IN THE SUPREME COURT OF FLORIDA

AKEEM MUHAMMAD,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,030
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court
of the 17th Judicial Circuit.

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TABLE OF CONTENTS

ARGUMENT

AUTHORITIES CITED

CASES **PAGE**

FLORIDA STATUTES

ARGUMENT

1. WHETHER THE COURT ERRED IN CONDUCTING A HEARING RESPECTING WITNESS KATIA OUT OF THE PRESENCE OF APPELLANT.

Page 11 of the state's brief says that there was no fundamental error. This is true only if there was no serious constitutional error. "To be a fundamental error, the error must be one which amounts to a denial of due process of law. See, e.g., Sochor v. State, 580 So. 2d 595 (Fla. 1991); Ray v. State, 403 So. 2d 956 (Fla. 1981)" Willie v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992). "This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process. [Cit.]." Ray, 403 So. 2d at 961.

Fundamental error analysis is inextricably intertwined with determination of whether constitutional error has occurred:

> Fundamental error has been defined as one that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process. [Cit.]. One characteristic of a fundamental error can be that no corrective instruction or action by the court would have "obliterated the taint" caused by the improper conduct. [Cit.]. When confronting a claim that the jury's verdict was unconstitutionally coerced, our fundamental error analysis depends on the constitutional analysis. If the totality of the circumstances supports the finding of improper coercion of the jury, then there has been a type of constitutional violation which is fundamental error, and per se reversible. On the other hand, in this case, error not amounting to a constitutional violation is not fundamental error, so an objection at trial is necessary to preserve the issue and a harmless error analysis is

> appropriate. See S. 924.051(3), Fla. Stat. (Supp.1996); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Scoggins v. State, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997); see also Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The fundamental error cases at pages 11-12 of the state's brief must be read in the light of this principle.

Page 13 of the state's brief says United States v. Adams, 785 F.2d 917 (11th Cir. 1986) "is directly on point". There, the judge only told the witness that he could be held in contempt if he did not testify, and asked if the prosecutor had offered to help him. The court noted that a judge (id. 920; e.s.):

> ... must insure that the conference is carefully conducted so that no rights of the defendant are threatened. In this case, the court followed procedures to insure that the conference was fair: first, at no time was the substance of Pooley's inculpatory testimony discussed; second, the entire conference was transcribed. [FN omitted.] Cf. United States v. Watchmaker, 761 F.2d 1459, 1466 (11th Cir. 1985) (ex parte conference with frightened juror proper where transcribed and judge's comments carefully framed).

At bar, however, the judge's comments were not carefully framed. The judge repeatedly told Mr. Katia that he and his family were in danger if he did not testify and appellant were acquitted.

The state also cites LaChappelle v. Moran, 699 F.2d 560 (1st Cir. 1983). LaChapelle held that ex parte conferences are generally improper, and specifically disapproved of the judge's suggesting an answer for the witness to give in court, id. 566-67, but found no due process violation since the witness rejected the

judge's suggestion. The judge's conduct was otherwise aimed only at relieving the juvenile witness's embarrassment at using sexual terms. The court at bar went well beyond the actions in La-Chappelle. It injected itself so far into the counseling of the witness as to affect the defendant's constitutional rights.

Appellant agrees with the general discussion of Supreme Court cases on the right to consult with counsel at pages 13-14 of the state's brief. He disagrees, however, as to United States v. Arroyo-Angulo, 580 F.2d 1137, 1143-44 (2d Cir. 1978), which the state says "is on point". There, various defendants had had chamber conferences with the judge, from the other defendants were excluded, and then sought disclosure of the co-defendants' conferences while opposing disclosure of their own. Id. 1142.[1] The appellate court rejected the specific arguments which the defendants presented,[2] none of which are presented by appellant at bar, and rendered a very limited holding (id. 1144-45 (e.s.)):

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[1] In part, it had been necessary to conduct separate hearings because the defendants were threatening each other -- at one point defendants "Arroyo and Ahon engaged in a bloody brawl in the courthouse outside the presence of the jury."

[2] The defendants had argued that exclusion of the public was unconstitutional. One defendant argued that there was a Confrontation Clause violation, but the court noted that the government did not rely on ex parte evidence before the jury. Another defendant argued that there may have been exculpatory evidence revealed at the conferences, but the court noted that the record did not support this claim.

> In sum, we conclude that the in camera proceedings here were justified by the threats of violence which pervaded the trial and by the need to keep confidential the broad drug smuggling investigation. The impingement on the interests of defendants precluded from attending the in camera proceedings, upon analysis, was minimal at best. We do not intend to indicate in any way that this case stands for the proposition that such closed proceedings are to be encouraged. On the contrary, they are fraught with the potential of abuse and, absent compelling necessity, must be avoided. We simply hold after a careful examination of the record in this case that under all the circumstances present here the procedures followed were not constitutionally infirm.

