IN THE SUPREME COURT OF FLORIDA

OSVALDO ALMEIDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,432
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida.

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ARGUMENT

1. WHETHER THE COURT ERRED IN OVERRULING DEFENSE OBJECTION TO THE STATE'S MISLEADING FINAL ARGUMENT REGARDING THE BURDEN OF PROOF ON INSANITY?

Saying that this matter is not preserved for appeal,[1] appellee ignores that the court denied the defense objection. Then, after another objection and a bench conference, the state read the standard instruction to the jury. T 2041-44. Thus, the jury heard: the state argue that appellant had to disprove sanity beyond a reasonable doubt; the judge overrule the objection (communicating to the jury that the state's argument was correct); repetition of the argument by the state, followed by an objection; and, after a conference unheard by the jury, the state read the standard instruction. The state did not retract its argument before the jury; the court did not tell the jury that the earlier argument was wrong. From its vantage point, the jury had to think the state's argument was right: under the standard instruction, the defense had to disprove sanity beyond a reasonable doubt.

As for the minimal harmless error argument, the state must prove beyond reasonable doubt that the error did not contribute to the verdict: "Harmless-error review looks, we have said, to the basis on

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[1] The state's brief argues that several issues in the initial brief are not preserved for appeal. In determining prejudice as to any issue, this Court will look at both preserved and unpreserved errors. Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994) ("Although Whitton did not object to the first two alleged comments on Whitton's post-arrest silence, he argues that the cumulative impact of all three comments requires reversal. We agree that we must consider all three comments in our harmless error analysis because the harmless error test requires an examination of the entire record. The reviewing court must examine both the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict. DiGuilio, 491 So. 2d at 1135.").

which 'the jury actually rested its verdict.'" Yates v. Evatt, 500 U.S. ___, ___, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The state must show "beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained." Id. 2081. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials". Yates v. Evatt, 500 U.S. 391, 414, 111 S. Ct. 1884, 114 L.Ed. 2d 432 (1991) (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

A "bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor v. Florida, 112 S.Ct. 2114, at 2123 (1992) (O'Connor, J., concurring). "The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." Id. "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."

Id. The state's cursory argument does not meet these standards. This Court should order a new trial.

2. WHETHER THE STATE PRESENTED IRRELEVANT OR PREJUDICIAL EVIDENCE TO THE JURY?

A. Appellee's brief[2] says that the issue about the knife was not preserved for appeal. This rests on a narrow reading of the contemporary objection rule contrary to Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984) (objection made within time frame of questioning preserves issue for appeal). Appellant made a timely objection, and said he would make a motion. When the witness's testimony ended, he sought a mistrial on specific grounds. While he did not state the grounds at the time of the objection, the context shows the grounds. He preserved the matter under section 90.104(1)(a), Florida Statutes, which says a court may predicate error where the ground of the objection is apparent from the context. The contemporaneous objection rule serves to "place[ ] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). State v. Heathcoat, 442 So. 2d 955, 956 (Fla. 1983) states:

> In Hubbard v. State, 411 So. 2d 1312[, 1314] (Fla. 1st DCA 1981), appeal dismissed, 424 So. 2d 761 (Fla. 1982), the First District Court of Appeal correctly observed

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[2] As to the first three matters on Point 2, the state says at page 30 that they relate to the elements of the crime rather than to the defense of insanity, and that, since appellant killed Ingargiola, the errors are harmless. While appellant agrees that none of them had any bearing on insanity, there is no plausible argument that the knife incident, the dream, the bullets, or the alleged gang membership had any bearing on the elements of the offense. They only served to distract the jury from consideration of the insanity defense and were prejudicial under Sullivan and State v. DiGuilio.

> that [t]he primary thrust of the rule is to insure that the trial judge is made aware that an objection is being made and that the grounds therefor are enunciated. We do not believe that the rule was intended to approve or disapprove a special word formula; we will not exalt form over substance by requiring that counsel use the magic words, "I object," so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that the judge was given a clear opportunity to rule upon the objection.

Here the judge was on notice of the error and had an opportunity to correct it, but did not do so.

As to the court's not specifically ruling on the objection, the reliance on LeRetilley v. Harris, 354 So. 2d 1213 (Fla. 4th DCA 1978) is misplaced. There, the appellant in a tort case did not pursue the objection with any additional request for relief. The court noted that this rule normally does not apply in criminal cases, citing to Thomas v. State, 202 So. 2d 883 (Fla. 3d DCA 1967).[3] It emphasized the preference for addressing appellate issues on the merits in capital cases, writing that a court may consider questions raised for the first time on appeal "especially in capital cases." 354 So. 2d at 1215.

J.D. v. State, 553 So. 2d 1317, 1318 (Fla. 3d DCA 1989) states:

> On direct examination, the prosecutor asked one of the arresting officers "[w]hat did you do, after you apprehended the [appellant]?" The officer responded "I read him his rights, and asked him to give a statement, he refused." Defense counsel thereupon objected on the ground that this amounted to a comment upon appellant's post-arrest silence,

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[3] Of course a different rule applies where the defense makes a written motion and fails to obtain a ruling on it, so that the court has no notice of the alleged error. See the discussion in State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991).

> and, simultaneously, moved for a mistrial. The court denied the motion for mistrial, but did not offer a separate ruling as to the objection. Considering the totality of the circumstances surrounding the offending comment and defense counsel's response to it, we hold that the court's actions amount to a tacit overruling of defense counsel's objection, thereby admitting the offending comment into evidence. Accordingly, it follows that the trial judge, sitting as the trier-of-fact, considered the offending comment, along with the other evidence presented during the trial, in reaching the judgment rendered in this case.

Here, the court ruled on the merits, making the waiver issue moot. Savoie v. State, 422 So. 2d 308, 309 (Fla. 1982) states (e.s.):

> The issue before us arose from a denial of a motion to suppress made during trial. Although the trial judge heard the motion on the merits, he denied it both on the merits and on the ground of waiver, finding waiver because the motion was made during trial and was, therefore, not timely under the provisions of Florida Rule of Criminal Procedure 3.190(h)(4). On appeal, the district court affirmed the waiver ruling and refused to consider the denial on the merits. Under the circumstances of this case, we reject the district court's holding that waiver was the proper basis for denying the motion to suppress. The trial judge considered the motion on the merits, and we find that this renders the waiver issue moot.

