IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD LUKEHART,

Appellant,

vs. CASE NO 90,507

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations to the record shall be as in the initial brief. References to the answer brief shall be AB#, and references to the initial brief shall be IBR#. Issues numbered by Roman numerals correspond to those in the initial brief.

Appellant relies on his arguments in the initial brief and supplements those arguments as needed with the following reply.

REPLY TO STATEMENT OF THE FACTS

The State claims as fact that Trooper Earl Davis Jr. "did not question" Andrew after he handcuffed him. AB3. The record refutes that claim. Trooper Davis said after he took Andrew into custody, "I did ask him where the baby was." V15T819.

The State claims as fact that Deputy Jeff Gardner "did not try to question" Andrew. See AB3-4. The State also implies that Officer Richard G. Davis did not question Andrew. See AB4-5. However, the record directly refutes that assertion, for Officer Davis candidly admitted he and Gardner interrogated Andrew as soon as Gardner and Andrew returned from Trooper Davis's house:

> Q [BY MS. COREY FOR THE STATE] Did you or Detective Gardner -- Deputy Gardner ever attempt to question any

> further about this baby that was missing?
> A [BY OFFICER DAVIS] We just wanted to get basic information, vehicle description, what the child was wearing, just anything to just find out what happened, what was going on. Where he lost the vehicle, that type of thing, anything [that] would help us.

V15T852.

The State says Officer Davis related to other officers that Andrew wanted to tell his side of the story and that "people" were on their way from Jacksonville to talk to him. See AB5. That statement omits the fact that Andrew previously had asked for a lawyer; that nobody gave him a lawyer; that nobody told him he could speak with a lawyer; and that the "people" police were bringing up from Jacksonville were all investigating officers.

The State says Andrew "agreed" to go back to the car wreck, see AB3; see also AB21. The State again omits to mention that at that time, Andrew was handcuffed behind his back; he was surrounded by armed officers; he had just surrendered himself with his hands raised above his head; he had asked to be read his rights; and he had asked for a lawyer. The State further says Andrew "agreed" to go to the Police Memorial Building for interrogation. See AB9. The cited portion of the record reveals no such "agreement." Moreover, the context again omitted by the State is that Andrew was still handcuffed behind his back; he had been handcuffed for hours; he had asked for, but was not given, a lawyer; and he had been interrogated continuously out in the woods by a cadre of officers without being advised of his rights.

In describing the testimony of Detective Aaron Timothy Reddish and Lieutenant Jimm Redmond, the State says Reddish

denied ever telling Andrew he would be arrested for murder if he stuck to his story. See AB25. The State omits to mention that Redmond admitted making exactly that threat when he sat alone with Andrew coercing him to confess. See V11R1875; IBR47.

REPLY ARGUMENT

I. THE STATE'S ATTEMPT TO DODGE THE VIOLATIONS OF MIRANDA V. ARIZONA, 384 U.S. 436 (1966) AND EDWARDS V. ARIZONA, 451 U.S. 477 (1981), IS PREDICATED ON FACTUAL OMISSIONS AND ERRORS, AS WELL AS LEGAL GROUNDS THAT ALREADY HAVE BEEN REJECTED AND ARE UNSUPPORTED; THE STATE ALSO TOTALLY MISCHARACTERIZES APPELLANT'S CLAIM OF ACTUAL COERCION, THEREBY EVADING ALMOST EVERY RELEVANT FACT AND SETTLED LAW SUPPORTING APPELLANT'S CLAIM

A. The *Miranda* and *Edwards* violations

The State's answer appears to make three claims to dispute the clear evidence that Andrew was subjected to custodial interrogation without being advised of his rights and in blatant disregard of his request for counsel: (1) He was not in custody because the purpose of his custody was to prevent him from killing himself; (2) he was not interrogated; and (3) by only asking for a lawyer once and later talking to detectives, he had made at most an ambiguous or equivocal request for counsel that he himself ignored. See AB31-33. None of these claims has support in fact or law.

1. The custody argument is based on erroneous factual and legal premises concerning the purpose of custody.

The State's argument necessarily is predicated on the erroneous assumptions that Andrew was placed in custody solely for self-protection and mental evaluation, so he was not a suspect in custody in connection with a criminal investigation when he was handcuffed. Similarly, the trial judge said Andrew

was "not even a suspect at that point, he was still looked upon kindly as the person who had tried to apprehend or at least he chased as he says the abductor of the baby." V11R1913. To reach that conclusion, the State and judge relied exclusively on the testimony of officers who were not present when Andrew was placed in custody, all but ignoring the testimony of Trooper Davis, who slapped handcuffs on Andrew, who admitted Andrew was in custody, and who initiated the many hours of questioning. See AB18-28.

The State's own evidence unequivocally demonstrates that Trooper Davis regarded Andrew as a kidnapping suspect when he handcuffed him. That was the only information he had. He knew nothing about Andrew's suicide attempts; he had no concern about Andrew's mental state when he handcuffed him; he knew nothing about the possible existence of another person chasing or pursuing the white male kidnap suspect; and he neither gave nor had any other reason to take Andrew into custody:

> A [BY TROOPER DAVIS] They were -- they advised me there was a white male that was in the woods, that they were looking for that possibly abducted a five month old baby.
> Q [BY MS. COREY FOR THE STATE] Is that all the information you got?
> A They were -- I asked them some situations, was the subject [armed], they said possibly. They were trying to give me a description what he looked like, they didn't know, they were -- basically had me on hold, talking to the officers on the ground, getting me information.
> That was basically it, had me back and forth to give me information what was going on.

V11T1748-49 (emphasis supplied). Moments later,

> A .... I seen a white male with no shirt on and shorts and tennis shoes in the ditch coming up toward my house.
> Q Did you recognize this person when you saw him?

A No, I didn't know who it was. I didn't know if this person is going to tell me, hey, I know where this guy is or if this was the subject.
Q All right.
A This subject said something, I believe he said, I'm the one they're looking for.
When I went back in the house I grabbed my gun belt I come back outside, subject had his hands in the air. He said, I'm the one they are looking for? [sic]

V11T1750 (emphasis supplied). Not knowing who the man was,

A .... I told him to turn around, and I put my handcuffs on him.
Q Why did you do that?
A Basically for officer safety, also, you know, that he said they were looking for him, so that was basically it, I put them on there just for custody reasons.
Q Now, at that time did you try to question this defendant?
A I asked him where the baby was at, he said he didn't know what the hell I was talking about, read him his rights.
Q Did you read him his rights?
A No, ma'am, I didn't.
Q After you handcuffed him did you contact the Clay County Sheriff's Office?
A I told them when I had them on the phone that I had the guy and they were sending officers.