The state says any error was harmless under Garcia v. State, 492 So. 2d 360 (Fla. 1986). Garcia was not at a pretrial hearing at which the court made rulings favorable to the defense. Hence, this Court ruled his absence was harmless beyond a reasonable doubt. He was also absent from other, similarly innocuous matters. At bar, however, appellant was not at a hearing directly bearing on whether he had intimidated a witness and at which the court urged the witness that his safety lay in the defendant's conviction.

The state says at page 16 that, even if the judge was partial in his conduct with the witness, it was harmless because it was outside the jury's presence, citing United States v. Stewart, 820 F.2d 370 (11th Cir. 1987). There, the claim was that the judge had "vituperatively questioned defense witnesses". Briefly disposing of this claim, the court wrote that the questioning was neutral and occurred out of the jury's presence. The case does not hold that

a judge can tell a witness that his life is in danger if the defendant is acquitted and the witness did not testify against him.

> 2. WHETHER THE COURT ERRED IN ALLOWING THE TESTIMONY OF SANDRA DESHIELDS AS TO THREATS TO HER AND HER CHILD.

At page 19 of its brief, the state cites Pittman v. State, 648 So. 2d 167 (Fla. 1994), for the proposition that "threats to a non-victim are admissible if relevant to a material issue such as motive." Pittman, after threatening Marie Knowles and her family, murdered her parents and sister. He also threatened an inmate who testified against him. The threats against the Knowles family were directly relevant to the fact that he murdered them, and the threat to the inmate was also relevant. This Court wrote (id. 170-71):

> In his first claim Pittman contends that the trial court erred in allowing the State to introduce evidence of Pittman's collateral crimes and bad acts. Pittman asserts that the trial court erroneously permitted the State to introduce evidence of threats Pittman made against his former wife and the Knowles family, an attack on a prison informant, and testimony that Pittman had once made a gas bomb. Section 90.404(2)(a), Florida Statutes (1989), states: "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." [Cit.]. However, evidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue. [Cit.]. We have acknowledged that "such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice." [Cit.]. We find that each bit of evidence of which Pittman complains was clearly relevant to a material fact in issue and of

> sufficient probative value to be admitted. We find no error in the admission of this evidence.

Thus, Pittman, while approving the evidence in the case before it, voiced great caution about the use of such evidence. This is in keeping with the rule that evidence of collateral bad acts "is presumed to infect the entire proceeding with unfair prejudice". Castro v. State, 547 So. 2d 111, 115 (Fla. 1989) (citing cases).

Further, the threats in Pittman were directed at the victims and against a witness in response to his testimony. At bar, there was no threat against the deceased, and the evidence was that appellant hardly knew him. Hence, evidence of the threats against DeShields had no bearing on the murder -- it was relevant only to prove bad character or propensity. Even if it had some relevance, it was so slight as to be inadmissible under Pittman.

The state cites Kearse v. State, 662 So. 2d 677, 684 (Fla. 1995) and Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984), saying that an evidentiary ruling will not be disturbed absent a "clear abuse of discretion". In fact, neither case uses the word "clear" -- they simply apply the abuse of discretion standard to evidentiary rulings. More importantly, the evidence in Kearse was clearly admissible, and the evidence in Blanco was clearly inadmissible. In Kearse, the evidence was that, in telling an officer about the murder, Kearse said that he held the gun with both hands which, the officer testified, meant that he had better

control over the weapon. This evidence went directly to Kearse's actions at the time of the crime. In Blanco, there was no abuse of discretion in excluding evidence of an unrelated robbery in support of Blanco's "far-fetched and unsupported" defense theory. Thus, neither case involved the admission of evidence of threats of the defendant against third persons.

Page 19 next cites Raleigh v. State, 705 So. 2d 1324 (Fla. 1997) and Huff v. State, 569 So. 2d 1247 (Fla. 1990) for the general rule that there is an abuse of discretion only if no reasonable person would take the court's view. This is true so far as it goes, but it is significant that neither case involved an erroneous admission of prejudicial evidence. Raleigh involved the trial court's resolution of a problem with an obstreperous juror. Huff found that it would be an abuse of discretion to deny a motion to admit pro hac vice. Huff noted that Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) sets out the standard for abuse of discretion. In Canakaris, this Court wrote at page 1202 that the abuse of discretion standard does not apply to an incorrect application of an existing rule of law: "appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion".

Raleigh and Huff do not authorize departure from the Evidence Code. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) noted that the Code restricts a trial judge's discretion. Finding

an erroneous exclusion of evidence directly bearing on the defendant's state of mind, the court wrote: "As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence."

Significantly, the state makes no argument, and thus has waived any argument, concerning the inadmissibility of the evidence under section 90.403, Florida Statutes.