The state argues now that the knife incident served to rebut the insanity defense. But it made no showing below that this incident was related to any issue before the court. It just presented the jury with the fact that there was a "knife incident" which occurred "before" a threat to Salmon. The jury was left with the fact that appellant had at some time been involved in a knife incident (apparently involving a threat to Salmon), but there was no showing of how it related to the insanity defense or testimony on recross. Contrary to its argument on appeal, it did not show below that the incident qualified, explained,

or rebutted the testimony on cross. It was an extraneous matter adduced to suggest that the defendant was a bad person.

B. Again, the state says counsel incompetently waived the issue about the dream. The court ruled on the merits, so that the waiver issue is moot. Savoie. Further, the motion was sufficiently timely that the court could have undertaken to remedy the state's injection of this irrelevant matter into the record.

The state's only argument on the merits, made for the first time on appeal,[4] is: "this testimony was relevant to show appellant's state of mind to prove or explain his subsequent behavior. Armstrong v. State, 642 So. 2d 730 (Fla. 1994)." As the author of the error, the state may not now for the first time on appeal devise an argument for admissibility of the evidence. See Hayes v. State, 581 So. 2d 121, 124 (Fla. 1991) (text and footnote 8; state-appellee failed to present theory of admissibility in trial court), Baker v. American General Life & Accident Ins. Co., 686 So. 2d 731 (Fla. 1st DCA 1997) ("Appellees request us to uphold the dismissal based on arguments not addressed by the trial court. We decline to do so.").

Further, the state's theory that the evidence served to prove or explain "subsequent behavior" is belied by the record: there was no showing that the dream occurred before the shooting. Armstrong does not help the state. There, in a prosecution for murder of a policeman, the state showed that the defendant had previously said he hated police officers. The evidence was directly related to the offense charged.

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[4] Called upon below, the state made no offer of justification of its use of this evidence. R 1492-93.

Armstrong might apply had appellant said he hated bar managers, but the dream evidence had no bearing on any issue before the jury.

C. Relying on Kearse v. State, 662 So. 2d 677 (Fla. 1995),[5] the state says the evidence about Black Talon bullets was relevant to premeditation. But the evidence here was not tied to the murder -- Salmon gave no context for the conversation -- whereas in Kearse the testimony concerned the defendant's actions at the time of the murder.

3. WHETHER THE STATE PRESENTED IMPROPER OPINION TESTIMONY ABOUT APPELLANT?

Over objection, the state presented on direct examination Louis Salmon's lay opinion that appellant was a bad boy so that it was time for him to pay the consequences and that he was prepared to face the consequences. T 1433-34. Having made no argument below for admission of this evidence, it now says that the objection below did not preserve this matter for appeal, relying on Rodriguez v. State, 609 So. 2d 493 (Fla. 1992) where the defense at trial objected to testimony as irrelevant (that is, inadmissible under section 90.404, Florida Statutes) but on appeal argued that the at evidence was inflammatory (that is, inadmissible under section 90.403). Rodriguez is irrelevant.

Rodriguez has no bearing on the case at bar. Here, just before admission of the evidence, there was significant argument over the state's failure to provide a predicate for the lay opinion. T 1433. When the evidence was admitted, appellant again objected to the lay witness opinion. T 1433-34. From the context, this necessarily was an objection that the opinion testimony lacked a proper predicate.

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[5] The state also mentions Spencer v. State, 645 So. 2d 377 (Fla. 1994), which involves a question of sufficiency of the evidence.

Regardless, at page 98 of his small treatise Florida Trial Objections (West: 1997), Prof. Ehrhardt sets out this model objection: "Your Honor, I object. The question improperly calls for a lay witness to express an opinion." He notes that the objection calls for a response giving the predicate for the opinion. The objection here raised the question of the propriety of the opinion evidence. The opinion was admissible over this objection only upon making a proper predicate.

The answer brief makes no showing that this was proper opinion evidence. The testimony was simply the witness's moral judgment of appellant which had no bearing on the issues before the court. It was improper opinion evidence, and the court erred in allowing it.

The state makes no argument (thus waiving the issue) that this moral judgment (he was a bad guy who had to pay his dues) was harmless.

Also improper was testimony that appellant "was prepared to face the consequences." In Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996), the opinion (which directly pertained to the defendant's ability to tell right from wrong at the time of the crime) was based on a conversation which occurred "immediately following the crime". At bar, there was only a generalized impression that appellant was prepared to face the consequences. The state's harmless error argument is wrong: the experts gave no opinion about appellant's moral culpability, and their testimony was based on examination of appellant long after his arrest. The lay opinion was not cumulative to their opinions -- rather it was an improper opinion without a predicate in the record.

4. WHETHER THE COURT ERRED BY ALLOWING USE OF A PHOTOGRAPH SHOWING THE VICTIM'S BODY AFTER HIS INTERNAL ORGANS HAD BEEN REMOVED?

The state displayed to the jury a photograph of the gutted corpse of the decedent. Its brief ignores the on-point authorities of Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993) and Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990). At bar, counsel objected that the photograph was not essential, that it had a graphic nature, that the issue of the cause of death was almost moot in view of the defense, and that the diagram would clearly communicate to the jury the collapse of the legs. T 1211-12, 1219. Thompson and Hoffert disapprove of use of autopsy photographs where they are not essential and there are other means of demonstrating the fact in question and the danger of prejudice outweighs the probative value.

Ignoring these cases, the state relies on King v. State, 623 So. 2d 486 (Fla. 1993), Burns v. State, 609 So. 2d 600 (Fla. 1992), and Jones v. State, 648 So. 2d 669 (Fla. 1994). King did not involve autopsy photographs. Burns and Jones say that autopsy photographs are admissible unless their relevance is outweighed by their prejudicial impact. Jones, 648 So. 2d at 679; Burns, 609 So. 2d at 604.

5. WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO THE POLICE?

Appellee says State v. Almeida, 700 So. 2d 640 (Fla. 1997) resolved this issue. That case dealt only with a certified question,[6] and did not address the specifics of the instant issue: the distinction between an equivocal response made during substantive questioning versus during the Miranda process. The issue of the retroactive application of cases was not addressed. Appellee's request that this

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[6] The certified question does not affect the issue here.

