IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 92,717
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. WHETHER THE COURT ERRED IN LETTING THE STATE PUT INTO EVIDENCE THE MMPI NARRATIVE REPORT.

A. The judge ruled, pursuant to the state's argument, that the short MMPI narrative was admissible to impeach Dr. Toomer. T 270-71. The answer brief abandons that theory of admissibility at page 17 (e.s.): "Regardless of Hitchcock's characterization of the State's use of the report as some sort of improper 'tactic' (and regardless of whether or not the State considered what it was doing to be 'rebuttal'), the state of the law is that relevant evidence is admissible at the penalty phase of a capital trial."

Our law does not let a party successfully take one position at trial and a different position on appeal. In Hayes v. State, 581 So. 2d 121, 124 (Fla. 1991), the defense made a hearsay objection and the state argued an exception to the hearsay rule. The judge overruled the defense objection. On 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 approach (e.s.):

> 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 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).").

Federated Mutual Implement & Hardware Insurance Co. v. Griffin, 237 So. 2d 38, 41 (Fla. 1st DCA 1970) (e.s.) states:

> 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.

See also 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").

Since the state has dropped its claim that the report was admissible as impeachment, there is no longer any dispute that the judge applied the wrong law. Hence, error occurred.

B. The state's new theory of admissibility is: "Obviously, the MMPI report (which was generated at the instance of Hitchcock's expert) was relevant to the mental mitigators which were the

subject of that expert witness's testimony. (R171-193)." Answer brief, page 17.

This relevance is not obvious. The witness never mentioned the MMPI test, much less the brief narrative, on direct examination. He never testified that the MMPI test, much less the narrative, showed anything about the personality disorders to which he testified. The state's entire five question cross-examination (appended to this brief) does not show that he relied on the MMPI test at all, or even that the narrative was generated at his instance. It shows only that "MMPI is a test instrument containing approximately 560 true or false questions which is administered and then interpreted, scored, if you will". T 194. Toomer identified a 20-page exhibit as "the scoring of that test". Id, T 271. He did not testify that he asked for the narrative report section. The record does not show whether such narratives are generated routinely regardless whether they are ordered. More importantly, he did not testify that he relied on the narrative in any way.

The state's failure to ask Toomer whether he relied on the MMPI or the narrative is especially remarkable since the judge gave the state one hour and forty minutes in which to frame its questions. T 193 (granting state's request for time to decide extent of cross-examination); R 955 (showing length of lunch break).

Thus, the record shows no relevance - no link at all - between the narrative and the witness's opinion.

In its argument, the state relies on Wuornos v. State, 644 So. 2d 1012, 1013 (Fla. 1994) and Alvord v. State, 322 So. 2d 533, 538 (Fla. 1975) for the following proposition: "The report was properly admitted under that standard [relevance] - Hitchcock's brief ignores that standard, and, in so doing, argues for reversal based upon legally inapplicable matters." Answer brief, page 17.[1] The cited cases do not say that where, as here, the state has maintained that evidence is admitted for a particular purpose (impeachment), the appellant should not address that matter in the initial brief.

The state's parenthetical construction of Wuornos and its quotation from Alvord suggest an idea of unlimited admissibility of anything termed "relevant" in capital sentencing. Our law does not support this broad view. In Jackson v. State, 648 So. 2d 85 (Fla. 1994), Jackson presented an expert's testimony about a hypnotic regression session. The judge let the expert testify, but refused to let into evidence a videotape of the session. This Court affirmed: "Finally, we also find no error in the trial court's refusal to admit the videotape as mitigating evidence. If we were to rule otherwise, defendants in capital cases could present as mitigating evidence videotaped statements to mental health experts, and thereby preclude cross-examination by the State." Id. 91. See also Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989) (officer

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[1] Despite what the state says, the initial brief argued, as appellant argued below, T 268, that the MMPI narrative had no bearing on Dr. Toomer's testimony. Initial brief, page 24.

could testify to hearsay about prior violent felony, but victim's taped statement was inadmissible).

Under Jackson and Rhodes, even if Dr. Toomer had testified that he relied on the narrative report, it was not automatically admissible. The state could question the witness about the report, but could not put the report itself into evidence. Appellant could not cross-examine the report or its author.

Wuornos and Alvord do not support the state's claim of broad admissibility. Aileen Wuornos contended in mitigation that she never attacked without provocation and had undergone a religious conversion. To dispute these facts, the state introduced testimony that she had made unprovoked attacks and had made a claim of religious conversion when jailed some years before. 644 So. 2d at 1012. This Court observed: "Once the defense advances a theory of mitigation, the State has a right to rebut through any means permitted by the rules of evidence." Id. 1012-13 (e.s.).

Alvord also does not repeal the rules of evidence. There the state presented testimony about the defendant's mental state at the time of a prior offense. The opinion states only that "There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence." 322 So. 2d at 539. It does not say that there should be no application of the rules of evidence. It does not authorize the state introducing documents setting out the opinions of sources unknown.