> 3. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE HEARSAY OBJECTION TO MATTIE SWANSON'S TESTIMONY AS TO HER SON'S PLAN TO GET A LICENSE FOR HIS CAR WASH.

The state contends at pages 21-22 of its brief that, in making his hearsay objection to Ms. Swanson's testimony about her conversation with Jimmie Swanson, appellant waived his objection to her testimony that he was "getting excited and talking about his life." This argument hardly bears scrutiny. Appellant made a hearsay objection to questioning about the conversation. He makes the same argument on appeal. The state has apparently confused appellant's argument as to prejudice with his argument that the hearsay was inadmissible. Appellant's argument is that the evidence was inadmissible as hearsay. He further argues that the evidence was prejudicial because it created sympathy for the deceased. In this regard, Terry v. State, 688 So. 2d 954 (Fla. 1996), Rodriguez v. State, 609 So. 2d 493 (Fla. 1992) and section 924.051 are beside the point.

The state argues at pages 22-23 that the hearsay was not offered to prove the truth of the matter asserted so that it was admissible under section 90.801(1)(c), and that it was admitted "merely as background information, which was relevant." It made no such argument below: its only argument there was that the evidence was admissible "Based upon 90.803, sub-3 it's an exception to hearsay where it states future plans or intents." R 1870-71. It cannot now devise a new theory of admissibility. Cf. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cause for resentencing. To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to its non-inclusion, or seek a cross-appeal on this issue."), 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. Wassal v. W.H. Payne, 682 So. 2d 678 (Fla. 1st DCA 1996).").

In Hayes v. State, 581 So. 2d 121, 124 (Fla. 1991), as at bar, the defense made a hearsay objection and the state argued that the hearsay was admissible under an exception to the hearsay rule. The trial judge overruled the defense objection. On the defendant's

appeal, the state, as appellee, argued for the first time that the statement was admissible because it was not admitted to prove the matter asserted. This Court disapproved of this tactic:

> The state now acknowledges that while the statement may not have satisfied the standard of nonhearsay under section 90.801(2)(c), it was nonetheless nonhearsay because it was not offered to prove the truth of the matter asserted, i.e., the fact that Watson was at the scene. Even if the state had timely made this argument at trial, [FN8] it would be without merit because how Smith came to regard Hayes as a suspect in the case was not sufficiently probative of any material fact at issue to allow its admission into evidence. See §§ 90.401-403, Fla.Stat. (1987).
>
> FN8. In order to enable parties to properly and timely debate evidentiary rules at trial, to seek limiting instructions where appropriate, and to facilitate judicial review, parties are admonished that when objecting or responding thereto, they should state their grounds with specificity if the specific grounds are not apparent from the context. See § 90.104, Fla.Stat. (1987).

See also Chung v. State, 641 So. 2d 942, 946 (Fla. 5th DCA 1994) ("Although not necessary for our holding in this case, we also find that by agreeing to the Allen charge and to the jury's further deliberation, and also by supplying a new verdict form, the state [appellee] waived any objection."), Cook v. State, 638 So. 2d 134 (Fla. 1st DCA 1994).

The state's new theory of inadmissibility is incorrect. Gillion v. State, 573 So. 2d 810 (Fla. 1991), on which it relies, answered a certified question as to whether evidence about the area where the crime occurred was "unduly prejudicial." This Court

ruled it was not, but cautioned that such evidence might cause reversal in another case. The evidence was that, before Gillion's arrest, the officer had seen drug deals in the area. This Court wrote that this testimony was "relevant to clarify for the jury why this area was selected for this police operation, why this is where a drug buy would be made." Id. at 812.

Gillion has no bearing at bar. The subject of the conversation between Jimmie and Mattie Swanson was inadmissible. Hearsay "background information" is generally inadmissible. See Conley v. State, 620 So. 2d 180 (Fla. 1993); Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989) (en banc).

The state next argues that "even if the trial court's ruling may have been entered for an erroneous reason if his ruling is sustainable under any theory revealed by the appellate record affirmance is proper." In favor of this very broad notion, it cites Caso v. State, 524 So. 2d 422 (Fla. 1988) and Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980). These cases do not support its position. In Caso, the trial court denied a motion to suppress after an evidentiary hearing based on a flawed legal analysis. This Court held that, although there was a flaw in the reasoning, it would not disturb the judge's findings, which were supported by competent, substantial evidence. In Applegate the appellant did not present a record sufficient to support the appeal, so that the decision of the trial judge was upheld.