Court take judicial notice of the briefs in that case has no basis in law: the judicial notice rule is a rule of evidence applicable to trial proceedings. See also Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995) (improper "to attempt to cross-reference issues from a brief in a distinct case pending in the same court").

The state's main argument seems to be that the equivocal request was made during substantive questioning and not during the Miranda process. The pertinent colloquy was:

> Q [Detective Mink] All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?
>
> A [appellant] Yes.
>
> Q Do you wish to speak to me now without an attorney present?
>
> A Well, what good is an attorney going to do?
>
> Q Okay, well you already spoke to me and you want to speak to me again on tape?
>
> Q [Detective Alllard [sic]] We are, we are just going to talk to you as we talked to you before, that is all.
>
> A Oh, sure.

T 1526-27. Thus, this is not during substantive questioning. The fact that appellant waived his Miranda rights earlier does not diminish the fact that the police needed to clarify his equivocal response during the Miranda process. Det. Mink apparently deemed the prior waiver insufficient or questionable; hence, he renewed the Miranda process. The sole responsibility during the Miranda process is to see a suspect may be exercising his rights. Equivocal statements during this process differ from such statements during substantive questioning. In the

latter, officers concentrate on a suspect's responses and developing a line of questioning. They no longer focus on a suspect's understanding and invocation of rights. Ambiguous statements at this stage will not be recognized as needing clarification where the focus is on the suspect's substantive admissions. Thus, it makes sense to relieve the officer of the burden of recognizing something he is not concentrating on. It would make no sense to relieve the officer of his sole duty during the Miranda process -- informing the suspect of his rights and listening to his responses to determine if he may wish to exercise them (even if that wish is poorly expressed). Thus, the Utah Supreme Court wrote in Utah v. Leyva, 1997 WL 469582, *5 (Utah Aug. 19, 1997):

> The questions of waiver of Miranda rights and of postwaiver invocation of those rights are entirely separate. Smith v. Illinois, 469 U.S. 91, 98, 105 S.Ct. 490, 494, 83 L.Ed.2d 488 (1984). Regarding initial waiver of those rights, the United States Supreme Court has stated that "a heavy burden" rests on law enforcement officers "to demonstrate that the defendant knowingly and intelligently waived" his Miranda rights. Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. Wood's[7] requirement that an officer faced with an ambiguous response to the officer's reading of a suspect's Miranda rights limit his questioning to clarifying the suspect's response is entirely consistent with this heavy burden. See Wood, 868 P.2d at 85. However, once a suspect has clearly, knowingly, and intelligently waived his Miranda rights, Davis places the requirement of clarity with respect to postwaiver invocation of those rights on the suspect. As the majority in Davis describes it, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis, 512 U.S. at 459, 114 S.Ct. at 2355. Davis's holding did not address the prewaiver scenario, and therefore Wood's prewaiver clarification requirement is not inconsistent with Davis. Thus, we decline to disrupt

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[7] State v. Wood, 868 P.2d 70 (Utah 1993).

established precedent unnecessarily, and we hold that Davis did not overrule Wood.

Appellee has not addressed the argument about the problem of appellant coming from a different culture and Det. Mink's dilution of Miranda warnings and the policy of not clarifying a suspect's request.

Appellee also claims that the new rule announced in State v. Owen, 696 So. 2d 715 (Fla. 1997) applied retroactively to Owen, so that it should also apply retroactively here. Owen's situation is different from appellant's. At the time of Owen's interrogation the police were not governed by cases requiring clarification of equivocal requests. At the time of the interrogation at bar, however, Owen v. State, 560 So. 2d 207 (Fla. 1990) controlled the police, requiring clarification of such requests. Thus, applying the new Owen decision to Mr. Owen is not in conflict with not applying it here. Appellee has not challenged the rationale for not applying the new rule of law at bar -- that the law in effect at the time of their conduct must govern the police. Failure to apply the law at the time of the conduct would have the police ignoring existing law because the court will not be enforce it.

In a bare claim of lack of prejudice, the state makes no serious claim that the confession did not contribute to the verdict or sentence. Such an argument does not meet the requirements of Sullivan.

6. WHETHER THE VICTIM'S FAMILY'S EMOTIONAL REACTIONS REQUIRE A NEW TRIAL?

Appellant relies on his initial brief.

7. WHETHER THE COURT ERRED BY APPLYING THE COLD, CALCULATED, AND PREMEDITATED CIRCUMSTANCE?

Page 44 of the state's brief states: "the existence of mental mitigating circumstances do not preclude the finding of this aggravat-

ing circumstance, they merely affect the weight given the mitigating factors. See Card v. State, 453 So. 2d 17 (Fla. 1984); Michael v. State, 437 So. 2d 138 (Fla. 1983)." Neither case helps the state. Card,[8] had no mitigators. 453 So.2d at 23. The entire mitigation case showed only that Card was a sociopath. Id. 24. In Michael,[9] "The only mitigating circumstance found by the trial court was Michael's lack of a significant history of prior criminal activity." There was no competent evidence of mental mitigating circumstances. 437 So. 2d at 141. Thus, Card and Michael differ from the case at bar.

Pages 44-45 of the state's brief say that appellant attacks only the coldness element, so that Besaraba v. State, 656 So. 2d 441 (Fla. 1995) is beside the point. This misconstrues appellant's argument. His brief challenges the calculation, coldness, and pretense elements, although with primary emphasis on the coldness element. He specifically cited Besaraba regarding the calculation element. Regardless, the coldness and calculation elements are indivisible.

The state contends that the cases in the initial brief are "domestic", implying a "domestic" exception to the circumstance. There is no such exception. While such cases may show the sort of rage or turmoil that refute a claim of cool reflection, this rule is not limited to murders involving heated domestic relationships. See

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[8] Card involved a carefully planned robbery, kidnapping, and murder of a Western Union agent.

[9] In Michael, the defendant beat, strangled, and stabbed an elderly woman after she changed her will to leave him her considerable estate. 437 So. 2d at 139. Subsequently, resentencing was ordered in his case because of ineffective assistance of counsel. State v. Michael, 530 So. 2d 929 (Fla. 1988).

Lawrence v. State, 698 So. 2d 1219, 1222 (Fla. 1997) (Anstead, J., dissenting in part). Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) held, as a rule of general application, that the state must prove that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)".