V11T1752 (emphasis supplied).[1]

Stansbury v. California, 114 S. Ct. 1526, 1530 (1994), held that "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." Here, Trooper Davis unambiguously conveyed his belief to Andrew by "deed" by arming himself, turning Andrew around, handcuffing him, and summoning other officers to take him away. No evidence could ever be more clear. Trooper Davis also conveyed his belief to Andrew by "word" by

[1] A copy of Trooper Davis's complete suppression hearing testimony is attached to this brief as Reply Appendix A1-15.

interrogating Andrew about where the baby was, and by proclaiming to officers, in Andrew's presence, "I had the guy." The State's analysis applies Stansbury only to irrelevant testimony of other officers who were not there when Trooper Davis took Andrew into custody. See AB32.[2]

Moreover, the only Florida law authorizing officers to take one into custody to protect him against himself, the Florida Mental Health Act (also known as the Baker Act), provides only one way officers can seize persons for involuntary examination: by taking them "into custody." § 394.463(2)(a), Fla. Stat. (1995). That statute does not authorize or require an "arrest." So, even if Andrew had been held solely to protect and mentally evaluate him, he had to have been taken into custody.

Stansbury also underscores the long-established principle that custody is measured by the standard of whether, under the totality of circumstances, a reasonable person in the defendant's shoes would have believed he was not free to leave. Custody certainly is shown by these facts, as well as Andrew's own assertions that "I'm the one they're looking for," that he wanted to be advised of his rights, that he asked for a lawyer, and that he was stranded in the woods without a car.

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[2] Even if this Court considered what other officers believed after Andrew was taken into custody, every one of those officers knew they were investigating a possible kidnapping of an infant in which Andrew had some involvement, and Andrew in no way had been cleared of suspicion. In fact, their suspicion must have been quite substantial right from the beginning given that Andrew immediately asked to be read his rights, asserted his right to counsel, and told officers early on that he had a prior child abuse conviction.

Many courts have held that a handcuffed person is in custody for fifth amendment purposes, and the State has offered no contrary authority. See New York v. Quarles, 467 U.S. 649, 655 (1984) (Quarles "undoubtedly" was in custody where he was "surrounded by at least four police officers and was handcuffed when the questioning at issue took place"); United States v. Bullard, 103 F.3d 121, 1996 WL 683790 (4th Cir. Sept. 24, 1996) ("In our view, there can be no question but that Bullard, handcuffed and seated in a chair, was entitled to Miranda protections."); Commonwealth v. Damiano, 660 N.E.2d 660 (Mass. 1996) ("The fact that the trooper's initial questioning was not hostile and was undertaken simply to find out what the defendant knew about what had happened does not excuse the failure to give Miranda warnings. The defendant was handcuffed in the back seat of a police cruiser in the middle of the night on a multi-lane State highway. As a matter of law no reasonable person in that situation would believe that he or she was free to leave.") (internal citation omitted); State v. Walsh, 495 N.W.2d 602 (Minn. 1993) (although officer told defendant several times he was not under arrest, a reasonable person handcuffed and bound to stairway railing would have believed he was in custody); In re Welfare of M.E.P, 523 N.W.2d 913 (Minn. Ct. App. 1994) (despite officers telling three juveniles they were only being questioned as witnesses and were not under arrest, they were in custody: they had been handcuffed, placed in squad car, and taken in for processing); Zayas v. State, No. 13-96-434-CR, 1998 WL 177418 (Tex. Crim. App.-Corpus Christi, April 16, 1998) ("There is no

question but that appellant was in custody at the time he was questioned; he had been handcuffed and placed in the patrol car for up to thirty minutes while Flores investigated the scene."), petition for review filed (Tex. Crim. App. June 8, 1998).

Aside from the erroneous factual premise, the State's custody argument is totally predicated on the erroneous legal principle that the purpose of custody matters in deciding whether one is "in custody." See AB32. The United States Supreme Court flatly rejected that argument in Mathis v. United States, 391 U.S. 1 (1968). The government claimed Mathis was not "in custody" for fifth amendment purposes based on the fact that he had been restrained by others for a different purpose. The Court rejected the government's position and suppressed his statements, holding that the purpose for which government restrains one's freedom is not relevant in determining whether the person's freedom of movement had in fact been restrained.

The fifth amendment privilege applies to all custodial interrogation regardless whether custody is alleged to be to further a civil action where no criminal proceedings might be brought, see Mathis; for a completely different and unrelated criminal investigation, see id.; Arizona v. Roberson, 486 U.S. 675 (1988); or even to investigate a minor traffic infraction if the detained motorist "is subjected to treatment that renders him 'in custody' for practical purposes," Berkermer v. McCarty, 468 U.S. 420, 441 (1984). See generally 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.6, at 491 (West 1984) ("it is now clear that Miranda applies to interrogation of one in custody

for another purpose or with respect to another offense."). Similarly, the nature of the proceeding makes no difference, for the privilege applies to questioning in any "proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

Accordingly, this Court in In re Beverly, 342 So. 2d 481, 488 (Fla. 1977) held that the fifth amendment privilege shields one who is questioned in civil commitment proceedings designed purely to protect one against himself (or others) if the questioning "entangle[s] him in any criminal prosecution," and any incriminatory statements made during such questioning must be suppressed "at any subsequent criminal prosecution ... to protect his constitutional rights."

