholly unaware that he or she is at risk. See, e.g., State v. Von Deck, 607 So. 2d 1388 (Fla. 1992)(assault not necessarily lesser included offense of attempted murder because "an essential element of any assault . . . is an act creating a well founded fear in the victim" not needed in attempted murder). Thus, the inclusion in the definition of assault of an element not present in the crime of murder prevents the State here from relying upon its alleged proof of intent to murder as sufficient to establish burglary with assault as the intended underlying offense.

Second, even assuming arguendo that the State's position below is not binding on it, and assuming that evidence existed sufficient to support a conviction of burglary, with assault as the underlying crime intended, those assumptions would not obviate the harm caused by the erroneous charge given to the jury. The jury was not instructed that it could convict of felony murder upon a finding that the killings occurred during the course of a burglary committed, with assault as the underlying crime intended. We cannot presume that the jury would have returned a verdict of guilt based upon such a charge, even assuming that there was ample evidence to support such a conviction. To so presume

would be the equivalent of directing a verdict of guilt on the crime.

The State blames Appellant for the lack of a charge on assault as an underlying offense. To begin with, even if Defendant had objected to the instruction below, and if that objection were the cause of the charge on assault not being given, that objection would not be tantamount to inviting error in the giving of the charge on felony murder as erroneously given.

Defendant did not ask the trial court to charge the jury that felony murder could be found with burglary as the underlying felony, established only with intent to kill as the underlying-underlying offense. Instead, Defendant objected vigorously to such an instruction. There was no invited error.

Second, it was not Defendant's objection to the charge on assault which caused that charge not to be given. It was the State's withdrawal of the request for that charge. Before the judge ruled on Defendant's objection, the State voluntarily agreed that the charge on assault would not be given.

The discussion during which the State withdrew its request for a charge on assault occurred as the verdict form was being structured. See Tr.1365. Apparently concerned with the effect it might have on sentencing, defense counsel objected to a box on the verdict form in which the jury could have found that an assault occurred during the alleged burglary. Tr.1366. The trial court did not sustain the objection, but advised the State: "I don't think you should bother with it. I mean your major things are Counts 1 and 2 any way." Id.

The State withdrew its requests for a verdict interrogatory and instruction on assault, as follows:

MS. DANNELLY: All he gets is a box [for the jury's response to the interrogatory about burglary of a dwelling]. Take it [the interrogatory about assault] out.

THE COURT: We are not going to have assault on the form.[1]

MS. DANNELLY: Or the instruction itself.[2]

THE COURT: Or the instruction.[3]

MS. DANNELLY: If they [defense counsel] don't want them, we want him to be happy.

Tr.1366-67(emphasis added). Defendant was not the cause of the jury not being instructed on assault, it was the lack of evidence and the lack of a request for such a charge that prevented it from being given.

The State in its Answer Brief has attempted to re-cast Appellant's argument to fit its failure-to-preserve position. The State asserts that Defendant failed to preserve an argument "that the trial court should somehow have revised the instructions on felony murder." See Answer Brief at 24. There was no need to preserve any such argument below, because Appellant has not taken the position in this appeal that a different instruction on felony murder would have been appropriate.

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[1]Appellant submits that this statement by the trial court should be read as a comment summarizing of the result of the State's withdrawal of its request for an interrogatory on the assault issue, rather than as a ruling on Defendant's objection.

[2]This was not a question from counsel to the trial court, but a statement indicating that the State withdrew its request for a charge on assault.

[3]See note 1, supra.

Appellant does not take the position that any instruction on felony murder should have been given. The State has consciously mischaracterized or unconsciously misunderstood Appellant's whole point on this issue. Defendant argued long and hard below--and again argues in this appeal--that the felony murder instruction should not have been given at all.

The issue was preserved when Defendant moved for a judgment of acquittal on the felony murder charge at the close of the State's case-in-chief, on the specific ground that the charge of felony murder inconsistently required a finding of intent to kill to establish the underlying felony. Tr.1303. The issue was again saved for appellate review when Defendant again moved for an acquittal on that charge at the close of all the evidence, and again the motion was denied. Tr.1351.