It is a denial of due process to decide an issue not presented by the parties. See Kerrigan, Estess, Rankin & McLeod v. State, 711 So. 2d 1246, 1248 (Fla. 4th DCA 1998) (citing cases). The state cannot argue one position below and then argue an inconsistent position on appeal. Cannady, Baker, Wassal, Hayes, Chung, and Cook. Cf. Hernandez v. Home Depot U.S.A., Inc., 695 So. 2d 484 (Fla. 3d DCA 1997) (party could not successfully exclude evidence and then make opposite argument to jury that party should have introduced such evidence); Federated Mutual Implement & Hardware Insurance Co. v. Griffin, 237 So. 2d 38, 41 (Fla. 1st DCA 1970) ("The general rule has long been established in Florida and other jurisdictions that litigants are not permitted to take inconsistent positions in judicial proceedings and that a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose."); Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1338 (Fla. 3d DCA 1979) (noting "the universal rule which forbids the successful assertion of inconsistent positions in litigation").

Finally, the state makes a pro forma claim that the evidence was not prejudicial as to guilt. It ignores that the evidence served only to create sympathy for the deceased. The eyewitnesses in the car saw appellant only for a few seconds and were later subjected to a suggestive lineup in which appellant was the only

person shown smiling with gold teeth. The store manager, Mr. Katia, also had previously not identified appellant until told by the judge that appellant's acquittal could result in his death.

Significantly, the state does not dispute that this evidence was prejudicial as to penalty. Hence, at a minimum, this Court should order resentencing.

4. WHETHER THE COURT ERRED IN CONDUCTING PORTIONS OF THE VOIR DIRE EXAMINATION AT THE BENCH WITHOUT APPELLANT'S PRESENCE.

As to the argument in the first paragraph of page 24 of the state's brief, appellant relies on his initial brief.

At page 25 of its brief, the state says that rule 3.180(a)(5) applies "only after a jury has been sworn." It offers no authority for this proposition. Nevertheless, the state is correct in noting that rule 3.180(a)(4) is even more clearly on point, and appellant cites it as additional authority.

The nub of the state's argument is that the questioning at the bench was part of the "general qualifications process" so that appellant had no right to be present. There is no support for this idea. The general qualification process occurs in the jury room before the venire comes into court for a specific trial. Remeta v. State, 522 So. 2d 825, 828 (Fla. 1985) ("The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of

qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not present because this preliminary qualification process occurs days prior to the trial."); Wright v. State, 688 So. 2d 298, 300 (Fla. 1996) (same; quoting Remeta); Henderson v. Dugger, 925 F.2d 1309 (11th Cir. 1991). See also North v. State, 65 So. 2d 77, 80 (Fla. 1953).

Here, the bench conferences occurred after the jurors had entered the court room, had been introduced to the parties, and had received preliminary instructions, and after voir dire questioning had begun. They did not occur during the general qualification process under the foregoing cases.

The bench conferences, as detailed at pages 26-27 of the state's brief, involved matters which one would necessarily consider in exercising peremptory challenges. The matters had significance both as to guilt and as to penalty issues.

The state's brief does not dispute that the error was prejudicial at bar.

5. WHETHER THE COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE TO JUROR RANIERI.

Appellant does not dispute the general position at pages 28-29 of the state's brief that this Court ordinarily applies an abuse of discretion standard to rulings on cause challenges. This standard does not mean, however, that a ruling will stand if it is based on a juror's disagreement with the death penalty. In Johnson v.

State, 660 So. 2d 637 (Fla. 1995), upon which the state places primary support, this Court wrote at page 664 (e.s.):

> Our case law holds that jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions. Penn v. State, 574 So. 2d 1079 (Fla. 1991). On this question, the trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses. If there is competent record support for the trial court's conclusions regarding rehabilitation, then the appellate courts of this state will not reverse the determination on appeal based on a cold record.
>
> The reasons for this conclusion are evident. As the trial court below suggested, jurors brought into court face a confusing array of procedures and terminology they may little understand at the point of voir dire. It may be quite easy for either the State or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law. The trial court is in the best position to decide such matters where, as here, the record strongly supports such a change of heart. Moreover, the courts should not become bogged down in semantic arguments about hidden meanings behind the juror's words. So long as the record competently supports the trial court's interpretation of those words, appellate courts may not revisit the question. We therefore may not do so here.

Juror Ranieri expressed strong feelings about the death penalty, but also indicated an ability to abide by the trial court's instructions. She was qualified to serve under Johnson. Further, as shown in the initial brief, the trial did become bogged down in the semantic meanings behind her words. It felt that defense counsel had to ask her if she would vote for the death penalty in a case other than one of a serial murderer. Our law

does not allow such case-specific questioning. Voir dire cannot be used to find out how a juror will vote in a specific case. A judge abuses his discretion when, as here, he bases his ruling on an erroneous view of the law or facts. Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980), U.S. v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992), Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S.Ct. 2447 (1990).