A recent federal decision suppressed incriminatory statements in a case analogous to what the State claims happened here. In United States v. Fenton, No. CRIM 98-01J, 1998 WL 356889 (W.D. Pa. May 28, 1998), Fenton reportedly had threatened to harm various people, including a member of Congress. Three armed officers went to Fenton's residence and entered his room, finding him on his bed. They told him they were responding to the report of threats and wanted "Crisis," the county's mental health agency, to talk to him for the purposes of involuntary commitment evaluation. They waited with him in his room for two Crisis workers to arrive. Nobody advised Fenton of his rights, and there is no evidence he was handcuffed. When the Crisis workers

arrived, they (and one officer) questioned Fenton, adduced incriminating responses, and took him to a hospital. Later Fenton was charged with crimes arising from the threats, and the government sought to introduce those statements by arguing he was not in custody. The court applied the fifth amendment and held he was in custody because the presence of the officers in the room, coupled with the fact that they told Fenton they were waiting for the Crisis evaluators to arrive, "would have conveyed to a reasonable person the message that he was not free to leave until Crisis had appeared and completed their evaluation." Id. at 6. The evidence of restraint was bolstered by the fact that one officer stood in the open doorway after the evaluators arrived, while others stood nearby, and the limitation on his freedom continued during the evaluation. Id.

The State takes great pains to suggest that officers were motivated by their genuine concern about Andrew's fragile state of mind due to his suicide attempts. See, e.g., AB7-9. It would seem, then, that the officers would also have obeyed the rule of law that "[i]f a defendant has a mental impairment that was known or reasonably apparent to the interrogators, they must exercise special care." United States v. Hall, 93 F.3d 1337, 1346 (7th Cir. 1996); see also Snipes v. State, 651 So. 2d 108 (Fla. 2d DCA 1995); cf. Rhode Island v. Innis, 446 U.S. 291, 303 (1980) (noting concern for whether officers know a suspect is "unusually disoriented or upset"). However, the only "special care" officers gave Andrew was to hold him handcuffed behind his back for 6-12 consecutive hours; not advise him of his rights during

the first hours of interrogation; flagrantly ignore his request for a lawyer; interrogate him continuously for 17-18 hours despite his not having slept for 28 hours; threaten to arrest him for murder unless he changed his story; and prey on his fragile psychological and emotional state with pleas for a decent burial.

Essentially, the State has taken a self-defeating position. If the officers' concern for Andrew's mental condition was genuine, they violated the law by not exercising "special care" to avoid coercion. If the officers' concern for his mental condition was not genuine such that no special care was required, their claim that they held Andrew in custody because he was a suicide threat is nothing but pretext.

2. The "interrogation" issue is defaulted and meritless.

The core of the State's argument is that "any questions" asked by officers after Andrew was placed in custody, asked for his rights to be read, and asked for a lawyer, "were innocuous and not designed to elicit an incriminating response." AB33. The argument is procedurally defaulted because the State at trial did not argue it or get a ruling on it. See V11R1913-14; Dupree v. State, 656 So. 2d 430, 432 (Fla. 1995) (State barred from pursuing argument on appeal when trial court did not rule on it); Wike v. State, 698 So. 2d 817, 823 (Fla. 1997) (same), cert. denied, 118 S. Ct. 714 (1998); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (same); State v. Mae, 706 So. 2d 350 (Fla. 2d DCA 1998); § 924.051(1)(b), Fla. Stat. (1997) ("issue" and "legal argument" must have been presented and "ruled on by[] the trial court" to be preserved for appellate review).

On the merits, the State's own witnesses refute the claim because they testified they asked Andrew direct, probing questions about the incident:

- Trooper Davis, immediately after handcuffing Andrew: "I asked him where the baby was at." V11R1752.
- Deputy Gardner, after Andrew was handcuffed and asked for his rights, but before he asked for a lawyer: "I asked him what was going on." V11R1768.
- Deputy Gardner, immediately after Andrew asked for a lawyer: "I just asked him basically what's going on." V11R1768-69.
- Officer Davis, after Andrew asked for his rights and a lawyer, and after he was transported to the site of the car wreck: "[W]e [he and Deputy Gardner] tried to ask him where the baby was -- where the -- what happened and what happened with the baby did the baby -- did the Blazer or what happened. Actually we were trying to ask him what happened to the Blazer, what was the situation." V11R1736; "We [he and Deputy Gardner] just wanted to get basic information, vehicle description, what the child was wearing, just anything to just find out what happened, what was going on. Where he lost the vehicle, that type of thing, anything [that] would help us." V15T852.

Of course, these were just the first questions in what became a marathon of interrogation by many officers.

Moreover, statements made after Andrew was brought to the cite of the car wreck in handcuffs were neither "volunteered" nor "initiated" by Andrew because his statements were all made in the course of a continuing, ongoing interrogation initiated by police the very moment they placed the handcuffs on him without Miranda warnings and without the police ever stopping to honor his request for counsel. The State's own evidence shows that Officer Davis and Deputy Gardner had just questioned Andrew about the baby, the Blazer, and the entire situation, when Andrew made the statements the State now claims were "initiated" and

"volunteered." See V11R1736-42. Under the State's theory, every statement a person makes during custodial interrogation is "volunteered" and "initiated". This is not the law. See, e.g., Bush v. State, 697 S.W.2d 397 (Tex. Crim. App. 1985) (reversing murder conviction on Edwards violation where after Bush had been Mirandized and asked for counsel, periods of silence and conversation and changes in topics of conversation never diverted police from their apparent course of getting Bush to reveal location of murder weapon).

The State also asks this Court to misconstrue Rhode Island v. Innis, 446 U.S. 291 (1980). See AB33. Innis said direct questioning clearly is interrogation, leaving only indirect interrogation subject to further analysis. See IBR57. See also Hoffman v. United States, 341 U.S. 479, 486 (1951) (the privilege applies "to instances where the witness has reasonable cause to apprehend danger from a direct answer.").

3. The claim Andrew did not want a lawyer is defaulted and unsupported.

The State seems to suggest that Andrew did not really want a lawyer, apparently concluding that he expressly revoked his request for counsel because during further custodial interrogation he said he wanted to tell his side of the story. See AB33. The argument is procedurally defaulted because the State did not argue it or get the trial court to rule on it. See V11R1911-14; Dupree; Wike; Cannady; Mae; § 924.051(1)(b).

As to the merits, the record is crystal clear:

< Deputy Gardner, after Andrew was handcuffed and asked for his rights: "He said, I don't want to speak to anybody until I

see a lawyer." V11R1768.

< Officer Davis, asked if he Andrew asked for a lawyer in his presence: "Yes, he did." V11R1736.

< Officer Davis, asked if he informed Detective Goff or other officers that Andrew asked for a lawyer: "Yes, I did." V11R1744.