At bar, the state put into evidence a narrative consisting of an opinion made by someone or something unknown,[2] who could not be cross-examined. It takes no narrow view of the rules of evidence to see that it was inadmissible. In Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997), this Court upheld the trial court's refusal to let into evidence a political asylum application to corroborate the defendant's mother's testimony about his childhood:

> ... . We find that this asylum application could not be admitted because there was no opportunity to rebut it. The preparer of the application was not identified. The record shows that the application was submitted to the United States Immigration and Naturalization Service but not that any official action was taken concerning it. On the basis of this record, we find that this document was merely a self-serving statement filed in the public records. We find no error in the trial court's refusal to admit the application. Even if the document had been admitted, it would have been cumulative because of the testimony of appellant's mother concerning his childhood. ... .

The document at bar is like the asylum application in Mendoza. It author is unknown. Appellant could not rebut it. It was inadmissible.

The state argues at pages 17-18 that appellant was afforded the opportunity to recall the witness to rebut its hearsay contents. This argument is contrary to Jackson and Rhodes. Just

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[2] Defense counsel said that "this is a machine scored result." T 266. The state told the judge that it was "done by a neutral, not a machine score, by a psychologist at the University of Minnesota". T 268.

as the tapes in those cases could not be cross-examined, so could the narrative at bar not be cross-examined.

There was no reason for the defense to recall Toomer, whom the state had treated with condescension,[3] as to which see generally Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (disapproving prosecutor's "needless sarcasm"), in order to lay the predicate for the state's exhibit.

C. At page 19, the state misunderstands appellant's argument, writing: "Finally, to the extent that Hitchcock attempts to blend in elements of a claim that there was some error with regard to the State's use of the MMPI report in closing argument, no such claim was preserved for appellate review by timely objection at trial."

To determine prejudice, the court looks to the entire record, including how the erroneous evidence is used in final argument. E.g. Aneiro v. State, 674 So. 2d 913 (Fla. 4th DCA 1996) ("We reverse and remand for new trial. The issue on appeal is whether the trial court erroneously admitted harmful hearsay, over

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[3] The state's remarks about the witness in final argument are discussed in the initial brief. When the witness was testifying, the state made a spurious objection to his testimony as an expert on the ground that he was not board certified. T 171. When he testified about the untimely death of appellant's father, "who was sort of the glue holding the family together", the state said: "Objection. Could I voir dire on the basis of who told him the glue story." T 181. When the witness testified about appellant's manifestation of empathy, the state objected: "I object and move to strike the manifestation of empathy. I don't think that's a psychological term he's able to diagnose. It wasn't responsive to the question, either." T 186. Needless to say, "empathy" is a commonly used psychological term. See "Empathy", Encyclopedia of Psychology, Vol. 1, p. 479, Corsini, Raymond J., ed.

objection, then erroneously permitted the state to argue to the jury, without further objection, such hearsay to establish the credibility of a CI not available for cross-examination."), Killian v. State, 730 So. 2d 360, 363 (Fla. 2d DCA 1999) ("The trial court committed prejudicial error when it introduced these books into evidence, and the State compounded that error in closing argument. We must order a new trial."), Morgan v. State, 700 So. 2d 29, 30 (Fla. 2nd DCA 1997) ("This error was further compounded by the prosecutor's closing remarks."), Hernandez v. Home Depot USA, Inc., 695 So. 2d 484 (Fla. 3rd DCA 1997), Thompson v. State, 615 So. 2d 737, 744 (Fla. 1st DCA 1993) ("Moreover, Thompson's conviction for armed robbery became a feature of the state's rebuttal, compounding the error."), Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986) ("This error was compounded by the prosecutor's closing argument to the jury that there were no mitigating factors."), Garcia v. State, 564 So. 2d 124, 128 (Fla. 1990) ("The state compounded that error in its closing argument ... .").

Under Whitton v. State, 649 So. 2d 861, 864-65 (Fla. 1994), and Ruiz v. State, 24 Fla. L. Weekly S157, 159 (Fla. Apr. 1, 1999), the Court looks to both preserved and unpreserved errors in deciding prejudice. See also Gore v. State, 719 So. 2d at 1202-1203 (Fla. 1998). The cases which the state cites on this point are irrelevant. Those cases did not involve the state's use of erroneously admitted evidence in its final argument.

D. The state's brief does not deny that the evidence prejudiced appellant. The burden is on the state "as the beneficiary of the error" to prove lack of prejudice beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986). Its burden is "most severe." Holland v. State, 503 So. 2d 1250, 1253 (Fla. 1987), Varona v. State, 674 So. 2d 823, 825 (Fla. 4th DCA 1996).