Cannady v. State, 620 So. 2d 165 (Fla. 1993) does not fall under the usual heading of a "domestic" case since the murders did not arise from any heated domestic dispute. Cannady killed his wife when she was depressed, and killed a man who he thought had raped her.

Significant in this regard is Padilla v. State, 618 So. 2d 165 (Fla. 1993). After Padilla and Marisella Davila ended their relationship, two of her relatives (Hector Davila and Paul Gomez) beat Padilla up. Padilla got a gun from a friend, saying, "A man has got to do what a man has got to do." After shooting at an apartment to which Marisella had just moved (apparently Hector and Paul also lived there), he returned to the friend for more bullets. Returning to the scene, he shot Paul outside the apartment. Seeing someone (it proved to be Marisella) open the door, he fired at that person. He told the police that he had been beaten up and went back to get revenge. He confessed to shooting Paul and said that, on seeing the door open, he thought that Hector was coming out and fired two shots. Id. at 166. This Court noted that the trial court's finding[10] "supports the assertion

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[10] The trial court in Padilla found (618 So. 2d at 170):

> According to testimony at trial the defendant was beaten at his place of employment. He then acquired a weapon and bullets from someone he had left the gun with as collateral for a loan. He apparently went to a former apartment of the victim of the attempted first-degree murder and expended the

that this murder was one of a spontaneous act, resulting from Padilla's being beaten, than a preplanned act that was done with cold deliberation." Id. 170. This Court found error in use of the circumstance and ordered jury resentencing: "In our view, the nature of the event does not establish the necessary elements to establish this aggravating factor. Because we find that this was a significant aggravating factor in the imposition of the death sentence, and its elimination reduces the number of aggravating factors to two, with one mitigating factor, we find that it is necessary to remand this cause for a new sentencing proceeding before a new jury." Id.

At bar, the court's findings also show that the murder was the product of rage (R 286; e.s.):

> The evidence at trial revealed that on November 14, 1993, the manager of Higgy's restaurant and bar grabbed a beer from the defendant to prevent him from drinking because he was underage. Mr. Ingargiola had previously kicked the defendant out of the restaurant for drinking alcohol and told him not to do it again. The defendant, wanting to beat up the victim, attempted to lure him outside by claiming that he had identification in his car; however, Mr. Ingargiola refused to accompany him to the parking lot. The defendant and his friend, Louis Salmon, left the restaurant, at which time Mr. Salmon tried to calm the enraged defendant. They drove to Regas' restaurant, where they picked up two other friends. Mr. Almeida drove the three men to Mr. Salmon's house, where Mr. Salmon spent over an hour and a half attempting to calm down the very angry defendant and try to talk him out of killing Mr. Ingargiola. The defendant insisted that Mr. Salmon could not talk him out of doing this. Finally, the defendant left Mr. Salmon's home and dropped off the other two men at their respective homes. He then, in his own words, got drunk and returned to

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> bullets. He then went back and borrowed more bullets, went to the new apartment and proceeded to commit the first-degree murder and attempted first- degree murder. The Court finds the aggravating circumstance was proven.

> Higgy's, where he waited in the parking lot until Mr. Ingargiola finished closing up the restaurant. As the victim walked to his car, the defendant drove by and shot him at close range with a Magnum .44 revolver loaded with Black Talon ammunition.
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> The very fact that the defendant returned to the restaurant and waited until 4:30 in the morning for the victim to emerge so that he could shoot him provides ample support for the finding that the homicide was committed in a cold, calculated and premeditated manner. The defendant literally was lying in wait for his victim, thereby evidencing the absence of frenzy or panic as well as supporting the calculating nature of the crime. In addition, the Court finds the "heightened premeditation" element exists from the fact that despite Mr. Salmon's best efforts to dissuade the defendant from committing the crime, Mr. Almeida insisted that he would not be talked out of killing Mr. Ingargiola.

This circumstance requires the mental state associated with execution, contract, or witness-elimination murders. E.g. Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987); Stokes v. State, 548 So. 2d 188, 197 (Fla. 1989). The facts at bar show no such mental state.

This case presents a young man of slender psychological resources suffering the consequences of a profound life crisis (the break up of his marriage), who reacted in an irrational way to a perceived attack. This does not show the level of cold bloodedness required by law.

As to the pretense element, the state's brief says that appellant's argument relies on appellant's purely subjective beliefs. In fact, the state's evidence formed the basis for the argument on this point: the state's case showed that the murder arose from the actions of the deceased directed at appellant, including the threat to "kick my ass". T 1530. The state forgets that on direct examination of its own expert, Dr. Block-Garfield, the state itself elicited testimony that appellant felt justified. T 1890.

As to the reliance on the other murders to establish CCP contrary to Wuornos v. State, 676 So. 2d 966 (Fla. 1995), page 50 of the state's brief says: "In Wuornos, there were no witnesses and the defendant's confessions did not support the existence of this aggravator." At bar, also, there were no witnesses to the murder, and appellant's confession does not support the aggravator. See also Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) (seeming to disapprove of use of collateral crimes to establish the coldness circumstance).

The state's brief notes that this Court will uphold a circumstance if supported by competent substantial evidence. While this is true, it is also true that the evidence meets this criterion only if it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). The evidence shows a reasonable hypothesis which might negate the aggravating factor.

Santos v. State, 591 So.2d 160, 163 (Fla. 1991) states: "it is equally reasonable to conclude that Santos' acts constituted a crime of heated passion as it is to conclude that they exhibited cold, calculated premeditation." As the judge found at bar, Mr. Salmon spent over an hour and a half attempting to calm down the very angry defendant and trying to talk him out of killing Mr. Ingargiola.[11] Further, in appellant's own words, he got drunk and returned to Higgy's. Appellant acted from unchecked emotion abetted by the effect of alcohol on a troubled mind. It was error to find this circumstance.

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[11] Compare this with Santos, where the defendant announced two days ahead of time his intent to commit the murder, and acted out of "a misguided, excessive sense of masculinity." 591 So. 2d at 161.

The state makes a bare argument that use of this circumstance was harmless, relying on Rogers v. State 511 So. 2d 526, 535 (Fla. 1987). In Rogers, the only possible mitigator that the trial court might have found was that Rogers "was a good father, husband and provider." Id. The case at bar presents much more mitigation. Having emphasized the significance of this circumstance,[12] the state cannot now say that it did not affect the sentencing decision. State v. DiGuilio, Sullivan.