< Detective Goff, asked if before he interrogated Andrew he was told Andrew wanted a lawyer: "Yes, I was." V11R1785.

When Andrew said he wanted to tell his side of the story, he did so later amid a custodial interrogation after his Miranda and Edwards rights had been violated. Also, he did not say he wanted to tell his side of the story to the police, see V11R1740-41, but he did say he wanted to talk to a lawyer, see V11R1768. Giving him officers to talk to, rather than the lawyer he requested, was a coy, manipulative police invention to evade his request for counsel to coerce him to talk. The State's argument defeats the very essence of Edwards, Smith v. Illinois, 469 U.S. 91 (1984), Minnick v. Mississippi, 498 U.S. 146 (1990), and their progeny.

The only authority the State relies on, Slawson v. State, 619 So. 2d 255 (Fla. 1993), is inapposite because Slawson never asked to talk to a lawyer before or after he equivocally said "What about an attorney?" Here, however, the State's witnesses agree Andrew's request for a lawyer was clear and unequivocal.

The State further stretches the truth by claiming Andrew's invocation of his right to counsel was just "anticipatory" because he wasn't under interrogation, citing Sapp v. State, 690 So. 2d 581 (Fla.), cert. denied, 118 S. Ct. 116 (1997). See AB37. Sapp involved a written invocation executed well before questioning, unlike here where Andrew vocalized his request in

the heat of interrogation. Certainly Andrew knew he was being interrogated when he asked for a lawyer: His immediate response to Trooper Davis's very first direct question was "read me my rights," and the questioning did not stop for about 17-18 hours.

A. The State mischaracterizes the intertwined coercion issue and recites the wrong standard of review.

In its brief, the State grossly mischaracterizes Andrew's intertwined coercion issue by saying "[t]here is also no merit to Lukehart's claim that Detective Redmond coerced him into confessing by using the 'Christian burial technique.'" AB34. Andrew's initial brief, however, argued actual coercion based on many circumstances, only one of which was the blatantly coercive and deceptive Christian burial speech ploy. The initial brief cites a long list of wrongful police conduct in this case that combined to coerce Andrew's confession. See IBR61-65.

Darwin v. Connecticut, 391 U.S. 364 (1968) bears some remarkable similarity to the present case. Darwin had been held incommunicado more than 30 hours; his mental condition was in question (he either fainted or pretended to faint); he had not been advised of his constitutional rights; his lawyer was denied access to him during questioning; police had him attempt to reenact the crime during which time he continued to deny committing the offense; and there had been "no break in the stream of events" from the time he was placed in custody to the time he gave a final confession. The Court held the confession and partial reenactment of the crime were involuntary and had to be suppressed. Many of these factors are present here, but this

case is worse because Andrew's request for counsel was ignored; Redmond threatened him to change his story or face arrest for murder; Redmond used the modified Christian burial speech ploy; Andrew had just survived a car wreck; Andrew was suicidal; and Andrew had an exceedingly low IQ along with a history of mental problems. See also Arizona v. Fulminante, 499 U.S. 279, 287-89 (1991) (statement obtained by threat was coerced).

The State suggests the "Christian" aspect of the burial speech technique is the reason this Court calls it a blatantly coercive and deceptive ploy. See AB34. The State cites no support for that narrow proposition. Even this Court omitted reference to religion when it defined "The Christian burial technique [a]s the practice of inducing a detainee to tell the location of a homicide victim's body so it can receive a proper burial service." Johnson v. State, 660 So. 2d 637, 643 n.1 (Fla. 1995) (emphasis supplied). The rule is not based on religion; it is based on the coerciveness of an intense emotional and psychological appeal preying on a susceptible, fragile, vulnerable individual. Certainly Andrew and the interrogation fit that description under the circumstances.

The State says Andrew could have slept but didn't. See AB27. Ironically, the State relies solely on Andrew's statement even though the State consistently accuses Andrew of lying and says his statements and testimony were incredible and untrustworthy. See AB56. The State has no evidence from any officer to support the contention that Andrew was given a chance to sleep, and considering that he was interrogated throughout the night, he had

no meaningful opportunity to sleep.

The State asserts this Court should apply a deferential standard of review, see AB36, suggesting in a footnote that this Court should reject constitutional standards announced by the United States Supreme Court, see id. n.4. Federal constitutional standards control federal constitutional issues. This Court cannot apply Florida law in a manner less favorable to the accused than the minimal standards set by the Supreme Court.

Aside from the de novo standard applicable to the issue of custody, see IBR 53-54, the United States Supreme Court also has established de novo review as the constitutional standard for actual coercion claims. In Beckwith v. United States, 425 U.S. 341, 348 (1976), the Court said when a party claims his confession was involuntary and coerced because

> "the behavior of law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined..." Rogers v. Richmond, 365 U.S. 534, 544 (1961))... it is the duty of an appellate court, including this Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. Frazier v. Cupp, 394 U.S. 731, 739 (1969); Davis v. North Carolina, supra, 384 U.S., at 740-741.

See also Arizona v. Fulminante, 499 U.S. 279, 287 (1991).

II. APPELLANT HAD NO ADDITIONAL BURDEN TO CHALLENGE THE JUDGE'S ADVERSE RULING THAT PREVENTED HIM FROM PROPERLY CROSS-EXAMINING A STATE WITNESS TO CAST DOUBT ON THE VOLUNTARINESS OF ANDREW'S STATEMENTS; AND THE STATE'S ARGUMENT IS PROCEDURALLY DEFAULTED

The State impliedly suggests that Andrew's lawyer had a burden to challenge the trial judge's decision sustaining the

State's objection. See AB 38. There is no legal or logical support for that proposition, and the State cites none. Additionally, the judge didn't ask the defense for its position; he just ruled immediately for the State.

The State claims questions going to the heart of the voluntariness of Andrew's statements were beyond the scope of direct. See AB38. This argument is procedurally defaulted because it was not raised or ruled on below. See Dupree; Wike; Cannady; Mae; § 924.051(1)(b), Fla. Stat. Anyway, Gardner already had testified that Andrew asked for a lawyer, and the State had asked Deputy Gardner many questions to elicit how the statements were made in an obvious, proper, and necessary attempt to demonstrate to jurors his statements were voluntary. See V15T138-43. The same is true with all the other officers. Furthermore, the State pointedly argued the voluntariness of his statements to the jury in closing of the guilt phase, see V17T1283, V17T1261, as did defense counsel, see V17T1239-42.