The other cases on which the state relies at pages 28-29 are unlike the case at bar. In Richardson v. State, 247 So. 2d 296 (Fla. 1971), the appellant failed to preserve the cause challenge issue for appeal and made no showing of what the arguments had been below.[3] In Kimbrough v. State, 700 So. 2d 634, 639 (Fla. 1997), the juror expressed strong reservations about her ability to be impartial as to the death penalty issue, said she was personally acquainted with two people on death row (one was a former schoolmate, the other was the father of her oldest child), repeatedly expressed uncertainty about serving on a death penalty case, and said her relationship with the two death row inmates would make it difficult for her and she did not think she could be completely fair and impartial. One cannot tell what the jurors said in Smith v. State, 699 So. 2d 629 (Fla. 1997), except that the

[3] Richardson is no longer good law insofar as it faults the defense for the trial court's failure to make a record of the voir dire examination. Cf. Delap v. State, 350 So. 2d 462 (Fla. 1977).

issue had to do with their attitude toward law enforcement officers. Cook v. State, 542 So. 2d 964 (Fla. 1989), concerned the jurors' ability to understand English -- a matter where the direct observations of the trial judge are of crucial importance.

In Gore v. State, 706 So. 2d 1328, 1332 (Fla. 1997), the jurors (like Ranieri) expressed biases and prejudices, but each of them (like Ranieri) also said "that they could set aside their personal views and follow the law in light of the evidence presented."

The state's representation of Randolph v. State, 562 So. 2d 331 (Fla. 1990), is somewhat inexact. There, the juror agreed with another juror who said she thought she would refuse to vote for the death penalty in every case and did not believe she could ever vote for it. She said it would be against her will to vote for death. Asked if she could vote for death for such persons as Charles Manson, Ted Bundy, or Adolph Hitler, she replied: "I hated mighty bad to hear of even Bundy being electrocuted. It made me sick. I didn't feel good. ... I just couldn't rejoice in somebody being electrocuted." Id. 336 (ellipses in opinion). In response to a very long, suggestive question, she said that she "guess[ed]" she could vote for the death penalty in extreme circumstances where no other punishment would be appropriate. This Court found no error in excusing her for cause, "given [her] equivocal answers".

The case at bar is different: Ms. Ranieri was clear that she could vote for the death penalty in appropriate circumstances. She was not subjected to the sort of interrogation which led to the equivocal response in Randolph. Ranieri stated she could follow the law, after hearing that the law called for a weighing of aggravating and mitigating circumstances.

7. WHETHER THE COURT ERRED IN FINDING THE "GRAVE RISK" AGGRAVATING CIRCUMSTANCE.

As to the state's reliance on Hawk v. State, 718 So. 2d 159 (Fla. 1998) and Raleigh v. State, 705 So. 2d 1324 (Fla. 1997) at page 46 of its brief, appellant notes that Raleigh states at page 1328: "our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Raleigh takes this language from Willacy v. State, 696 So. 2d 693 (Fla. 1997), which is also cited in Hawk.

At bar, the lower court's decision does not apply the right rule of law and there is not competent substantial evidence supporting it. The judge made no finding that appellant "knowingly" created a likelihood or high probability of death to many persons. He made no finding at all about appellant's mental state, and cited a statute (section 941.121(5)(c), Florida

Statutes) which does not even apply to capital murder cases. Hence, the court did apply the right rule of law.

The state also cites Howell v. State, 707 So. 2d 674, 680 (Fla. 1998). There, this Court relied on Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), which states:

> First, the trial court found the factor of great risk to many persons based on the fact that several other persons were present in the bank at the time of the robbery. We believe this factual situation, without more, is insufficient to support this factor. This factor is properly found only when, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death for many persons. While we agree that Williams' actions created some degree of risk, we cannot say beyond a reasonable doubt that he created an immediate and present risk to the others in the bank. There is no evidence, for instance, of indiscriminate shooting in the direction of bank customers, but only of an intent to kill the bank guard.

As in Williams, the state at bar failed to prove this circumstance beyond any reasonable doubt. While he created some degree of risk, he did not engage in indiscriminate shooting in the direction of the witnesses.

Mr. Katia was never in the line of fire. The state's brief refers to the bullet which entered the ice machine. But examination of the photograph of the bullet hole in the ice machine shows that the bullet went into the side of the machine so that the store (and hence Mr. Katia) was out of its path. (The detective testified that one could not tell the angle at which it was fired because "you have to allow for a ricochet". R 1523-24.) The

persons in the Herndon car did not testify to being in the line of fire. Significantly, the state did not ask any of the witnesses to the murder whether they were in the line of fire at that time. The only person to say he was in the line of fire was Mr. Ream, whose unsworn police statement was that, after the shooting, appellant fired at him while he chased him on his motorcycle.