Without this circumstance, this case fits into the Songer v. State, 544 So. 2d 1010 (Fla. 1989) category: there would be only one remaining aggravator and substantial mitigation. The record shows that appellant was a seriously disturbed young man undergoing a profound life crisis (the break up of his family), who had suffered serious childhood traumas and the crime arose directly from his abuse of alcohol. This Court should reduce the sentence to life imprisonment.

Alternatively, the state cannot show that the 7-5 death verdict at bar is "surely unattributable to the error" under Sullivan.[13]

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[12] The proportionality argument in the state's brief refers to this circumstance as "very strong", answer brief, p. 53 (referring to both aggravators employed at bar), as having "considerably greater weight" than the circumstances in Livingston v. State, 565 So. 2d 1288 (Fla. 1988), answer brief, p. 74 (same), and as "weighty." Id. 78 (referring to coldness circumstance).

[13] In determining prejudice, this Court will look at both preserved and unpreserved errors. Whitton, 649 So. 2d at 864-65. (See footnote 1 above.) Significant in this regard are: the prosecutor's penalty argument to the jury that it was free to disregard mitigating evidence and that rehabilitation was not a valid sentencing consideration (Point 10 on appeal), and the state's use of improper character evidence during the guilt phase. See Burns v. State, 609 So. 2d 600 (Fla. 1992) (ordering resentencing because of erroneous admission of evidence at guilt phase which was prejudicial as to penalty).

As in Padilla and Omelus v. State, 584 So. 2d 563 (Fla. 1991) this Court should at a minimum order jury resentencing. As noted above, Padilla ordered jury resentencing after striking this circumstance because it "was a significant aggravating factor in the imposition of the death sentence".

In Omelus, a contract murder case, this Court found error in instructing the jury on the heinousness circumstance and ordered jury resentencing: "Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio." 584 So. 2d at 567.

In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court wrote that, where there was nonstatutory mitigating circumstances, use of an improper aggravator required jury resentencing:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial....

Thus, this Court should at a minimum order jury resentencing.

8. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE AT BAR?

Respecting cases cited in the initial brief, the state notes that in Besaraba and Santos v. State, 629 So. 2d 838 (Fla. 1994), this Court

found the sentence disproportionate after striking the coldness circumstance. Here, as in those cases, the evidence does not show the level of calculation or cold-bloodedness required by that circumstance. Hence, the death sentence is disproportionate here under those cases.

Regardless, the state's argument seems to be that what it sees as extensive aggravation automatically detracts from the amount of mitigation. Contrary to such argument, this Court on proportionality review makes two inquiries: whether this is one of the most aggravated and whether it is one of the least mitigated of murder cases. Regardless whether this is one of the most aggravated of murders (which this case is not), the sentence is still disproportionate unless this is one of the least mitigated of murder cases. This is not among the least mitigated of cases. The death sentence is disproportionate.

Page 53 of the state's brief maintains that the court found "two very strong aggravating factors". In fact, the trial court did not assign any particular weight to the aggravating circumstances.

The same page of the state's brief says that, under White v. State, 403 So. 2d 331 (Fla. 1981), death is presumed to be the proper penalty when one or more aggravators are found unless they are outweighed by one or more mitigators. This appellate presumption is unconstitutional. Elledge v. State, No. 83,321 (Fla. March 5, 1998); White v. State, 664 So. 2d 242, 247 (Fla. 1995) (Anstead, J., dissenting; joined by Shaw and Kogan, JJ.). The state also maintains that death is appropriate if the jury has recommended it and the judge has found that the mitigators do not outweigh the aggravators. Such, however, is simply a statement of the procedural requirements for

imposing a death sentence. Literal application of this standard would eliminate proportionality review.

In proportionality review, this Court analyzes "the nature and quality" of the sentencing circumstances as compared with other similar reported death appeals. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993).[14] The mitigators found below cannot be deemed insignificant.

(1) Extreme disturbance and substantial impairment. Appellee attacks the statutory mental mitigators, saying that they were not important[15] and that the court was wrong to find them. This Court has recognized the importance of statutory mental mitigating circumstances. See Rose v. State, 675 So. 2d 567, 573 (Fla. 1996) ("we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order") (citing cases). Appellee claims that the court should not have found these mitigators because appellant's and

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[14] See also Terry v. State, 668 So. 2d 954, 965-66 (Fla. 1996), in which this Court looked to the record to determine what weight to give an aggravating circumstance in its proportionality review.

[15] The record refutes the state's argument that the experts did not have a basis for their opinions. Dr. Bukstel gave appellant a neuropsychological test battery and a comprehensive exam. T 2288-89. He reviewed medical reports, incident and police reports, and a large body of depositions. T 2289. He saw appellant 10 times. T 2290. His total interview, test, scoring time was 44 hours. T 2291. Dr. Seligson (who testified for the defense as to guilt) met with appellant four times. T 1733. He conducted a mental status exam, a clinical interview, and an extensive background history; he reviewed depositions and police statements as well as appellant's statements to police and statements of Eddie Cooper, Louis Soloman, and various family members and others who had contact with appellant. T 1734-36. He reviewed Dr. Bukstel's testing, the Brazilian document respecting child abuse and US school documents. 1736-37. Dr. Strauss (who testified for the defense as to guilt) met appellant four times for a total of 8-9 hours. T 1655. Dr. Macaluso (who testified for the state as to guilt and for the defense at penalty) interviewed appellant twice and reviewed relevant documents. T 1954-56.

his relatives' reports of abuse, depression, and alcohol abuse were not credible. In fact, there was additional evidence -- official Brazilian police documents detailing appellant's abuse in that country. T 2558-60, supplemental record 14-18.[16] There was undisputed evidence of appellant's mental deterioration around the time of the murder. In finding this mitigator the trial court disagreed with appellee's evaluation of credibility. Thus, the finding of these important mitigators cannot be deemed wrong. In Nibert v. State, 574 So. 2d 1059 (Fla. 1990) this Court found the statutory mental mitigator to be "substantial" where the evidence to support the mitigator came from the defendant's reports to a doctor.[17]

As to the substantial impairment mitigator, the state places the bulk of its argument on the fact that appellant knew right from wrong, and was therefore not legally insane. Answer brief, pages 64-66. As the state itself admits, however, legal insanity is not the standard for this circumstance.