Here the state has shouldered its burden not at all. In Hitchcock v. Dugger, 481 U.S. 393, 399 (1987), the Court found error in failure to consider mitigation, and wrote: "Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge." In Passaat, Ltd. v. Pettis, 654 So. 2d 980, 981 (Fla. 4th DCA 1995), the court wrote: "The appellees have made no response at all to this argument in their brief, thus failing to give us any ground upon which we could treat this as harmless error."

The state's brief at bar makes no response to the discussion in the initial brief of how the error affected the sentence. Given its vigorous use of the narrative in final argument, it could hardly show that its admission did not prejudice the defense. Although this Court may apply the harmless error rule even if the state does not argue it, Heuss v. State, 687 So. 2d 823 (Fla. 1996), it may also consider the state's failure to be a concession of error. Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988). Given the magnitude of the issue at bar, and the state's use of the

exhibit in final argument, this Court should reverse for resentencing.

2. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S ARGUMENT ON MITIGATION.

The state cites several cases at pages 20-21 of its brief as to the procedure for finding mitigation. These cases do not say that the state may urge the jury to disregard valid mitigation. They do not say the state can have jurors ignore the Constitution and the teachings of this Court and the United States Supreme Court.

In King v. State, 623 So. 2d 486, 489 (Fla. 1993), this Court ordered resentencing because fundamental error occurred during the state's final argument. This Court set out in passing the procedure for finding mitigation, apparently because there were questions about the sentencing order under review. King has no bearing on the case at bar.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), the defense presented no mitigating evidence or argument about any childhood trauma. On appeal, however, Rogers contended that "he suffered trauma as a child because he thought his mother was dead when in fact she wasn't". Id. 534. This Court wrote (id. 535) (e.s.):

> The effects produced by childhood traumas, on the other hand, indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense. See Eddings, 455 U.S. at 112-13, 102 S.Ct. at 875-76. However, in the present case Rogers' alleged childhood trauma does not meet this standard of relevance. No testimony on this question was presented during the penalty phase, and Rogers raised the issue for

the first time on appeal. Indeed, the only evidence of such a trauma in the record is the following notation in the presentence investigation:

> [Rogers] was raised under the impression that his mother was dead but found out that she was not dead when he went in the service.... As far as his mental health, [Rogers says] "I'd say I'm in pretty good shape considering the stress I've been under. The strain, worrying about my family."

We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death. See Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

In the same vein and in light of the admonition that judges may not refuse to consider relevant mitigating evidence, Eddings, 455 U.S. at 115-16, 102 S.Ct. at 877, we agree that being a good husband and father or having a good service record are factors to be weighed in mitigation. Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. See Lockett, 438 U.S. at 604-05, 98 S.Ct. at 2964-65. The record does not disclose that the state contested the testimony of Rogers' wife that he was a good father, husband and provider. However, we find that the record contains an insufficient factual basis establishing the decorations Rogers received while in the Navy and the purpose of them. Rogers did not raise this issue until his appeal and bases his argument on a single sentence in his presentence investigation that says only that Rogers claims to have received decorations. Absent proof of the decorations, we cannot fault the trial court for finding no mitigating factor under these circumstances.

Rogers was an adult who had served in the Navy and had children, and there was no real evidence of his childhood trauma. Appellant, however, was 20 years old and the state did not dispute the

extensive evidence about his childhood. This Court's discussion of Rogers' being a good husband and father makes clear that the sentencer must weigh mitigation supported by the evidence.

Hall v. State, 614 So. 2d 473, 478-79 (Fla. 1993) reiterates the Rogers standard. In Preston v. State, 607 So. 2d 404, 411-12 (Fla. 1992) this Court upheld the trial court's well-reasoned rejection of disputed evidence of mental mitigation.

These decisions are consistent with Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990). Under Campbell, a deprived childhood is a mitigating circumstance as a matter of law so long as the evidence has established it. At bar, the state did not dispute the evidence. It urged jurors to ignore the evidence, contrary to law.

The state argues at page 21: "A rule of law that foreclosed such legitimate argument would literally deprive the State of a fair trial, and would produce a proceeding that was hopelessly one-sided in favor of the defendant."[4] Hardly. Neither side can urge the jury to ignore the law. In Cave v. State, 476 So. 2d 180, 186 (Fla. 1988), this Court ruled that defense counsel could not argue an invalid theory of defense, noting: "Counsel may not contravene the law and jury instructions in arguing to the jury." In Miller v. State, 712 So. 2d 451, 453 (Fla. 2d DCA 1998), the court wrote:

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[4] The state's brief cites Davis v. Kemp, 829 F.2d 1522, 1528 (11th Cir. 1987) on this point. That case says nothing about this issue. The state there did not urge the jury to disregard mitigation. In response to defense argument that the death penalty would serve no purpose, it argued that it served the purpose of retribution. It also argued that jurors should carefully do their job in deciding the penalty.