III: THIS COURT SHOULD NOT OVERRULE ITS MANY PREMEDITATION DECISIONS AS THE STATE REQUESTS; AND THE STATE MISCONSTRUES THE MERGER/FELONY MURDER ARGUMENT, RELYING ON AN UNCHARGED THEORY TO SUPPORT ITS CLAIM

A. The State asks this Court to disavow all its recent decisions reversing on premeditation.

The State's premeditation position boils down to two points. First, it says all this Court's recent adverse rulings on premeditation should be overruled because they "ignored" the law. See AB44 n.7. Those decisions are the law. Moreover, this Court has issued recent decisions that further support appellant's

premeditation argument. See Fisher v. State, 23 Fla. L. Weekly S351 (Fla. June 12, 1998) (at least 35 shots fired from multiple weapons after a fight); Cummings v. State, 23 Fla. L. Weekly S305 (Fla. June 11, 1998) (at least 35 shots fired from multiple weapons after a fight); San Martin v. State, 23 Fla. L. Weekly S335 (Fla. June 11, 1998) (multiple gunshots); Green v. State, 23 Fla. L. Weekly S281 (Fla. May 21, 1998) (victim stabbed three times, and Green had low IQ).

Second, the State relies exclusively on Andrew's own statement that Gabrielle cried as proof of premeditation. See AB43. This is disingenuous at best. Almost the entire case for the State at trial and on appeal has been predicated on Andrew's admittedly false statements and his lack of credibility. See AB56. Yet here the State wants this Court to accept as true and dispositive one select, uncorroborated coerced statement made amid of flood of falsehoods and that he himself refuted at trial. See V17T1191. Moreover, the State claims as "fact" that Gabrielle cried after the first blow. See AB43. That was not established to be true, it was refuted at trial, and it conflicts with the State's own medical evidence showing that any of the blows -- the order of which we do not know -- could have rendered her unconscious right away. See IBR11-12. Even if she had cried, premeditation was not proved beyond a reasonable doubt.

B. The State misconstrues the felony murder/merger argument by applying the *Blockburger* same elements test even though that test has nothing to do with the issue.

The first seven pages of the State's argument rely on the same-elements construction rules announced in Blockburger v.

United States, 284 U.S. 299 (1932), as applied in Florida under section 775.021, Florida Statutes (1995). See AB44-50. However, as Professors LaFave and Scott have made clear, that test has no bearing on the present issue, for merger rules limiting the application of felony murder "should not be confused with the broader double jeopardy doctrine concerning whether a defendant may be prosecuted and punished for both felony murder and the underlying felony." 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.5(g)(3), p. 231 (West 1986). The State's answer brief confused the issue in precisely the manner Professors LaFave and Scott said should not be done.[3]

The merger rule of Robles v. State, 188 So. 2d 789 (Fla. 1966), and Mills v. State, 476 So. 2d 172 (Fla. 1985), which the State asks this Court not to follow, expresses a logical, rational, common-sense limitation of the felony murder rule adopted in Florida. It is a view based on policy and justice, completely in accord with the historic common law origins and practical operation of the felony murder rule, as well as with the language of the felony murder statute. Professors LaFave and Scott recognize the Mills/Robles merger rule "requiring that the underlying felony be independent of the homicide" is one of the common limitations on felony murder. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.5, p. 206 (1986). Section

[3] This Court recently did likewise in Donaldson v. State, 23 Fla. L. Weekly S245 (Fla. April 30, 1998). However this very point has been argued on rehearing and that decision is still pending. Furthermore, the facts here are even more clear-cut to crystallize the issue and show why reversal is required.

7.5(g)(2) of their treatise specifically addresses this principle in cases of aggravated battery/murder, and cites to many cases throughout the country, many of which directly support Andrew's present claim on facts just like these. See also Robert L. Simpson, Annotation, Application of Felony Murder Doctrine Where the Felony Relied Upon is an Includible Offense with the Homicide, 40 ALR 3d 1341, 1345, § 4 (1971 & August 1997 Supplement) (collecting cases).

Factually indistinguishable child abuse cases from other states amply demonstrate the point. In People v. Smith, 678 P.2d 886 (Cal. 1984), California applied the merger rule to prohibit the bootstrapping of felony child abuse to felony murder where an act constituted abuse and murder. After an extensive analysis, the California Supreme Court first reaffirmed the principle that the felony murder rule cannot be applied "where the purpose of the conduct [constituting the underlying felony] was the very assault which resulted in death." 678 P.2d at 891 (quoting People v. Burton, 491 P.2d 793 (Cal. 1971)). The Court held:

> it is plain that the purpose of the child abuse was the "very assault which resulted in death." It would be wholly illogical to allow this kind of assaulting child abuse to be bootstrapped into felony murder merely because the victim was a child rather than an adult, as in [People v.] Ireland[, 450 P.2d 580 (Cal. 1969)].
>
> In the present case the homicide was the result of child abuse of the assaultive variety. Thus, the underlying felony was unquestionably an "integral part of" and "included in fact" in the homicide within the meaning of Ireland. Furthermore, we can conceive of no independent purpose for the conduct, and the People suggest none; just as in Ireland, the purpose here was the very assault that resulted in death. To apply the felony murder rule in this situation would extend it "beyond any rational function that it was designed to serve." (People v. Washington, 402 P.2d 130 (Cal.

1965)).

678 P.2d at 891 (emphases supplied; footnote omitted).

The Kansas Supreme Court reached the same conclusion in State v. Lucas, 759 P.2d 90 (Kan. 1988), reaffirmed on rehearing, 767 P.2d 1808 (Kan. 1989). There, the Court said the felony murder rule cannot apply when the "collateral" or "underlying" felony is one episode of child abuse causing the child's death. The collateral or underlying felony must be

> so distinct from the homicide as not to be an ingredient of the homicide. If it does not meet this test it is said to merge with the homicide and preclude the application of felony murder.