Consistent with this Court's prior practice, the statutory mental mitigators found by the trial court must be deemed substantial. Rose.

(2) Age. The state's brief says at pages 54-55 of its brief: "Nothing in the record suggests that appellant's age played a role in

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[16] The state overlooks that the court also looked to the PSI report "in a prior case" (apparently referring to the report in case 93-21249 of the trial court, which is case 89,402 of this Court) in considering mitigation. R 283. The state did not dispute the accuracy of the information in the report. The Supreme Court noted in Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977): "we must presume that reports prepared by professional probation officers, as the Florida procedure requires, are generally reliable."

[17] In Nibert, this mitigator was labeled substantial even though the trial court overlooked its importance.

the murder of Frank Ingargiola, or that appellant was so immature that he was less able to take responsibility for his actions or less able to appreciate the consequences of them." In fact, the murder is directly attributable to appellant's age: it was because of the Legislature's determination that someone under the age of 21 cannot handle alcohol that this entire episode occurred. Had appellant been a mature, stable adult over the age of 21, this crime would not have occurred. Reasonable persons could not differ on this point. This circumstance should be deemed significant in proportionality review.

The state's brief makes like arguments about non-statutory mitigators. Again, they are significant on proportionality review.

(1) Capacity for rehabilitation. The state says this circumstance is insignificant because appellant's mental and emotional problems are so profound it would be difficult to treat them. Answer brief, 67. This argument contradicts the argument that the mental mitigating circumstances are insignificant. Regardless, both the judge and the state misunderstood Dr. Bukstel's testimony about psychological rehabilitation. He said that characterological difficulties "tend to be more resistant to treatment, but nonetheless are among the disorders that psychologists and psychiatrists treat all the time." T 2309. On cross, he said:: "I think I qualified it ... that characterological problems are difficult to treat." T 2312. Thus, the evidence was that, while difficult to treat, appellant's problems are of the sort that experts treat all the time. Further, there was unrefuted evidence by state agents of appellant's good behavior during almost three years in jail. The state is wrong in saying that the evidence was contradictory; hence, its reliance on Quince v. State, 414 So. 2d 185 (Fla.

1982) is misplaced. To the contrary, the decision below is based on a misconstruction of undisputed facts or a misapprehension of the nature of the mitigator. This Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on misconstruction of undisputed facts or misapprehension of law. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990)(citing to Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990). A death sentence based on unreliable evidence violates the eighth amendment and due process. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

(2) Difficult/Abusive Childhood. Again, the state disagrees with the evidence underlying this mitigator. The fact that the evidence came from appellant and his relatives does not negate this factor's significance. Nibert (mitigator found by this Court during proportionality review despite fact that supporting evidence came from Nibert's reports to doctor). Appellee also points to facts not found by the trial court in an attempt to negate this mitigator.

While the state's brief mentions minor discrepancies in the record (such as whether it was the mother or the stepfather who gave the prostitute to the 12 year old appellant), it is undisputed that, on returning from Brazil, he did not appear normal, seemed goofy, doing strange things; he kept asking for dirty movies and magazines T 2376-77. He had many scars and marks on his body, his behind, and his legs T 2407. His mother testified he "was very sad, he was scared and in fear of everything." T 1597. He wanted to kill himself, stabbing his leg with a knife at age 14 T 1598. His sister related: "To me, it seemed like he was, he had been through the war, like it reminded me

of like one of the children in the concentration camp.... He wasn't clothed right, he was malnourished, he was skinny, he looked like a skeleton bones, I just couldn't understand that he was even him in there." T 1638. The state elicited his mother's testimony that he learned little in school, had language problems, T 1608, and "was sad at all times, he would never comment on anything that, anything that would happen or not happen to his day or anything." T 1610. Experts directly linked his childhood to his mental state at the time of the murder. These matters are undisputed, and must be deemed significant on proportionality review.

(3) Good behavior while incarcerated. The state says this mitigator is unimportant in view of Dr. Bukstel's testimony. But the court found nothing regarding his testimony in applying this factor. The state cannot make up a post hoc rationale for the judge's ruling. Further, it ignores that Bukstel testified that professionals treat traits like appellant's every day. T 2309.[18] Significantly, he saw a close link between appellant's childhood and his present personality. T 2298-99. He testified that the sincere conversion to Christianity provided positive potential for improvement. T 2309-10. Contrary to the state's brief, it takes no enormous leap to conclude that model behavior during nearly three years of incarceration was a strong indicator how appellant would behave in prison. The state's rationale for denigrating this circumstance is contrary to the evidence.

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[18] The state also mischaracterizes the substance of Dr. Bukstel's testimony. Bukstel testified that appellant may have some deviant perceptions of people, may view the world as threatening, and that it was "suggested" that he "may be prone to violent temper outbursts". T 2297.

(4) History of alcohol abuse and alcohol abuse on the date of the incident. The state now says that the evidence of appellant's alcohol abuse was insubstantial. It forgets that on direct examination of its own expert, Dr. Block-Garfield, the state itself elicited testimony that "One must also remember that Mr. Almeida was a daily beer drinker, which means he had reached a level of adaptation in terms of the alcohol consumption. People who drink regularly can drink a whole lot more than people who drink now and then." T 1890. Such a level of drinking in a minor is alcohol abuse. The record shows the effect of such drinking on a person of appellant's immaturity and psychological state. The claim that the record shows little or no alcohol abuse is contrary to the record and the state's own case. Cf. Puccio v. State, 701 So. 2d 858, 863 (Fla. 1997) ("We conclude that the trial court's determination that Puccio was more culpable than the others is not supported by competent substantial evidence in the record and is contrary to the State's own theory at trial.").

(5) Remorse. Appellant showed remorse in his taped statements, and in his interviews with the doctors. The state feels it is insignificant on the basis of matters not found below in evaluating this circumstance. The state makes its own fact finding, claiming (without a basis of fact in the present record)[19] that appellant

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[19] The state's penalty case showed that appellant shot Ms. Leath because she was robbing him. T 2226-29. The state did not show the nature of the injuries, and in fact did not show much at all about the nature of the incident. Similarly, its penalty case showed that he shot Ms. Counts because she was trying to get more money from him and was calling him racist and other names. T 2254, 2261-66. Again, the state did not show the nature of the injuries, and in fact did not show much at all about the nature of the incident.

committed all three murders "for no other reason than they 'pissed him off'", that he used particular bullets deliberately "to cause extreme damage", and that he purposely shot all three persons in the spine.