> A defendant has a fundamental right to present a defense, see Story v. State, 589 So. 2d 939 (Fla. 2d DCA 1991), and to have the jury properly instructed on any legal defense supported by the evidence, Gardner v. State, 480 So. 2d 91 (Fla. 1985). These rights stand for naught if the prosecutor can ridicule a defense so presented, denigrate the accused for his temerity in raising the issue, and misstate the law in contradiction of the judge's instructions, as the prosecutor in this case did. The error committed by the prosecutor in closing argument, therefore, deprived the appellant of his fundamental right to a fair trial.

See also U.S. v. Valdes-Guerra, 758 F.2d 1411, 1416 (11th Cir. 1985) ("Defense counsel may not argue incorrect or inapplicable theories of law to a jury."), Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989) (argument misstating law of defense of intoxication), Romero v. State, 435 So. 2d 318 (Fla. 1983) (same, as to burden of proof). The rule of law cannot survive if the state can have jurors disregard the law. See Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."; quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

This Court wrote in Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990):

> The record as a whole indicates, and the state admits, that the prosecution's strategy throughout the entire trial was to discredit the whole notion of psychiatry in general and the insanity defense specifically. We have addressed the impropriety of such an attack in the past, stating:
>
> > In response to rebuttal of the insanity defense, the assistant state attorney made several comments

> during cross-examination of court appointed psychiatrists and during closing argument, which were intended to discredit the insanity defense as a legal defense to the charge of murder. We believe that once the legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. Whether that criticism is in the form of cross-examination, closing argument, or any other remark to the jury, it is reversible error to place the issue of the validity of the insanity defense before the trier of fact. To do so could only helplessly confuse the jury. The insanity defense is a policy question that has plagued the courts, legislatures, and governments for decades. It is unnecessary to similarly plague [juries].

Garron v. State, 528 So. 2d 353, 357 (Fla. 1988) (emphasis added).

Accord Taylor v. State, 640 So. 2d 1127, 1133-34 (Fla. 1994). Cf. Barnes v. State, 24 Fla. L. Weekly D1250 (Fla. 4th DCA May 26, 1999) ("the failure of a lawyer to acknowledge clearly contrary facts or law is decidedly unethical and unprofessional").

In Nowitzke and Taylor the state's quarrel was with the law as to the insanity defense. In Miller, its quarrel was with the defense of intoxication. Here, its quarrel was with the law as to mitigation. Contrary to the state's argument, the sentencer must consider a deprived childhood in mitigation.

At page 22, the state presents a three-sentence argument that the error was not prejudicial "given the clear evidence of aggravation that exists here", and cites State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This Court should consider this cursory

argument as an abandonment of a claim of harmless error. See Otto v. Variable Annuity Life Ins. Co., 134 F.3d 841, 854-55 (7th Cir. 1998) ("This court has refused to consider unsupported or cursory arguments. [Cit.] Ms. Otto has devoted all of three sentences to the argument on this issue. The matter is waived."); U.S. v. McClellan, 165 F.3d 535, 550 (7th Cir. 1999) (same). See also U.S. v. Marshall, 132 F.3d 63, 70-71 (D.C. Cir. 1994) ("We also reject as insufficiently developed Marshall's cursory arguments concerning the government's disclosure of a surveillance report and certain tape recordings."), U.S. v. Johnson, 977 F.2d 1360, 1367, n.2 (10th Cir. 1992), Simkins Industries, Inc. v. Lexington Insurance Co., 714 So. 2d 1092, 1093 (3rd DCA 1998).

Regardless, State v. DiGuilio does not support the state's position. There this Court wrote at page 1135 that harmless error review entails "an examination of the entire record by the appellate court". The focus is not only on the state's case. Even if this were a case of overwhelming aggravation (which it is not), the Court would still look to the defense evidence. Here, the defense evidence was strong, but the state improperly urged the jury to ignore it. The judge approved the state's argument and never told the jurors that they must consider such evidence. This Court should reverse.

3. WHETHER THE COURT ERRED IN OVERRULING THE OBJECTION TO THE STATE'S ARGUMENT TO THE JURY ABOUT DR. TOOMER.

The state makes two arguments on this point: the issue is not preserved, and its remarks were proper.

A. When the state began to tell jurors why it did not cross-examine Dr. Toomer, appellant objected that such argument was improper. T 330. This was a well-founded objection, as discussed below. The state replied that it had not done anything improper yet, and then cut off defense counsel as she began to explain. Id. The court said: "Objection is overruled at this point." Id. The state then continued, saying it had not cross-examined the witness because he had told the jury "absolutely nothing" and "literally babbled for an hour", so that he "wasn't cross-examined, ladies and gentlemen, because he didn't say one word, not one word or thought that was in any way relevant to this case or made any sense". T 330-32.

Under Allen v. State, 662 So. 2d 323, 327-28 (Fla. 1995), which is cited in the state's brief, this issue is preserved. There, the defense objected when the state mentioned the decedent's grandchildren, the defense objected, and the judge "overruled the objection 'for the moment.'" This Court ruled that the reference to the grandchildren was improper, thus treating the issue as preserved and reaching the merits of the issue.