Defendant at the charge conference again objected to the jury being instructed on the felony murder theory on the ground that, under the circumstances of this case, the felony murder charge and the premeditated murder charge were conflicting and inconsistent. Tr. 1382-83. This Court should reject the State's attempt to restate Appellant's argument in a way which was not preserved for appeal.

The State argues that any error in the instruction was harmless. The State in its discussion of the harmless error issue itself clearly establishes that harm resulted from the erroneous instruction. On page 28 of the Answer Brief, the State concedes that there is no view of the evidence which would support a finding of guilt of unintentional felony murder, noting its position as follows: "neither the prosecution nor the defense was arguing that the murders were unintentional."

If there was, as the State concedes, no evidence to support the proposition that the

deaths of the Rodriquezes was unintended, then there was no evidence to support the giving of the erroneous jury instruction which included the statement of law that "to convict of first degree felony murder it is not necessary for the State to prove that defendant had a premeditated design or intent to kill." It was necessary for the State to so prove, as the State now admits!

The State in its Answer Brief cavalierly brushes-off this misstatement of the law applicable to this case as "irrelevant surplusage." It is not irrelevant for the judge to tell the jury it can convict a man of first degree murder without finding an essential element of the crime which the State on appeal admits was necessary to be proven.

The charge was erroneous. Defendant suffered prejudice. The trial court had ample opportunity to cure the problem by sending the case to the jury without felony murder as a theory. Therefore, the judgment of conviction should be reversed.

II.

A MISTRIAL WAS REQUIRED BY THE STATE'S IMPROPER ARGUMENT ABOUT DEFENDANT'S FAILURE TO TESTIFY, AND THE STATE'S ATTEMPT TO SHIFT THE BURDEN OF PROOF ONTO DEFENDANT

The State's justification for its improper comments during closing argument about the lack of evidence concerning the cause of injuries to Defendant's hands--that they were

comments on the prosecution's serologist's testimony--does not establish the propriety of those comments. Instead, that attempted justification more clearly shows how improper and prejudicial were the burden-shifting remarks about Defendant's failure to testify.

The State's questions to its serologist about his failure to examine Defendant during the two and one-half years after the Rodriquezes' deaths laid the groundwork for prejudice from the comments during closing, because those questions during the serologist's testimony established that no one other than the Defendant would have been in a position to offer evidence about when and how his injuries were inflicted.

The State, in its closing argument, had suggested without any evidentiary support that scars and marks on the Defendant' hands and arms were caused by some event which occurred after the deaths involved in this case. The serologist's testimony did not lend any support for that theory. See Tr.1122. Instead, the questions asked by the State of the serologist compounded the harm from the improper argument, by making it clear to the jury that the only person in the world who could refute the State's theory was the Defendant.

Prefacing his question with the unsupported hypothesis that Defendant "had absenced [sic] himself from this jurisdiction for a period of two and one half years from the time of the homicides until the time of his arrest,"[4] counsel for the State asked the serologist to agree that no prosecution witness would be in a position to say how Mr. Delgado had been injured. Tr.1122. The prosecutor asked: "Would you have, or anyone

[4]Defendant objected the first time that unsupported assumption was stated, but the objection was overruled. See Tr.1122.

else for that matter been in a position to look at his hands to see if he had any injuries?" Id.

Of course the State's expert witness responded that he would not have been in a position to see any injuries inflicted during the encounter between the Rodriguezes and Mr. Delgado. Id. He answered a follow-up question agreeing that no one else in the jurisdiction would have been able to confirm or deny injuries to Mr. Delgado. Tr.1123.

When the prosecutor asked the question during closing argument whether the jury had "seen any evidence to suggest . . . what was going on during that lapse of time," it implied that the jury could find from Defendant's failure to testify that the scars and marks were caused by some unrelated event which occurred after the Rodriguezes' deaths. The only effect which the serologist's testimony--now offered to justify that improper comment--could have had on the jury was to emphasize that no one other than Jesus Delgado could have been in a position to offer such evidence of how and when he was injured.