The state cites Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), Hallman v. State, 560 So. 2d 223 (Fla. 1990) and Bello v. State, 547 So. 2d 914 (Fla. 1989). Suarez and four others engaged in a high-speed chase after a robbery. During the chase, Suarez

> ... forced several oncoming cars off the road and also went through two attempted roadblocks. The chase ended when Suarez pulled into a driveway at a migrant labor camp, his car coming to rest at the rear of a parked bus. Four deputies by this time were close behind the getaway car, and they pulled into the area and stopped. Suarez got out of the car taking with him his .22 caliber semi-automatic rifle. He fired more than a dozen rounds from the rifle before it apparently jammed. One of those bullets found its way into the chest of one of the deputies as he was exiting his vehicle. The shot killed him instantly, a fact not discovered until a short while later after two suspects had been captured and Suarez and two other accomplices had fled the scene.

Id. 1202-1203. Hallman declined to extend Suarez beyond its facts. Hallman robbed a bank and then engaged in a shootout near a busy thoroughfare. Given that there was an exchange of gunfire, there was a greater likelihood that other persons would be shot than was the case at bar. This Court wrote (560 So. 2d at 226):

> The state's reliance on Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct.

> 2908, 90 L.Ed.2d 994 (1986), is misplaced. In that case the defendant fired more than a dozen shots in the area of a migrant labor camp, three persons other than the victim were in the line of fire, and his four nearby accomplices ran the risk of death from return fire.
>
> The trial judge referred to the presence of numerous people in the bank, five bystanders outside the bank, and passersby on busy U.S. 98 to support his finding. The evidence showed, however, that the seven persons in the bank ran almost no risk of being struck, as they were behind partitions and away from doors or windows and not in the line of fire. Five of the witnesses outside the bank either saw or heard the shooting, but only one of them was ever in the line of fire. It is true that there were a number of passersby on U.S. 98, but of the eight shots only one was definitely aimed in the direction of the highway and only two others could have been. [FN2] We do not believe that the possibility that no more than three gunshots could have been fired toward a busy highway is proof beyond a reasonable doubt that Hallman knowingly created a great risk of death to many persons.
>
> FN2. One shot hit Hallman, one hit Hunick, and at least three others lodged in the taxi.

In Bello, only the deceased and three other persons were in the line of fire. "The other people considered by the trial court to have been put at risk were too far away, separated by several walls, or out of the line of fire so that there was only a possibility of their being killed by Bello's actions in shooting through the bedroom door." 547 So. 2d at 917. Thus, Bello offers no support to the state.

As to prejudice, pages 51-52 of the state's brief cites Hamblen v. State, 527 So. 2d 800 (Fla. 1988), in which there were two remaining aggravating circumstances and nothing in mitigation. It also cites Ferrell v. State, 680 So. 2d 390 (Fla. 1996), Burns

v. State, 699 So. 2d 646 (Fla. 1997) and Duncan v. State, 619 So. 2d 279 (Fla. 1993). Ferrell had a prior conviction for "a second-degree murder bearing many of the earmarks of the present crime". 680 So. 2d at 391. Further, the judge in Ferrell found less in mitigation than the judge at bar. Burns involved the murder of a highway patrol trooper by a drug smuggler while the trooper stood in a watery ditch begging for his life. Like Ferrell, Duncan had a prior murder conviction.

Ferrell, Burns and Duncan all involve proportionality review which is distinct from harmless error analysis. See Sochor v. Florida, 504 U.S. 527, 539-40, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (harmless error analysis involves "quite different enquiry" than proportionality review). In proportionality review, this Court determines whether the trial court, after weighing correctly-determined circumstances, reached a death sentence that is not disproportionate to the crime. There is no error to be reviewed and the harmless-beyond-reasonable-doubt standard does not apply.

Harmless error review, however, follows from a finding that error has occurred, so that there is a presumption that the error has influenced the result. Hence, proportionality cases are not relevant to harmless error analysis.

The state's last case is Chaky v. State, 651 So. 2d 1169 (Fla. 1995), which is also a proportionality review case. Further, this Court reduced Chaky's sentence to life imprisonment.

The state argues at page 52 of its brief: “Clearly, Appellant has no respect for human life and will continue to use lethal force in any effort to advance his pecuniary gain.” This is an unfortunate statement: the court did not find the pecuniary gain circumstance, future dangerousness is not an aggravating circumstance, and this argument has no relevance to the question of whether there should be a sentence of death or life imprisonment.

8. WHETHER FUNDAMENTAL ERROR OCCURRED WHEN THE STATE READ TO THE JURY A TRANSCRIPT OF THE TAPED STATEMENT OF CURTIS REAM AT PENALTY.

Appellant agrees with the state’s argument at page 54 of its brief that this issue involves a question of fundamental error. As he argued at point 1 above, however, the determination of fundamental error is the same as the determination of whether there was serious constitutional error. Scoggins, Ake.