In the context at bar, the judge's ruling was that it was alright for the state to give its reason for not questioning the witness, but that, if the state made some other improper argument,

the defense could object. From the jury's perspective, the judge approved the prosecutor's argument. See Wheeler v. State, 425 So. 2d 109, 111 (Fla. 1st DCA 1982) ("The court's overruling of the objection compounded the prejudice."), Carrol v. Dodsworth, 565 So. 2d 346, 348-49 (Fla. 1st DCA 1990) ("The damage was compounded by the trial court's overruling of plaintiffs' timely objection and allowing defense counsel to repeat his improper question ... ."), Rollins v. Div. of Administration, 373 So. 2d 386, 388 (Fla. 4th DCA 1979) ("Had the trial court sustained the objection, we would have no difficulty in affirming the judgment. But in overruling the objection the trial court placed its imprimatur on counsel's argument").

The state's brief cites Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997), but it is inapposite because "no contemporaneous objections were registered to the prosecutor's alleged personal attacks against Chandler". It also cites Nixon v. State, 572 So. 2d 1336 (Fla. 1990), but there again "defense counsel failed to make a contemporaneous objection" to the offending remarks. Id. 1340. Likewise, in Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996), there was no objection.

B. The state next argues that its comments were proper. It cites no authority for the proposition that attorneys may tell jurors why they did or did not do something during a trial. There is no such authority. This Court should treat the state's cursory

argument on appeal as a nullity. Likewise, the state understandably makes no argument of lack of prejudice.

4. WHETHER FUNDAMENTAL REVERSIBLE ERROR OCCURRED IN THE STATE'S FINAL ARGUMENT TO THE JURY.

Two matters are not in dispute: First, as the state's brief correctly points out, the first complained-of argument is at transcript pages 318-19 (as cited at page 35 of the initial brief and pages 26-27 of the answer brief) rather than pages 320-21 (as mistakenly cited at page 40 of the initial brief). Second, as noted in the initial brief and the answer brief, the doctrine of fundamental error applies to the arguments raised on this point.

Since the question of fundamental error applies, there is no need to discuss the cases cited at pages 25-26 of the answer brief.

As to its argument that jurors should consider proven mitigation only if the jurors themselves decide that it "is the kind of fact that should have any weight in deciding whether somebody lives or dies for a crime like this", T 319, the state offers no law showing that such an approach is valid. In fact it is invalid: the question of whether a set of facts, once proven, is mitigating "is a question of law". Campbell v. State, 571 So. 2d 415, 419-20, n. 4 (Fla. 1990). Likewise, it presents no authority for argument limiting consideration of mitigation to evidence presented by the defense. As to this entire issue, the state cites only Valle v. State, 581 So. 2d 40, 46-47 (Fla. 1991), where this Court wrote: "The state may properly argue that the defense has failed to establish a mitigating factor and may also argue that the

jury should not be swayed by sympathy." The state's argument at bar is quite different: it argued that jurors were free not to consider valid mitigation, even if established by the evidence.

The state presents no authority as to its argument about Dr. Ruiz' testimony.

As to its repeated use of the word "rape", the state misunderstands the issue. If the state charges someone with murder, the court instructs the jury on the elements of murder, and the state proves the elements of murder, it may then call the defendant a "murderer". Here, however, the state succeeded in having the rape circumstance altered to the more easily proved offense of sexual battery. See pages at pages 65-67 of the initial brief. The judge instructed on the elements of sexual battery rather than those of rape, and the state argued the elements of sexual battery rather than those of rape. Thus the state relieved itself of the burden of proving the elements of rape, and then argued rape to the jury. The state may not obtain an instruction on one offense and then in argument claim that the defendant is guilty of an offense requiring more stringent proof. Cf. Jackson v. State, 690 So. 2d 714, 717-718 (Fla. 4th DCA 1997) (improper for state to argue that defendant is guilty of crime greater than crime charged), Gleason v. State, 591 So. 2d 278, 279 (Fla. 5th DCA 1991) (same).

At bar, the state successfully contended that rape is not an aggravating circumstance, and that it need prove only sexual

battery. It cannot argue successfully one theory to the court and a contrary theory to the jury. See Salcedo (noting "the universal rule which forbids the successful assertion of inconsistent positions in litigation").