Thus, contrary to the State's argument on page 34 of the Answer Brief, this case is just like Dean v. State, 690 So. 2d 720 (Fla. 4th DCA 1997). As noted by the State, the prosecutor's "comments were inappropriate in Dean because, under the unique facts of that case, 'the only person who could have testified at trial' and provided the alternative explanation that the prosecution was referring to, was the defendant." Answer Brief at 34 & n.12 (emphasis added). The State's serologist here, at the invitation of the prosecution, likewise established that Jesus Delgado was the only person "in this jurisdiction" who could say what injuries he sustained, and when he sustained them.

It is not a fair or acceptable response to a defense counsel's argument for the prosecutor to point to the Defendant's failure to testify. See generally Jackson v. State of

Florida, 522 So. 2d 802, 807 (Fla. 1988), cert. denied, 488 U.S. 871, 102 L. Ed. 2d 153, 109 S. Ct. 183 (1988). Nor is it fair or appropriate to respond by misinforming the jury on the burden of proof issue. See generally Hayes v. State of Florida, 660 So. 2d 257 (Fla. 1995); Jackson v. State of Florida, 575 So. 2d 181 (Fla. 1991). The so-called comments on the evidence here were inappropriate comments on testimony that the only evidence possible on this point would have to come from Defendant's mouth. Such comments are harmful error, and the judgment should be reversed.

III.

THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION TO SUPPORT MR. DELGADO'S CONVICTIONS FOR FIRST DEGREE MURDER

The State has failed to exclude every reasonable hypothesis other than Mr. Delgado's guilt of premeditated murder, so his convictions for first degree murder should be reversed. "Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Green v. State, No. 86,983, 1998 Fla. LEXIS 927 *12 (May 21, 1998).

In Green, this Court reversed the conviction of first degree murder because there was insufficient evidence of premeditation. Some of the same deficiencies in the State's case in Green exist in the present case.

For one thing, as in Green, there is no evidence linking the weapons used to kill the Rodriguezes with the Defendant. The victim in Green had been stabbed three times, but

"there was no testimony regarding Green's possession of a knife." In fact, the link of the Defendant to the weapons in the present case is even weaker than in Green, because the knife here was like those found in the Rodriguezes' kitchen, and there is nothing to suggest that Mr. Delgado owned any sort of firearm.

Everyone seems to agree that the knife in this case came from the Rodriguezes' home, and was not brought to the scene as part of a planned killing. The Rodriguezes owned at least one pistol, making it at least as likely that the gun was theirs, as that it is that the gun was the Defendant's. Nothing about the ownership of the weapons, or the circumstances of their presence at the scene, supports the State's case on premeditation.

The lack of gunpowder residue on the hands of the Rodriguezes does not conclusively establish that one of them did not shoot Mr. Delgado first, prompting him to retaliate in self-defense. The police criminologist who tested for gunpowder residue agreed that there are times when no residue is found on the hands of a shooter (Tr.953), and that post-shooting physical activity, such as a struggle over the weapon, can account for the absence of residue from the hands of someone who has fired it. Tr. 949-50.

The State in its brief theorizes that premeditation was established by evidence "consistent with the victims having been marched through the living area to the utility room and into the garage, immediately after they opened their doors," where Mr. Delgado planned to execute them. See Answer Brief at 42. However, the physical evidence is inconsistent with that theory of premeditation. For one thing, half of the bullet casings found at the scene were not found in the garage, but were in the utility room. There was no execution, but an altercation in different areas of the home.

As noted, all that is necessary to defeat a conviction of first degree murder is to

demonstrate that the facts are consistent with an alternative theory to premeditation, not to convince the court that the alternative theory probably is true. One important component of the State's premeditation case is its theory is that Mr. Delgado's blood at the scene resulted from cuts on his hands caused by using the knife to stab the Rodriguezes. Appellant's position is that the evidence is at least equally consistent with the theory that Mr. Delgado was shot first, and started bleeding before the knife was employed as a defensive measure.