Appellee also disagrees with other mitigating circumstances found by the trial court. Appellant will rely on his Initial Brief for further argument regarding them.

Finally, appellee says this Court should not consider other mitigation in determining proportionality based on Lucas v. State, 568 So. 2d 18 (Fla. 1990). But the part of Lucas that appellee cites has nothing to do with proportionality review -- it only deals with what mitigators the trial court must address. However, in determining a sentence all mitigation in the record must be considered. Cf. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993).

The state rests its case for proportionality on Ferrell v. State, 680 So. 2d 390 (Fla. 1996), Duncan v. State, 619 So. 2d 279 (Fla. 1993), Asay v. State, 580 So. 2d 610 (Fla. 1991), Henry v. State, 649 So. 2d 1361 (Fla. 1994), and Hudson v. State, 538 So. 2d 829 (Fla. 1989). Ferrell had much less mitigation than the case at bar: the court found no statutory mitigators and six nonstatutory mitigators. Justice Anstead, who had concurred in affirming the death sentence, wrote in dissent from denial of rehearing: "As noted by the majority, the death sentence imposed herein rests on one aggravator, and 'we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, [and] we have affirmed the penalty despite mitigation in other cases where the lone aggravator was especially weighty.' The presence of substantial mitigation obviously could make a difference in this case." Id. 392 (e.s.). Thus, the absence of

statutory mitigators was important to the result reached. Further, as explained in the initial brief, Ferrell had shown that he was not amenable to rehabilitation in view of the fact that he had previously been in prison for murder.

In Duncan the majority opinion emphasized the absence of the factor of under the influence of alcohol and the two statutory mental mitigators. 619 So. 2d at 284. And Duncan proved himself not amenable to rehabilitation by killing a fellow inmate some years before.

In Asay, there was only one mitigating circumstance: age (23). Hence, it was not among the least mitigated of murder cases. In Henry, as well as having a contemporaneous "previous" murder conviction, the defendant also had been convicted of murder in the past of his first wife. Thus, like Ferrell and Duncan, been previously imprisoned for murder, showing no likelihood of rehabilitation.

Hudson shows no non-statutory mitigation, and the defendant was older and apparently more mature than appellant. Hudson does not show what the prior violent felony was, but apparently that conviction preceded Hudson's murder of the woman for which he was sentenced to death. Further, this Court wrote that it was "arguably a close call" as to whether Hudson's death sentence was disproportionate compared with Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). 538 So. 2d at 832. Like appellant, Fitzpatrick was a seriously disturbed man-child, 527 So. 2d at 812, and appellant's death sentence is disproportionate.

9. WHETHER THE COURT ERRED IN FAILING TO EXERCISE DISCRETION IN EVALUATING MITIGATING CIRCUMSTANCES?

The predicate for the state's brief is that the trial court followed his own instructions to the jury and considered all mitiga-

tion. Significantly, however, the court did not instruct the jury that it had an affirmative duty to consider all mitigation. Further, the judge told the jury that it would be "only under rare circumstances that this Court could impose a sentence other than what you recommend." T 2519. In fact, the court prefaced its findings of the circumstances:

> Accordingly, this Court, having heard the evidence presented at both the guilt and penalty phases, having had the benefit of legal memoranda and further argument of counsel in favor of and in opposition to the death penalty, and in accordance with Florida Statute, Section 921.141, giving great weight to the jury's sentencing recommendation, finds as follows:

T 283 (e.s.). Similarly, the sentencing order shows that the court did not independently determine the sentence: it states that a death recommendation "should not be overruled unless no reasonable basis exists for the recommendation" and employed a presumption of death upon the finding of one or more aggravating circumstances. R 293. Thus, the court sought to justify the jury's recommendation rather than weigh sentencing circumstances independently. It abused its discretion in arbitrarily giving some or little weight to various mitigating factors.

Further, the state ignores the extent to which the judge's findings are contrary to the evidence. It is an unconstitutional abuse of discretion to make a capital sentencing decision based on a flawed view of the facts. See Nibert, Pardo, Johnson, Gardner.

> 10. WHETHER FUNDAMENTAL ERROR OCCURRED WHERE THE STATE URGED THE JURY NOT TO CONSIDER IMPORTANT MITIGATION AND THE COURT'S INSTRUCTION ON MITIGATION WAS THAT THE JURY HAD DISCRETION TO DISREGARD MITIGATION?

Appellant relies on his initial brief.

> 11. WHETHER THE COURT ERRED IN LETTING THE STATE ASK THE DEFENSE EXPERT IN MITIGATION WHETHER THE DEFENDANT MET THE STANDARD FOR LEGAL INSANITY?

The state correctly says that Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) addressed and rejected an apparently identical argument, writing that testimony that the defendant could differentiate right from wrong and understand the consequences of his actions was relevant in determining the existence of the mental mitigating circumstances.

Appellant respectfully submits that Ponticelli was wrongly decided on this point: the legal sanity standard does not bear on the mental mitigators. The testimony would confuse the jury as to whether it could apply those circumstances where the defendant was not legally insane. Given the trial court's excessive reliance on the jury's penalty recommendation, this confusion infected the sentencing process and this Court should reverse and remand for resentencing.

Instructive on this point is Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994):

> We note that the trial judge's sentencing order in this case is confusing at best. First, in considering the mitigating factor of committed while under the influence of extreme mental or emotional disturbance, the trial judge stated that Morgan was "in a rage" but knew what he was doing and that what he was doing was wrong. The trial judge stated that no evidence existed to prove this factor; however, he then stated that this mitigating factor "is proven, but did not play a major part in the happening of the tragedy." Next, the trial judge stated that he was bound by the jury's rejection of the insanity defense in the guilt phase in evaluating whether Morgan suffered from a mental infirmity, disease, or defect as mitigation. The trial judge then determined that Morgan's age could be considered as a mitigating circumstance only if it was relevant to his mental and emotional maturity and ability to take responsibility for his actions. Under that standard, the trial judge found that Morgan's age of sixteen was not a mitigating circumstance because Morgan's low IQ was still within the normal range. The trial judge also rejected all nonstatutory mitigating circumstances and specifically stated that he was rejecting that Morgan committed the

> murder while in a "sudden rage" because the jury had rejected that defense during the guilt phase even though that is how the prosecutor portrayed Morgan's actions.