Without disputing the authority of Garron v. State, 528 So. 2d 353, 358-59 (Fla. 1988), Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), and Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989), the state maintains at pages 29-30 that it was proper to urge jurors to imagine and speculate about Cynthia Driggers' final thoughts. See also Walker v. State, 707 So. 2d 300, 315-16 (Fla. 1997) (finding isolated remark harmless). A recent opinion concerning such argument is McDonald v. State, 24 Fla. Law Weekly S 347, n. 9 (Fla. July 1, 1999). In McDonald, as at bar, there was no objection. There, this Court found that the argument, as a whole, did not amount to fundamental error. Appellant submits that the argument at bar, taken as a whole does amount to fundamental error given the number and variety of improper arguments. See Cochran v. State, 711 So. 2d 1159, 1162-63 (Fla. 4th DCA 1998) (while taken individually, unobjected-to remarks might not warrant reversal, they "must be viewed cumulatively in light of the record in this case"). Of course, the Court will consider unpreserved errors in deciding the prejudicial effect of preserved errors. Whitton, Ruiz, Gore. Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990) does not authorize such argument.

As to the its argument concerning the differences between 1976 and 1996, the state says that it was based in the record because the crime occurred in 1976. Nothing in the record, however, shows that the world of 1976 was different from the time of the trial. The state's argument simply emphasized the length of time from the crime and again improperly urged jurors to speculate how Cynthia "would react mentally to being raped."

As to its account to jurors of what it feels like to be strangled, the state offers no authority approving such argument, and makes no mention to Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998), which condemns similar argument. See also McDonald.

The state cites no authority supporting its sarcastic comments regarding Dr. Toomer at trial, as to which see Gore, 719 So. 2d at 1201 (disapproving prosecutor's "needless sarcasm").

As to its use of the MMPI report in final argument, the state again cites no authority for such argument. Significantly, it does not dispute that the report was admitted as impeachment, and does not dispute that it was used as substantive evidence.

As to its argument that the jury should disregard valid mitigation as a plea for sympathy, the state relies on Saffle v. Parks, 494 U.S. 448, 110 S.Ct. 1257, 108 L.Ed.2d 316 (1990). Saffle does not authorize such argument. There, the claim was that an abstract instruction that the jury not base its decision on sympathy had violated the Eighth Amendment. The Supreme Court declined to rule on the constitutionality of the instruction. It

instead ruled that Saffle's argument presented a "new rule" which the habeas court could not decide on post-conviction. It noted at most that sympathy alone probably should not be the basis of a capital sentencing decision. Id. 495. Saffle did not involve the sort of argument made at bar. The state also cites Valle. As discussed at page 18 above, Valle did not involve argument denigrating mitigation established by the evidence.

The state also cites Kight v. Dugger, 574 So. 2d 1066, 1070 (Fla. 1990). There, the state observed that jurors might feel sympathy for the victim's family, and then admonished jurors that such sympathy was not a proper consideration. This Court found no error, writing: "We do not believe this admonishment had the effect of diverting the jury's attention away from the character of the defendant and the circumstances of the crime by focusing it on the effect the murder had on the victim's family." At bar, of course, the state's argument did divert the jury's attention away from the mitigating evidence. Kight does not support the state's position.

Also at page 32 of its brief, the state accuses appellant of "misleadingly claim[ing] that the defense argued that sympathy did not play a role in the sentencing decision." In fact, defense counsel did argue that sympathy played no role in the sentencing decision. T 347-48, 362. The defense did not make a plea for sympathy. It presented valid mitigation, and properly argued it to the jury.

In contrast to the defense argument, the state said ® 346):

> Because in the last analysis of this case, what you have to ask yourselves is for what he did, and considering the mitigation, is merely putting him in prison for life enough? Is it equal justice before the law? Does it balance? Is it equal? I submit to you that it is not and it never will be equal.

Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) condemned similar argument: "the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation."

5. WHETHER THIS COURT SHOULD REVERSE IN THE INTERESTS OF THE JUDICIAL PROCESS, AND WHETHER IT WAS ERROR FOR A SUBSTITUTE JUDGE TO RULE ON THE MOTION FOR RESENTENCING.

As an initial matter, appellant denies directing "an ad hominem abuse toward the Orange County bench." Answer brief, page 34, n. 16. His argument is that, under the very unusual facts at bar, reversal is required.

Appellant also disputes the claim that his rule 3.800 (b) motion was "unauthorized". The state's cases, Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992) and Burch v. State, 522 So. 2d 810, 813 (Fla. 1988), involve motions to mitigate sentence under rule 3.800(c), which by its own language expressly does not apply to "cases in which the death sentence is imposed". Rule 3.800(b) contains no such limitation.

Significantly, the state did not object below that rule 3.800(b) does not apply to capital cases. R 1102 (state's written response), T 444 (state's argument on motion).

The state's argument presents no reason why Robinson v. State, 702 So. 2d 213 (Fla. 1997) does not require reversal at bar. Its brief does not even mention Robinson. In fact, it presents no legal argument at all. Hence, appellant relies on the initial brief.

6. WHETHER THE COURT ERRED IN FINDING, IN LETTING THE STATE ARGUE, AND IN INSTRUCTING THE JURY ON, THE "AVOIDING OR PREVENTING LAWFUL ARREST" CIRCUMSTANCE.