The State's evidence included proof that some of Mr. Delgado's blood was found on the gun. But as long as the gun had bullets in it, it would not have made sense for Mr. Delgado to locate a knife, use it to stab one of the victims, cut himself in the process, then pick the gun back up, leaving his blood on it. It makes more sense that Mr. Delgado was wounded and started bleeding, then took possession of the gun and bled on its before the knife became involved. Blood on the gun is more consistent with self-defense than with the State's premeditation theory, or at least equally consistent, requiring reversal of the first degree convictions.

Even if Mr. Delgado's wound had come from the knife, that fact does not sufficiently establish premeditation. For a killer to use a knife from the Rodriguezes' kitchen is inconsistent with the State's theory that Mr. Delgado premeditated the deaths, marching the victims to a location in the home other than the kitchen.

There is no evidence as to who took the knife from the drawer. The bloody footprints found at the scene were not matched-up with anyone there. Even if it was Mr. Delgado who took the knife from the drawer, his visit to the home without the weapon, and resort to it during the struggle, is consistent with self defense and inconsistent with

premeditated murder.

The State argues that the Rodriguezes' preoccupation with home security somehow negate's Delgado's self-defense claim. To the contrary, it makes his claim stronger. Defendant's unforced entry past multiple locks into the Rodriguezes' home evidences that the victims had nothing to fear from him. If there were animosity or friction between the parties sufficient to cause one side to plan to commit murder, Defendant's peaceable entry onto the Rodriguezes' property is more consistent with him having been lured there to be killed, than it is with the proposition that he went into territory occupied by armed enemies to kill them.

There is no showing that it was Defendant who placed the telephone call to his girlfriend's home. His palmprint on the telephone could have been left there during another call, or upon simply replacing the receiver left off by another. Even if he placed the call, that is not evidence of premeditation inconsistent with other hypotheses why he placed the call.

The State's case for premeditation was even stronger in the Green case than in the present one. As here, the State argued that the nature of the victim's wounds provided circumstantial evidence of premeditation. Unlike the present case, in which Mr. Rodriguez owned at least one gun, and involving Mr. Delgado's claim of self-defense, there was nothing about the facts in Green to suggest that the victim was an armed aggressor, or otherwise was capable of using deadly force. (She was, however, "angry and intoxicated" shortly before she was killed.)

The State's case in Green was bolstered by the fact that the Defendant was heard by several witnesses on the afternoon before the murder "proclaim in a fit of rage that he

was going to kill" the victim. 1998 Fla. LEXIS 927 at *13. However, due to the lack of evidence that the Defendant brought a weapon with him, lack of other evidence "that Green committed the homicide according to a preconceived plan," and in light of the Defendant's very low intelligence, this Court reversed the conviction of premeditated murder. The State's case here is no stronger than it was in Green.

For whatever reason, trial counsel failed to present medical evidence such as x-rays to support Defendant's theory that the wound on his shoulder he showed the jury at trial was caused by the first shot fired in this altercation. No lead fragment has (yet) been removed from Defendant to account for one of the missing slugs shot that night. Trial counsel did not call any witnesses to try to establish that the character of the victims was shady or would prompt someone in Defendant's position to be fearful for his own safety. So Appellant is unable to demonstrate on direct appeal that, more likely than not, he was shot first, prompting him to defend himself. But that is not a defendant's burden in appealing a conviction of premeditated murder. The evidence is consistent with the alternative theory, so the conviction must be reversed.

IV.

THE TRIAL COURT ERRONEOUSLY EXCUSED FOR CAUSE DEATH QUALIFIED PROSPECTIVE JURORS

The State in its brief justifies the excusal for cause of death-qualified jurors using tests not recognized by this Court. The State argues that Juror Watkin's excusal was permissible because of she "equivocated" on the subject of the death penalty, even though

she said she could follow the law and impose death. Answer Brief at 50. Although she said she could put aside her personal feelings and impose the death penalty, the excusal of Ms. Dixon is defended on the ground of her "vacillation and indefinite answers." Answer Brief at 52. Juror Seidenman also tempered his statements that he could follow the law with his candid reservations about the issue, which the State asserts is enough to warrant excusal. Id.