The State concedes that the sentencing order was defective in this regard. Among other errors, the trial judge should not have relied on the jury's verdict to reject factors in mitigation.

> The rejection of [a defendant's] insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation. Moreover, we have made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved."

Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993) (e.s.) (quoting Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990)).

Further, as the state's brief admits, the sole reason for this testimony was "to negate the mental mitigators". Answer brief, page 84 (referring to prosecutor's argument at T 2340-44). This is an improper use of such evidence, as legal sanity does not negate the mental mitigating circumstances. Since, as the state points out, "the prosecutor made it perfectly clear, repeatedly", id., that this was the purpose of the evidence, and since this is an improper use of such evidence, the court erred. Given this improper use of the evidence its confusing nature, the state cannot show that it did not contribute to the jury's 7-5 sentencing recommendation.

> 12. WHETHER THE COURT GAVE APPELLANT ERRONEOUS ADVICE REGARDING HIS RIGHT TO ADDRESS THE JURY, TAINTING THE WAIVER OF THAT RIGHT?

Appellant relies on his initial brief.

13. WHETHER THE COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION?

Notwithstanding the improper reliance on Richardson v. State, 437 So. 2d 1091 (Fla. 1983), the state says the court independently weighed the circumstances. In fact, however, the court prefaced its findings of the circumstances (T 283 (e.s.)):

> Accordingly, this Court, having heard the evidence presented at both the guilt and penalty phases, having had the benefit of legal memoranda and further argument of counsel in favor of and in opposition to the death penalty, and in accordance with Florida Statute, Section 921.141, giving great weight to the jury's sentencing recommendation, finds as follows:

Thus, the court's findings were based on excessive deference to the jury's recommendation. Elledge v. State, No. 83,321 (Fla. March 5, 1998) does not involve a sentencing order which explicitly relied on an incorrect understanding of the role of the judge at sentencing.

14. WHETHER THE COURT ERRED BY EMPLOYING A PRESUMPTION IN FAVOR OF THE DEATH PENALTY IN ITS SENTENCING ORDER?

While Elledge appears to govern this issue, appellant respectfully submits that, although this Court wrote there that it found "no error," it in effect did find error, but determined that it was harmless. This Court wrote in Elledge that White v. State, 403 So. 2d 331 (Fla. 1981) "has been superseded". Hence, reliance on White must be error. At bar, the trial court also relied on White. Further, Elledge had much more in aggravation and much less in mitigation than the case at bar. Hence, prejudicial error occurred here.

15. WHETHER THE COURT ERRED IN REFUSING TO ALLOW LIFE WITHOUT PAROLE AS A SENTENCING OPTION?

Appellant relies on his initial brief.

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE STATE TO INTRODUCE EVIDENCE OF TWO PRIOR MURDER CONVICTIONS TO PROVE PREMEDITATION AND IN REBUTTAL TO APPELLANT'S INSANITY DEFENSE.

Page 96 of the state's brief says: "The State filed its notice of intent to use Williams rule evidence on January 14, 1994 (R 11). Appellant filed his notice of intent to rely on the insanity defense on April 27, 1995 (R 169). The issue was argued on September 22, 1995 (T 397-436). During trial, after appellant had put on his experts in support of his insanity defense, the State renewed its motion to allow admission of evidence of these prior homicides (T 2009)."

The argument at T 397-436 ended with the court deferring ruling. The argument starting at T 2009 was at the end of the state's rebuttal case. Thus, the only ruling by the court raised in the state's brief is its ruling during the state's rebuttal case. The state's argument there was that the cross-examination of the state's rebuttal witnesses made the collateral crime evidence admissible. T 2010-11. Defense counsel pointed out that cross examination had not opened any doors to this evidence. T 2011. On appeal, however, the state does not argue that issue. Hence, the issue has been waived.

Further, the state has shown no abuse of discretion. The judge obviously felt that the defense had not opened the door to the evidence, which in any event was irrelevant and its prejudicial impact outweighed its probative value. The cases cited by the state are cases in which the appellate court held that the trial court did not abuse its discretion by allowing collateral bad act evidence. It relies on no case showing error in excluding such highly prejudicial evidence.

Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) involved use of collateral crime evidence to refute the defendant's testimony that "portrayed her as the actual victim". Id. 1006. This Court held evidence of other identical crimes "relevant to the State's theory of premeditation and to rebut Wuornos' claim that she was the one attacked first." Id. 1007. At bar, on the other hand, premeditation was not an issue -- the only question was appellant's sanity at the time of the crime. Appellant's other murders do not bear on that issue since they involved significant factual differences -- he did act in self-defense in those cases, but there was no claim of self-defense at bar.

The court wrote in Rossi v. State, 416 So. 2d 1166, 1168 (Fla. 4th DCA 1982): "In essence appellant's defense in this case was that his actions against the victim resulted from an isolated and temporary mental breakdown. In considering the validity of such assertion we believe the jury was entitled to know that the appellant had engaged in virtually the identical conduct on a prior occasion." Again, Rossi is different from the case here. Appellant's prior murders involved self-defense during confrontations with prostitutes, one of whom was robbing him and the other of whom was demanding more money from him. They did not involve virtually identical conduct as the case at bar.

The state's reliance on Traylor v. State, 498 So. 2d 1297 (Fla. 1st DCA 1986) is puzzling since this Court on discretionary review ruled that it was error to admit the evidence of the collateral crime, albeit on different grounds. Traylor v. State, 596 So. 2d 957 (1992). Regardless, the district court opinion in Traylor explicates neither the similarities between the two crimes or how the collateral crime in Alabama helped to prove intent to commit the murder in Florida.

In arguing similarity of the crimes, the state's brief says at page 99: "Although not explicitly spelled out in the record, it can be fairly inferred that appellant knew that his shot was designed to sever his victims' spinal cords, known as a spinal shot, and that it would fall his victims in place." The record does not support this claim.

Since reasonable judges could disagree about the admission of the evidence, there was no abuse of discretion at bar.

CONCLUSION

This Court should vacate the judgments and sentences and remand with such instructions as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to David Schultz, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, by courier this 16 day of March, 1998.

Of Counsel