759 P.2d at 93-94; see also id. at 96. The Court distinguished this merger rule from the Blockburger-style same elements test, see 759 P.2d at 96, and applied it to reverse a murder conviction where the act of abuse caused a child's death:

> It was the State's theory that Shaina died as a result of a severe beating to her head administered by the defendant from which she lost consciousness and drowned in a bathtub. There was no claim that any of the other acts of abuse caused or contributed to her death. The defendant could have been found guilty of abuse of a child solely on the fatal beating and convicted of felony murder solely on the fatal beating. If one and the same act can constitute both felony murder and the underlying felony, it would seem superfluous to determine if the underlying felony was inherently dangerous to human life or to consider the time, distance, and causal relationship of the underlying felony to the killing.
>
> Had an adult been beaten on the head, lost consciousness as a result thereof, and drowned in a pool of water or been asphyxiated by his blood and vomit, we have no hesitancy in holding that the aggravated battery (the beating) was an integral part of the homicide and that it merged therewith and could not serve as the underlying felony. Can a different result logically be reached by designating the beating an abuse of a child rather than aggravated battery? We believe not.

759 P.2d at 96. The court summed up its holding as follows:

> We now conclude that a single instance of assaultive conduct will not support the use of abuse of a child as the collateral felony for felony murder when that act is an integral part of the homicide.

759 P.2d at 99-100.

States that apply a different rule generally do so because their respective state laws compel a different reading. See, e.g., State v. Campos, 921 P.2d 1266 (N.M. 1996) (holding that because New Mexico felony murder law uniquely requires proof of means rea to kill, New Mexico law is distinct from the law in other jurisdictions and need not incorporate the rules followed in California, Kansas and other states).

To evade application of the merger rule, the State first makes the specious claim that this was not a case of aggravated battery because the jury could have decided its verdict on the ground of willful torture under subsection 827.03(1)(b), Florida Statutes (1995). See AB50. However, willful torture -- a distinct statutory theory -- was not charged in the indictment, see V1R13; the prosecutor did not argue the theory to the jury; no instruction for it was requested or presented to the jury; and no credible evidence supports the uncharged theory.

The State next relies on Richardson v. State, 823 S.W.2d 710 (Tex. Ct. App.-San Antonio 1992). See AB51. Yet Richardson absolutely and completely supports appellant's position, holding:

> The felony murder rule will not apply where the underlying felony sought to be used as a basis for the operation of the rule is an offense included in the fact of the homicide itself. Where there exists no general means rea based upon proof of the commission of a separate felony which may be transferred from that

> crime to an independent homicide committed in the course thereof, the felony murder rule cannot apply because there is a "merger" of the two offenses.

823 S.W.2d at 714. The court found there is no bar to felony murder when the predicate offense is car theft. However, the court said, the merger rule has barred felony murder convictions even where the underlying felony is ordinarily a statutorily permissible predicate offense. For example, in Garrett v. State, 573 S.W.2d 543 (Tex. Crim. App. 1978), the court applied the merger rule to reverse a felony murder conviction where the victim was killed as the result of an aggravated assault in a single "indivisible transaction."

The State relies on People v. Miller, 297 N.E.2d 85 (N.Y. 1973), to imply that New York law, on which Robles relied, does not apply the merger rule in this context. See AB51-52 n.11. However Miller does not say that, nor is such a reading even plausible. Miller is a felony murder case where burglary was the predicate felony for felony murder; and given that burglary was not the lethal act, Miller does not even speak to the present issue. Instead, consistent with Florida law, Miller held that burglary can be a predicate felony for felony murder.

The State relies on Mapps v. State, 520 So. 2d 92 (Fla. 4th DCA 1988). See AB52-53. But Mapps is fatally flawed because, like the first seven pages of the State's argument here, it is based on the Blockburger rationale and cites as its principal authority Carawan v. State, 515 So. 2d 161 (Fla. 1987). This is precisely the wrong analysis, as Professors LaFave and Scott pointed out. See supra. It is also ironic that the State points

out how Carawan is no longer good law, see AB46-48, yet it then heavily relies on a case that was expressly based on Carawan. Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994), which the State also cites, see AB53, merely relies on the fatally flawed Mapps decision with no analysis. Taylor also is factually distinguishable because the child's murder was committed during the commission of a burglary and a second homicide. Mackey v. State, 703 So. 2d 1183 (Fla. 3d DCA 1997), review granted, No. 92,179 (Fla. 1998), cited at AB49, lends no support to the State because the merger issue was not even raised or discussed.

The rationale in Smith, Lucas, Richardson, Garrett, Mills, and Robles, is supported by common sense and is consistent with Florida's statutory scheme. The Florida Legislature has always excluded aggravated battery from the list of enumerated felonies in the felony murder statute. Even when the Legislature added aggravated child abuse, it continued to exclude aggravated battery. Aggravated child abuse is an alternative conduct statute embracing four theories, only one of which is aggravated battery, and aggravated child abuse by aggravated battery can be committed in a homicide case without the battery causing death. Certainly it is not clear from the face of the felony murder statute that the Legislature suddenly intended to make a major change in the history of Florida felony murder law and merger law by bootstrapping aggravated battery into the felony murder statute. Any ambiguity as to whether the Legislature intended this bootstrapping must be resolved in Andrew's favor. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.; Perkins v. State,

576 So. 2d 1310 (Fla. 1991); § 775.021(1), Fla. Stat. (1995).

Moreover, almost every homicide involves an aggravated battery. Without limiting the felony murder rule where a single indivisible episode of aggravated battery is the core of the case, every aggravated battery upon a child where death results will automatically be a capital murder irrespective of other circumstances or the defendant's state of mind. That would wholly abrogate second-degree depraved mind murder and manslaughter either by intentional act or culpable negligence; it would eliminate the State's burden to prove a murderous state of mind in every child battery case where a death results; and it would circumvent the legislative gradation system for classes of homicides. This would be an absurd, extreme, and not clearly an intended result. Also, as the California Supreme Court said, applying the felony murder rule in this situation would extend it beyond any rational function that it was designed to serve.

Double jeopardy does indeed come in to play, but it does so through the principle of Missouri v. Hunter, 459 U.S. 333 (1981), which held that double jeopardy forbids punishment greater than that which state law clearly intended. To determine what state law intended here, this Court should look to the merger rule as explained above -- not to a Blockburger-style same elements analysis -- to determine whether the felony murder prosecution violated double jeopardy, as Andrew contends. See LaFave & Scott, supra, at § 7.5(g)(3).