Jury panel members' healthy equivocation and thoughtfulness about their willingness to recommend the death sentence is not grounds for excusal for cause. In Farina v. State, 680 So. 2d 392, 397 (Fla. 1996), this Court reversed the excusal for cause of a juror who, like the panel members in this case, only committed to "try to do what's right." Equivocal answers are not enough to support a challenge for cause, as this Court established where it held that "while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath." Id. at 398(emphasis added).

This Court in Farina, supra, cited with seeming approval its decision in Chandler v. State, 442 So. 2d 171 (Fla. 1983). Thus, notwithstanding the U.S. Supreme Court's clarification of the Witherspoon standard in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), this Court still recognizes that a prospective juror should not be excused for cause where they do not exhibit "unyielding conviction and rigidity" regarding their opposition to the death penalty. See Chandler, supra at 174.

The jury panel members in question could follow the law. The fact that they would do so deliberately and reluctantly does not disqualify them from serving. Therefore, the

death penalties imposed on Defendant should be reversed.

V.

DEFENDANT WAS UNFAIRLY PREJUDICED BY THE INTRODUCTION OF GRUESOME PHOTOGRAPHS OF MINIMAL RELEVANCE, WHICH WERE UNNECESSARY BECAUSE OTHER EVIDENCE ALREADY ESTABLISHED THE MATERIAL POINTS REPRESENTED THEREBY

Appellant relies upon the arguments and authorities set forth in his Initial Brief in support of reversal on this point.

VI.

THE TRIAL COURT ERRED IN FAILING TO PROVIDE MR. DELGADO WITH A THOROUGH EVALUATION BY QUALIFIED EXPERTS, THEREBY DEPRIVING MR. DELGADO OF A FUNDAMENTALLY FAIR TRIAL AND RELIABLE SENTENCING IN VIOLATION OF AKE v. OKLAHOMA

The State in its Answer Brief throws out such a barrage of data about who was hired to do what after the trial of this case, that the issue of Defendant's lack of a competent court-appointed neurological examination prior to the sentencing phase of the trial is completely obfuscated. The State's barrage of information--about who was retained when, and what they concluded--conceals the singlemost important point of this issue: Defendant, who might well suffer from organic brain damage, was not examined for that condition before the sentencing phase of the trial was over and done with! The jury did not

hear whatever evidence on that point that a competent neurological examiner might have offered.

Initially, Appellant hopes to narrow the focus of this issue by addressing quickly the State's argument that he "was evaluated by at least six (6) experts of his own choosing." There were not six experts competent to evaluate Mr. Delgado's possible brain injury.

First, the appointment of a "mitigation expert" was the appointment of a lawyer; not a neurological expert. Next, the appointment of a social worker to assist in the sociological aspects of sentencing is irrelevant to the issue of diagnosing Defendants's organic brain disease, and explaining that condition to the jury. Third, the examination by Dr. Schwartzbard at JMH is the single pre-sentencing phase neurological exam which was conducted; and it is that inadequate exam by an inexperienced hospital resident-in-training of which Defendant complained below and complains on appeal.

The fourth, fifth, and sixth of the six experts the State mentions were Dr. Cagen, Dr. Lorenco, and Dr. Herrera. Those four experts were appointed by the court after the sentencing phase of the trial. It was too late for them to formulate and present to the jury opinions about Mr. Delgado's possible organic brain damage. Although Defendant moved for a new trial on the sentencing phase before a new jury at which those experts' opinions could be presented, that motion was denied.

The single neurological evaluation conducted before the sentencing phase of the trial, by resident-in-training Julie Schwartzbard, was wholly inadequate. The trial court's order dated November 14, 1995, a week before Mr. Delgado's penalty phase hearing before a jury was scheduled to begin, specifically states that the evaluation be performed on Mr. Delgado to "rule out any type of neurological deficit or organic brain damage or any

other disability that the Defendant may have suffered secondary to childhood meningitis or automobile accident." R.503 (emphasis added).

On November 14, Dr. Schwartzbard, resident in-training at Jackson Memorial Hospital performed a hasty consultation on Mr. Delgado. SR5.1. Dr. Schwartzbard's report, faxed to the trial Court's office in the late afternoon of Thursday, November 16, 1995, did not indicate that she had evaluated Mr. Delgado in any way to determine whether or not Mr. Delgado suffered from the brain defects noted by the trial court in its order. Nor did the report address whether or not Mr. Delgado suffers from organic brain damage. SR5.1.