The state relies primarily on Correll v. State, 523 So. 2d 562, 568 (Fla. 1988). Correll murdered his ex-wife and her mother. He murdered his young daughter Tuesday because she was a witness to these murders. When the ex-wife's sister came home to this bloody scene, he killed her. This Court upheld use of this circumstance in the killing of the daughter and sister, since the only plausible explanation for these murders was to eliminate witnesses. The facts at bar are quite different. The record shows that appellant panicked when Cynthia began hollering, and he tried to quiet her. Had appellant gone about murdering other people in the house after killing Cynthia, Correll might apply, but it does not apply to the facts at bar.

It also cites Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996) for a partial statement of the standard for the aggravator. In discussing Garron v. State, 528 So. 2d 353 (Fla. 1988), Consalvo states that the fact that the victim is the witness to another crime is not dispositive. In Garron, this Court struck the circumstance even though Garron shot the victim as she was telephoning the police after seeing Garron murder her mother. This Court observed in Consalvo that there was "no proof of the true motive for the shooting of [Garron's] second victim, other than

that it involved another family member and immediately followed the mother's shooting. In fact, the motive was unclear." Consalvo, 697 So. 2d at 820. Consalvo also noted another case which is even closer to the facts at bar:

> Appellant's reference to Cook v. State, 542 So. 2d 964 (Fla. 1989), is also inapposite. In that case, we found the defendant's statement that he shot the victim to keep her quiet because she was yelling and screaming was insufficient to support the trial court's finding that the defendant killed the victim to avoid arrest. Rather, the facts indicated that the defendant shot instinctively, not with a calculated plan to eliminate the victim as a witness. Id. at 970. In this case, the victim's screaming was contemporaneous with her threat and actions to call the police.

697 So. 2d at 820. The case at bar is like Cook. The record indicates that appellant acted instinctively, not with a calculated plan to eliminate a witness.

Knight v. State, 721 So. 2d 287, 298 (Fla. 1998) has no bearing on the case at bar. Knight kidnapped a bank officer and his wife as part of an elaborate robbery scheme and then, after robbing the bank, took them to a remote location and murdered them. The circumstance properly applied to such a case. It also applied in Gore v. State, 706 So. 2d 1328 (Fla. 1997), where the defendant kidnapped two girls and took them to a remote location to rape and kill them. When one girl tried to escape, he killed her. Gore's facts are far different from those at bar: appellant had no pre-arranged plans to commit a rape-murder. The murder occurred in a

panicked response to the situation. The state's other cases are similarly far afield. In Swafford v. State, 533 So. 2d 270 (Fla. 1988), Swafford robbed a gas station clerk, then took her to a remote location where he raped and killed her. In Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), the defendants discussed killing the victims in order to eliminate them as witnesses, then did so. Harich v. State, 437 So. 2d 1082 (Fla. 1983) involved facts similar to Gore, and the opinion barely mentions the avoiding arrest circumstance.

The state's reliance on Wike v. State, 698 So. 2d 817, 822 (Fla. 1997) and Whitton v. State, 649 So. 2d 861, 867, n. 10 (Fla. 1994) is misplaced. Those cases decided that the instruction on the circumstance is not unconstitutionally vague. They did not decide the separate question of whether the instruction, by failing to tell the jury that there must be "strong proof" that the "dominant or only" motive for the murder was to avoid lawful arrest, unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by this Court.

7. WHETHER THE COURT ERRED IN DENYING APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE SENTENCE OF IMPRISONMENT AND FELONY MURDER CIRCUMSTANCES AS APPLIED.

Appellant relies on his initial brief, except to note that the state is incorrect in claiming that rule 3.800 does not apply to capital cases. See the discussion at point 5, page 24 above. As already noted, the state made no such argument below. Finally, the state makes no argument that the improper use of these circumstance was harmless. The state has the burden of showing that the constitutional error of improper application of an aggravating circumstance is harmless beyond a reasonable doubt. See Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

8. WHETHER THE EVIDENCE SUPPORTS THE FELONY MURDER CIRCUMSTANCE, AND WHETHER THAT CIRCUMSTANCE IS CONSTITUTIONAL.

Appellant relies on his initial brief except to note the following: The prior opinions of this Court regarding appellant considered sexual battery to be the underlying felony. In the instant appeal, the state again does not argue that the evidence showed rape, as required by the statute at the time of the crime.

Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) is beside the point: there, the jury found that there was a premeditated murder during the course of a felony. This finding was sufficient to serve the narrowing function required by the Eighth Amendment rule reserving the death penalty for only the most aggravated murder cases. At bar, there was no such finding by the jury.

Again, the state makes no claim that the constitutional error of misapplying this circumstance is harmless beyond a reasonable doubt under Clemons.