The state’s brief at pages 54-55 relies primarily on Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994), where the state had introduced a police officer’s testimony about statements that the murder victim had made about Spencer. This Court wrote:

> ... we find no error in admitting the officer's testimony. Although the testimony involved hearsay, it was admissible under Florida's death penalty statute. During the penalty phase proceedings for capital felonies, "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." S 921.141(1), Fla.Stat. (Supp. 1992). This hearsay testimony was probative of both the CCP and HAC aggravating factors as it showed

> Spencer's intention to kill Karen as well as his intention to punish her. Spencer was also given an opportunity to cross-examine the officer. Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla.), cert. denied, 506 U.S. 957, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992); see also Clark v. State, 613 So. 2d 412, 415 (Fla. 1992), cert. denied, 510 U.S. 836, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993) (finding hearsay testimony about defendant's prior first-degree murder conviction admissible where defendant afforded opportunity to rebut, even though he did not or could not rebut the testimony).

Accord Damren v. State, 696 So. 2d 709, 713 (Fla. 1997).

Appellant respectfully submits that Spencer overlooked that both Waterhouse and Clark involved hearsay testimony about prior convictions. In both cases, the defendant had already been afforded his Confrontation Clause rights in the proceedings leading to those convictions and had had a similar motive to cross-examine the witnesses. Hence, there was no Confrontation Clause violation.

The same is true for Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), appeal after remand 638 So. 2d 920 (Fla. 1994), where this Court ruled that the Confrontation Clause does apply to capital sentencing proceedings. 547 So. 2d at 1204, 638 So. 2d at 925. It found no error, however, where an officer testified to hearsay concerning a prior conviction. Id. It did find error, however, in admission of a taped statement of the victim of the prior offense. 547 So. 2d at 1204.

At bar, as in Rhodes, the state put into evidence the actual hearsay statement of a non-witness. Thus, there was constitutional error. Further, since appellant was never convicted of any offense

regarding Mr. Ream, he never was able to question his account in an adversarial setting.

This case is unlike Spencer and Damren: first, in those cases the state did not introduce the victim's verbatim statement; second, those cases concerned hearsay statements of the murder victims who had been killed by the defendants themselves.

Constitutional error occurred in the admission of Ream's verbatim account. This constitutional error constituted fundamental error requiring a reversal of appellant's sentence.

> 9. WHETHER THE COURT ERRED IN FAILING TO CONSIDER MITIGATING EVIDENCE WHICH WAS APPARENT ON THE RECORD.

Appellant relies on his initial brief except to note the following: the state is correct in arguing that, in most cases, the defense has the duty to alert the trial court of mitigating factors present in the record. This rule, however, does not and cannot hold where, as at bar, there is a pro se defendant who does not present mitigation. There, to assure that the sentence is lawfully imposed, the court must consider all mitigation present on the record, even if the defendant urges the court not to do so. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) states (e.s.):

> Second, Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is

> believable and uncontroverted. [Cit.] That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Robinson v. State, 684 So. 2d 175, 177-79 (Fla. 1996) discusses this matter at length. Among other things, this Court concluded in Robinson that, as at bar, the trial court's consideration of the PSI report received little discussion in the sentencing order. This Court observed at page 179 (e.s.): "It is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed, and it is error to fail to do so. Farr, 621 So. 2d at 1371."

As shown in the initial brief, the sentencing order does not affirmatively show that the court considered and weighed all possible mitigation. Hence, reversible error occurred.

> 11. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION THAT THE STATE DISCLOSE MITIGATING EVIDENCE.

At page 71 of its brief, the state says that it and the judge acknowledged the state's duty to disclose favorable evidence. At best, the acknowledgment was half-hearted and soon abandoned. After the judge said that the state had "some obligation" to make disclosure if it were to "accidentally trip over a mitigator", and the state said that was only true to some extent, R 976-77, the judge backtracked and denied the motion, ruling the state was not "duty bound to make that assessment as far as what is a mitigator",

and could not be held accountable for failing to do so. R 978. As initial brief shows (and the answer brief does not dispute) the state has such a duty, and is accountable for failure to meet it.

It could not be clearer that the court failed to apply the correct legal standard in denying the motion. Hence, an abuse of discretion occurred. Canakaris, Cooter.

Rivera v. State, 717 So. 2d 477 (Fla. 1998) and Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1989), cited at page 72 of the state's brief, are beside the point. Those cases do not involve a judge's unconstitutional refusal to order disclosure of evidence.

At bar, there was judicial constitutional error. In such a situation, the question is whether the state, as the beneficiary of the error, can show the it was harmless beyond a reasonable doubt. Since the judge's ruling precluded the creation of a record sufficient to review this question, reversal is required. See Pender v. State, 700 So. 2d 664 (Fla. 1997). See also Elledge v. State, 613 So. 2d 434 (Fla. 1993).