Appellee argues that the insufficiency of Dr. Schwartzbard's consultation and report was not cognizable by the trial court, because the failure to test for--and report on the existence of--brain damage was not noted by another neurologist prior to the sentencing trial. But Defendant had no time or resources to independently obtain such a neurologist's report before the sentencing hearing began, and the trial court denied Defendant's motions for appointment of another expert before that hearing or for a continuance.

In fact, another neurologist, Dr. Edward Cagen, did confirm under oath the inadequacy of the resident-in-training's testing and report. But by then the jury had finished its work and recommended that two death sentences be imposed.

In summary, although the State paints a pretty picture of plenty of experts appointed in a timely fashion, not a single competent neurologist examined Defendant for brain damage before the sentencing trial. Such an examination was required under the law. See Ake v. Oklahoma, 470 U.S 68 (1985).

The State does not seriously contest the point that Dr. Schwartzbard's report and

examination were inadequate and not in compliance with the order. The State only makes some half-hearted excuse that Dr. Cagen, as well as neurological psychologist Jorge Herrera, Ph.D., merely submitted "affidavits" and not "testimony" on that point. See Answer Brief at 61. An additional excuse is Defendant's alleged lack of cooperation with the State's experts. The affidavits were ample proof of the inadequate examination, and the alleged failure to cooperate was long after Defendant's rights to the requested examination for brain damage had been violated and the trial concluded. This Court should reject the State's invitation to pursue that procedural exit, and should enforce the Defendant's substantive legal right to have this highly-relevant brain damage issue properly evaluated.

VII.

THE TRIAL COURT FAILED TO FOLLOW THE PROCEDURES SET FORTH IN KOON V. DUGGER DURING MR. DELGADO'S SENTENCING PHASE AND DEPRIVED HIM OF A FAIR AND RELIABLE SENTENCING

As noted in his Initial Brief, Appellant was not given the opportunity by the trial court to make an on-the-record waiver of his right to present mitigating evidence at the sentencing hearing. Such a waiver is required where, as here, trial counsel is instructed by his client to refrain from introducing penalty phase evidence. See Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

The State in its Answer Brief confusingly responds to this argument by asserting that reversal is not required because "[t]he record is . . . abundantly clear that there was no 'waiver' of presentation of mitigating evidence." See Answer Brief at 66. Appellant agrees.

There was no such waiver on the record. That is the problem. The law requires such a waiver where counsel is told to refrain from putting on mitigation evidence.

Perhaps what the State means to say is that it believes that there was no instruction from Defendant to his trial attorneys prohibiting them from putting on proof at the sentencing phase. The possibility of such a situation is exactly why Koon requires the procedure it does: to find out before Rule 3.850 motions are filed whether the failure to put on mitigation evidence was the decision of the client, or the neglect of counsel.

Trial counsel for Defendant made enough of a record that they were being prevented from putting on mitigating evidence to trigger the need for a hearing on the issue. See SR. 1-6, R.608-14. The State notes in footnote 23 on page 66 of the Answer Brief that the testimony of family members proffered by defense counsel "is not mitigating," confirming that counsels' hands were being tied by their client. This court should not determine as a matter of law that no such decision was made by Mr. Delgado, but should reverse because the trial court failed to utilize the very procedure required to find out if such a decision had been made by Defendant, and that he was conscious of the ramifications thereof.

VIII.

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT AND OPENING STATEMENT DURING THE PENALTY PHASE DEPRIVED MR. DELGADO OF A FAIR TRIAL, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV, AND THE FLORIDA CONSTITUTION ARTICLE I, SECTIONS 9, 16 AND 17.

The State's primary response to this argument is that the issue was not preserved for appellate review. This Court should determine that such a "prosecutorial expertise" argument made in this case, along with the other improprieties in closing, render the error fundamental, permitting appellate review notwithstanding lack of timely objection. See generally, e.g., Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997).

Appellant otherwise relies upon the arguments and authorities contained in his Initial Brief in support of this issue.

IX.

THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT MR. DELGADO'S PENALTY PHASE JURY AND THE TWO DEATH SENTENCES MUST BE VACATED

The trial court erred in instructing the jury on CCP. The only evidence upon which the prosecution relies to support that instruction was that Defendant surprised the victims in their home at night with a silencer-equipped pistol on which the serial number had been removed. However that evidence was insufficient because there was never any proof that the pistol belonged to Mr. Delgado, nor that he brought it with him to the Rodriguezes' house. It is equally consistent with the evidence that the pistol belonged to the victims.

This Court should reject the "Catch 22" that erroneous instructions on aggravating factors can be harmless because there is no evidence upon which to base a jury's determination that the factor was present. Of course, if there was proof to support an instruction, it would not be error to give it. If the lack of proof to support an instruction

could render it harmless that the instruction was given, then the most unwarranted instructions would be the least reversible of them. That does not make sense. There was no proof of CCP and the trial court erred in allowing the jury to be charged on that factor. Appellant otherwise relies upon his Initial Brief on the sentencing instructions issues.

X.

THE TRIAL COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL "VICTIM IMPACT"TESTIMONY BEFORE MR. DELGADO'S PENALTY PHASE JURY; THE JURY'S RECOMMENDATIONS WERE SEVERELY TAINTED AND MR. DELGADO'S DEATH SENTENCES ARE UNRELIABLE

Appellant relies upon the arguments and authorities set forth in his Initial Brief in support of reversal on this point.

XI.

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE AND MR. DELGADO'S SENTENCES OF DEATH MUST BE VACATED

The death sentences imposed in this case do not pass proportionality review, because there are other murder cases involving more aggravating factors and less mitigation in which the death penalty has been reversed. "In preforming a proportionality review, a reviewing court must never lose sight of the fact the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders." Urbin v. State, No. 89,433, 1998 Fla. LEXIS 854 at * 13 (5/7/98). The aggravating factors which the trial court considered were not nearly so bad as those present in numerous other death

penalty cases reversed by this court.

For example, the "prior violent felony, aggravated assault with a firearm in 1985 mentioned by the State on page 78 of its Answer Brief was shown by Defendant to have been a misguided effort by him to assist someone in trouble, not a mean-spirited crime intended to harm others without any justification.

The trial court's finding that these murders were committed during the commission of an armed burglary improperly gives weight to an aggravating factor based on the killings themselves, because the only intended offense which made Defendant's presence in the victim's home a "burglary" was his alleged intent to kill them. Mr. Delgado's death penalty was said to be justified by the very intent which the State argues supported his conviction, not by any additional aggravating factor concerning the burglary.

The aggravating factors in this case are no weightier, nor are the mitigating factors any lighter, than existed in this Court's decision in Livingston v. State, 565 So. 1288 (Fla. 1988). Imposition of the death penalty upon Mr. Delgado would be arbitrary and capricious, in light of the disproportionately more egregious the circumstances in other cases in which death penalties have been reversed. Therefore, this court should reverse the death sentences.

XII.

THE TRIAL COURT'S REFUSAL TO GIVE MORE THAN LIMITED, LITTLE, OR ANY WEIGHT TO SUBSTANTIAL UNREFUTED MITIGATING CIRCUMSTANCES DEPRIVED MR. DELGADO OF A RELIABLE SENTENCING IN VIOLATION OF LOCKETT v. OHIO

Appellant relies upon the arguments and authorities set forth in his Initial Brief in

support of reversal on this point.

XIII.

MR. DELGADO'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant relies upon the arguments and authorities set forth in his Initial Brief in support of reversal on this point.

XIV.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AND HIS COURT MUST DECLARE A MORATORIUM ON EXECUTIONS; ELECTROCUTION AS A PUNISHMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 16 AND 17 OF THE FLORIDA CONSTITUTION

Appellant relies upon the arguments and authorities set forth in his Initial Brief in support of reversal on this point.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant's judgment of conviction and sentences should be vacated. In the alternative, the Appellant's death sentences should be vacated.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy hereof was served by mail, upon Fariba N. Komeily, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on this, the 8th day of June, 1998.

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