C. A new trial is required because the homicide conviction rested on a legally inadequate theory.

The error in submitting an unlawful theory to the jury was reversible under principles of due process and the requirements of precedent. The United States Supreme Court, and this Court, have made clear that a judgment of guilt cannot be affirmed when the judgment could have been based on an unlawful or unconstitutional ground.

In Stromberg v. California, 283 U.S. 359 (1931), one of three alternative theories upon which the jury could have relied to convict was unconstitutional. The court said that error required a new trial. See also Williams v. North Carolina, 317 U.S. 287, 292 (1942). The court later applied the same rationale in Yates v. United States, 354 U.S. 298 (1957), to require reversal when the improper prosecution theory violated controlling law in the jurisdiction rather than a constitutional provision. The only exception is when one of the state's theories proves to be invalid merely because it was based on insufficient evidence. See Griffin v. United States, 502 U.S. 46 (1991). Griffin drew a "clear line," 502 U.S. at 59, giving continuing force and clarity to Stromberg and Yates:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence, see Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

Griffin, 502 U.S. at 59 (emphasis supplied).

This Court and other Florida courts have many times recognized Stromberg/Yates/Griffin as controlling law. See, e.g., Mungin v. State, 689 So. 2d 1026, 1030 (Fla. 1995) ("a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory.")(footnotes omitted), cert. denied, 118 S. Ct. 102 (1997); Allen v. State, 676 So. 2d 491 (Fla. 5th DCA 1996) (reversing attempted murder conviction because one of the prosecution's theories was legally inadequate under state law); Mosely v. State, 682 So. 2d 605 (Fla. 1st DCA 1996) (reversing attempted manslaughter conviction because of prosecution's theories was legally inadequate under state law).

The application of these principles is quite clear. Jurors returned a general verdict of first-degree murder that could have been based on only two theories. One of those theories was legally inadequate. Given the absence of premeditation evidence, and the weight the State put on its felony murder theory, there can be no question the jury likely convicted on the legally inadequate theory. The murder conviction should be reversed.

IV: THE STATE'S ARGUMENT MISSES THE POINT BY NEVER DISCUSSING WHETHER ANDREW HAD THE RIGHT TO TIMELY WAIVE A DEFENSE WITH THE STATE'S CONSENT

The State's argument is that justifiable and excusable defenses are part of the standard definitions of certain crimes. See AB54-55. That is not the issue. The issue also does not involve a request for, or waiver of, instructions of lesser offenses. And besides, standard instructions are supposed to be

modified to fit a defendant's theory of the case. See State v. Anderson, 639 So. 2d 609, 610-11 (Fla. 1994).

All of the State's cases deal with whether instructions for defenses that inured to the benefit of the defendants under the facts and theories in those cases had been properly omitted absent timely objection. Here, the issue is whether an instruction for a defense detrimental to the accused under the facts and defense theory must be given despite the defendant's timely objection and despite the State's consent to the waiver at trial. The State's answer ignored that issue and all the cited authorities supporting the appellant. See IBR78.

V: THE STATE FAILS TO DRAW ANY MEANINGFUL PROPORTIONALITY DISTINCTION BETWEEN THIS CASE AND SMALLEY, AND FAILS TO DEMONSTRATE WHY THIS APPELLANT, WHOSE CRIME WAS NOT HEINOUS, ATROCIOUS, OR CRUEL, SHOULD BE TREATED THE SAME OR MORE SEVERELY THAN THOSE WHOSE CRIMES WERE FAR MORE HORRIBLE

The State claims it is significant that Andrew "never challenges the trial court's finding regarding [] mitigation," concluding that the "judge did not abuse his discretion regarding the mitigators." AB57. The judge found all the mitigation, so of course Andrew does not challenge those findings.

The State claims Smalley v. State, 546 So. 2d 720 (Fla. 1989) is distinguishable in large part because there was "no evidence of problems at home and depression comparable in quantity or quality to that produced by Smalley." AB58. The facts, however directly refute that claim. Smalley had one diagnosed mental disorder -- depression -- attributed to his not getting along with his housemate, severe money trouble, and pressures of caring

for ill children. Those pressures, and "minor marijuana use on the day of the killing," were the mental mitigating factors in Smalley. Yet those are not very different than troubles one finds in any household. Here, however, Andrew has an exceedingly low IQ of 79 and was diagnosed to be suffering from four distinct mental impairments, much of which stem from being homosexually raped over a long period of time by an abusive uncle, and years of physical and verbal abuse inflicted by his father. Evidence shows he felt worthless, he had a history of suicidal tendencies, and he tried to commit suicide right after the murder. Also unlike Smalley, Andrew had a long history of alcohol and substance abuse severe enough to be a diagnosed mental disorder. Qualitatively and quantitatively, the mental factors here are far greater than in Smalley.

The State tries to distinguish some of appellant's authorities by saying none of the defendants "appear" to have had prior child abuse convictions." AB59. That's pure speculation.

The State claims the "absence of HAC" is an irrelevant distinction between this case and almost every death sentence affirmance in child homicides because HAC "focuses on the impact of the victim." AB60. That is wrong. This Court in Cheshire v. State, 568 So. 2d 908 (Fla. 1990), made quite clear that the mental state of the defendant is the critical factor in HAC determinations. Cheshire held the killer's state of mind must "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Id. at 912. The

suffering of the victim is always circumstantial evidence that goes toward proving the killer's state of mind, but it is the killer's state of mind that aggravates those crimes. This record demonstrates a total absence of such a state of mind, the obvious reason why the State did not claim HAC and why the judge did not find it. The State all but concedes the point, saying "most people would consider the murder of an infant to be a despicable act and, therefore, heinous, atrocious or cruel." AB60. Yet this case was not found to be heinous, atrocious or cruel, thereby distinguishing it from most infant homicides.

Rather than comparing facts and qualitative differences of the cited cases, the State instead plays the numbers game, counting aggravavators and mitigators. See AB60-61. That is directly contrary to this Court's settled rule that proportionality "is not a comparison between the number of aggravating and mitigating circumstances." Terry v. State, 668 So. 2d 954, 965 (Fla. 1996) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)). To the contrary, "[p]roportionality review 'requires a discrete analysis of the facts,' entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." Urbin v. State, 23 Fla. L. Weekly S257, S258 (Fla. May 7, 1998) (emphasis in original) (quoting Terry, 668 So. 2d at 965).