Further, Rivera and Hegwood involved the question of whether discrete items of evidence had not been disclosed. Here, there was a blanket refusal to order disclosure of evidence. Rivera involved a claim of newly discovered evidence on post-conviction review. This Court concluded that the specific evidence involved was known to defense counsel and it was doubtful whether the evidence was favorable. In Hegwood, there was no failure to disclose

exculpatory evidence. Rivera and Hegwood are based on United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989), in which there was no failure to disclose exculpatory evidence, and which did not involve a judge's order relieving the prosecution of its duty to disclose such evidence.

Similarly beside the point is Roberts v. Butterworth, 668 So. 2d 580, 582 (Fla. 1996), which involves a post-conviction public records request. There, this Court wrote (e.s.):

> Roberts' complaint raised only a general request for exculpatory material under Brady. Under such circumstances, "it is the State that decides which information must be disclosed" and unless defense counsel brings to the court's attention that exculpatory evidence was withheld, "the prosecutor's decision on disclosure is final." Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987). However, as the circuit court noted in its order, the dismissal of the Brady claims does not diminish the Attorney General's obligation to disclose any Brady material. [FN7]
>
> FN7. This Court's review of the withheld documents revealed no exculpatory material.

At bar, unlike in Roberts, the judge actually abrogated the state's duty of disclosure.

In Pennsylvania v. Ritchie, Ritchie sought disclosure of a child welfare file arguing only that "the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." 480 U.S. at 44. On appellate review, the state supreme court ruled that the judge should have given the file to the defense to determine if it contained exculpatory evidence.

On review, the Supreme Court held that the federal constitution did not require letting the defense review the file to determine if it contained exculpatory evidence (id. 59-60):

> A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files. [Cit.]. Although the eye of an advocate may be helpful to a defendant in ferreting out information, [cit.], this Court has never held--even in the absence of a statute restricting disclosure--that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, [FN omitted] the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one").

The Court held that, at a minimum, the trial court should review the file in camera to see if it contained exculpatory information.

Thus, Pennsylvania v. Ritchie held only that the defense is not automatically entitled to review every privileged document it wants to see. It did not hold that the prosecution has the unreviewable power to decide what to disclose. The conclusion that the state draws from Roberts ("Therefore, based on the motion before the trial court, it would have been error to require the State to turn over all information regarding mitigating

circumstances.", answer brief, page 72) is wrong: the state does have the duty to turn over all mitigation.

Given the state's position at page 73 of its brief, it apparently sees itself as under no obligation to provide mitigation discovery. This evidences that it has never had any intention during this litigation to comply with its penalty discovery duty.

12. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

The state's brief relies on matters irrelevant to the sentencing decision at bar. Page 74 relies on unverified statements in the PSI concerning the prior violent felonies. Below, however, the state did not rely on any facts as to those crimes, simply putting the armed robbery convictions into evidence. Also, it waived reliance on the attempted murder counts, telling the jury: "You cannot consider attempted murder because it does not exist. The only one you could consider is the armed robbery count but again, you cannot consider attempted murder." R 2207 (e.s.). The judge made no findings as to the facts of the prior violent felonies, and found only the armed robberies in aggravation. R 2717. The state cannot for the first time on appeal rely on the statements in the PSI about these crimes and cannot rely on the attempted murder counts.

At pages 75-76, the state urges this Court to consider the premeditated aspect of this case, concluding: "This was a cold-

blooded execution-style murder." This despite the fact that the trial court specifically rejected the CCP circumstance. R 2719-20.

At pages 76-77, the state argues that the "motive for this homicide was clearly retribution" for Ms. DeShields' theft from appellant. The trial court rejected this theory in its sentencing order. R 2719-20. Further, the state never argued below, and the trial court did not apply, the pecuniary gain aggravator.

The state-appellee cannot present new aggravators on appeal. Cannady. This Court should reject the state's arguments and find the sentence disproportionate.

15. WHETHER THE COURT ERRED DURING JURY SELECTION IN SUA SPONTE INSTRUCTING THE JURY CONCERNING THE DEFENDANT'S EXERCISE OF HIS RIGHT OF SELF-REPRESENTATION AS TO PENALTY.

The state argues that appellant did not preserve this matter by contemporaneous objection. "The purpose of the contemporaneous objection rule is to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings." Norton v. State, 709 So. 2d 87, 94 (Fla. 1997). Here, the judge was fully aware of appellant's objections. The court had every opportunity to correct or prevent the error created by its sua sponte decision to give the instruction. While the objections were very polite -- as is appropriate and even necessary where the court has decided to act sua sponte -- it was clear to the court that appellant did not want it to proceed as it did.

The state next argues that appellant "gives no legal support" for his argument that jurors do not have a right to know the matters set out in the instruction. Of course, appellant cannot prove a negative. Significantly, the state has shown no authority providing such a right. There is no such right.

CONCLUSION

Based on the foregoing argument and authorities, appellant respectfully submits this Court should vacate the conviction and/or sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401 by courier this _____ day of January, 1999.

Attorney for Akeem Muhammad