The State cites only two cases appellant did not already address and distinguish in his initial brief, Durocher v. State, 604 So. 2d 810 (Fla. 1992), and Meyers v. State, 704 So. 2d 1368 (Fla. 1997), cert. denied, 118 S. Ct. 2380 (1998). Durocher was

a triple homicide including two child murders; all the murders were cold, calculated, and premeditated; and he waived mitigation, thereby skewing any possible proportionality analysis. Meyers involved a sexual battery -- a major distinction -- and unlike all the other cases it did not involve the death of a child under the age of 12. These cases certainly are not, as the State claims, "truly comparable." AB62. Nor is the only other recent capital case for the murder of a child under 12, Zakrzewski v. State, 23 Fla. L. Weekly S352 (Fla. June 11, 1998). That case was a triple homicide including the murders of two children; the murders were committed with a machete; both child murders were heinous, atrocious, or cruel; and all three murders were cold, calculated, and premeditated.

VII. THE STATE IGNORES THE FACT THAT THE FELONY PROBATION STATUTE HAD NO DEMONSTRABLE RETROACTIVE INTENT, AND THE STATE FAILS TO DEMONSTRATE WHY THE STATUTE IS NOT EX POST FACTO IN LIGHT OF THIS COURT'S HOOTMAN DECISION

First, the State did not even attempt to refute appellant's argument that the statute does not apply retrospectively because there is no evidence the Legislature so intended. See IBR87-89.

Second, the State fails to demonstrate why the reasoning of this Court's recent decision in Hootman v. State, 709 So. 2d 1357 (Fla. 1998), overruled in part on jurisdiction grounds, State v. Matute-Chirinos, 23 Fla. L. Weekly S386 (Fla. July 16, 1998), as well as the constitutional decisions on which Hootman relies, should not control the issue here. Instead, the State makes a bold and unsupported declaration that probation and community control are equivalent because they're both forms of custody.

See AB69. That flies in the face of numerous authorities holding the two are not and have never been regarded as legal or functional equivalents. See IBR88.

The State argues harmless error because the jury got a merger instruction. See AB70. However, if the judge knew the same law and erred by finding and weighing this factor, we must presume jurors did the same.

VIII: THE STATE'S ARGUMENT RESTS ON AN IRRELEVANT STATUTORY DISTINCTION THAT IN NO WAY DEFEATS THE FACT THAT IMPROPER DOUBLING OCCURRED HERE

The State's entire argument boils down to one contention: because the automatic felony murder/aggravated battery aggravator must involve a victim under 18, and the child aggravator must involve a victim under the age of 12, there is no doubling. See AB72. This so-called distinction is irrelevant when the child's age fits both statutes, and the only reason the two aggravators applied was because of the same aspect of the crime -- the child's age —- which the State does not contest. Effectively, the State seems to suggest this Court should abandon settled law and use a Blockburger analysis. Provence v. State, 337 So. 2d 783 (Fla. 1976), has been the law for more than 20 years and has been relied on repeatedly. Provence says if two aggravators are applied because of the same aspect of the crime, they have been erroneously doubled. That's precisely what happened here. Neither aggravator could have applied had it not been for one aspect of the crime, the age of the victim.

The only authority the State relies on for its argument is Banks v. State, 700 So. 2d 363 (Fla. 1997), cert. denied, 118 S.

Ct. 1314 (1998). That case is easily distinguished because it merely applied the Provence rule to find murder committed during an enumerated felony did not double with the HAC factor, which addresses the manner in which the homicide was committed.

X: THE STATE'S ARGUMENT ON ADMISSIBILITY OF EVIDENCE TO PROVE AN UNLAWFUL AGGRAVATING CIRCUMSTANCE IS UNSUPPORTED, AND ITS FEATURE ARGUMENT MISSES THE POINT

Most of the State's argument focuses on the general admissibility of penalty phase evidence. See AB77-78. Appellant addressed admissibility only to the extent that some of the collateral crime evidence supported an ex post facto aggravator. The State offers no support for the contention that evidence of an unconstitutional aggravator is admissible. To the contrary, this Court recently underscored the rule that evidence cannot be introduced to support an unlawful aggravator. See Donaldson v. State, 23 Fla. L. Weekly S245 (Fla. April 30, 1998).

The State says the feature argument is unavailing if the evidence is straightforward and unemotional. That is not the law. The law is intended to ensure that cosentencers properly focus on the present crime, not on the collateral crime.

XI: THE STATE FAILS TO ACKNOWLEDGE THIS COURT'S RECENT URBIN DECISION, WHICH STRONGLY SUPPORTS APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT

Appellant's argument is strongly bolstered by Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998), which the State did not cite. This Court in Urbin emphasized that "a court ruled by emotion [] is far worse" than the dispassionate system on which we all depend to find justice, id. at S259, castigating the Jacksonville prosecutor for numerous improper and emotional pleas

to the jury quite similar to those in this case. See IBR96-99.

XII: THE STATE RELIES ON ILLOGIC AND DECEPTION TO RESPOND TO THE GUIDELINES AND RESTITUTION CLAIMS

The State's guidelines argument essentially says the judge would have departed anyway, and appellant can't show it was a departure sentence. See AB 90. That Catch-22 argument defies logic and law. We don't know if the judge would have departed because he never determined what the guidelines sentence would have been. And we don't know if it was a guidelines sentence because he didn't fill out a score sheet. The law is clear: there must be a completed score sheet for noncapital sentences in capital cases. See, e.g., Lamb v. State, 532 So. 2d 1031 (Fla. 1988); Redmon v. State, 546 So. 2d 1138 (Fla. 3d DCA 1989).

The State's restitution argument is an utter fabrication. The State characterizes it thusly: "Lukehart now claims that the trial court erred by determining his ability to pay before entering the restitution orders." AB91. The State then goes on to show why ability to pay is not a meritorious issue. However, appellant never even mentioned ability to pay in his argument, explicitly or implicitly. See IBR100.

CONCLUSION

For the reasons expressed above and in the initial brief, the judgments of convictions and sentences should be reversed and the cause remanded for a new trial or for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy of this reply brief of appellant has been furnished by delivery to Barbara J. Yates, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Richard Andrew Lukehart, on this ____ day of August, 1998.

Respectfully submitted,

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