9. WHETHER THE COURT ERRED IN USING THE HEINOUSNESS CIRCUMSTANCE AND GIVING AN UNCONSTITUTIONAL INSTRUCTION.

Appellant relies on his initial brief, except to note that, again the state has made no claim that the constitutional errors at bar are harmless beyond a reasonable doubt under Clemons.

10. WHETHER IT WAS ERROR TO REFUSE AN INSTRUCTION ON DOUBLING.

Appellant relies on his initial brief, except to note that, again the state has made no claim that the constitutional errors at bar are harmless beyond a reasonable doubt under Clemons.

11. WHETHER IT WAS ERROR TO CONSIDER BOTH THE FELONY MURDER AND AVOIDING ARREST CIRCUMSTANCES, AND THE AVOIDING ARREST AND IMPRISONMENT CIRCUMSTANCES WHICH WERE BASED ON THE SAME FACTS.

Appellant relies on his initial brief, except to note that, again the state has made no claim that the constitutional errors at bar are harmless beyond a reasonable doubt under Clemons.

12. WHETHER THE COURT'S FINDINGS AS TO MITIGATION WERE DEFICIENT, REQUIRING RESENTENCING.

Appellant relies on his initial brief, except to note that, again the state has made no claim that the constitutional errors at bar are harmless beyond a reasonable doubt under Clemons.

13. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

The cases cited at page 63 of the state's brief are not like the case at bar. Gudinas v. State, 693 So. 2d 953 (Fla. 1997) involved sexual torture, and the defendant had a prior conviction for assault with intent to commit rape. In Hildwin v. State, 727 So. 2d 193 (Fla. 1988), the defendant had previously been impris-

oned for rape and attempted sodomy. He abducted a woman from a laundromat and raped her,[5] and, as the trial judge found, he then murdered her "merely to acquire some money with which to put gas in his car, and for a few personal possessions with which to stock his bedroom." Id. 198. In Cole v. State, 701 So. 2d 845 (Fla. 1997), the defendant and another man worked their way into the confidence of two young campers, then attacked, subdue and robbed them. Cole slashed the man's throat and fractured his skull. He forced the woman to have sex that night and again the next day, eventually leaving her gagged and tied to two trees. Cole and his friend stole the victims' cars. There were only two mitigating circumstances. In Sochor v. State, 619 So. 2d 285 (Fla. 1993), the defendant abducted a woman from a bar and forced her to have sex. Sochor had previously been convicted of violent sexual offenses and was "an admitted rapist". Id. 292. The judge found nothing in mitigation. Marquard v. State, 641 So. 2d 54 (Fla. 1994) involved a long-thought-out plan to murder a young woman accompanying Marquard and another man on a trip to Florida. They lured her into the woods near St. Augustine, stabbed her, and held her head under water, stabbed her again, then tried to behead her. There was no discussion of proportionality in this Court's opinion. In Meyers v. State, 704 So. 2d 1368 (Fla. 1998), the defense presented

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[5] The facts of the crime are set out in Hildwin v. State, 531 So. 2d 124 (Fla. 1988).

nothing in mitigation, and did not challenge the death sentence on appeal.

14. WHETHER THE COURT ERRED IN PERMITTING TESTIMONY THAT RICHARD GREENE REPRESENTED APPELLANT ON CLEMENCY.

Appellant relies on his initial brief, except to respond to the state's apparent argument that the witness somehow opened the door by truthfully answering the state's question about clemency. The state seems to argue that the witness should have indicated that appellant was seeking clemency in Florida for some other crime. Such testimony would have been improper for two reasons: First, it would be false. Second, if the witness had indicated that appellant was seeking clemency for another crime, this would be improper evidence of a collateral crime.

Thus, the state's question sought to establish either that:

a. Appellant was seeking clemency in the instant case - significantly, the state does not dispute that this would be improper; or

b. Appellant was seeking clemency for some other Florida crime, which evidence would have been false and prejudicial as just discussed.

Greene's truthful response to the state's improper question did not invite error.

15. WHETHER THE COURT ERRED IN DENYING RELIEF BASED ON THE NEWLY DISCOVERED EVIDENCE WITHOUT CONSIDERING THE CORROBORATING EVIDENCE AND CIRCUMSTANCES AND WHERE THE EVIDENCE WOULD HAVE BEEN ADMISSIBLE.

Appellant relies on his initial brief, except to note that the state has made no claim that the constitutional errors are harmless beyond a reasonable doubt under Clemons.

16. WHETHER THE COURT ERRED IN RULING ON AND DENYING THE MOTION FOR NEW PENALTY PHASE.

Appellant relies on his initial brief, except to note that the state has made no claim that the constitutional errors are harmless beyond a reasonable doubt under Clemons.

17. WHETHER THE COURT ERRED IN EXCLUDING FROM EVIDENCE, AND REFUSING TO CONSIDER, THE STATE'S PRIOR OFFER OF A LIFE SENTENCE.

Appellant relies on his initial brief, except to note that the state has made no claim that the constitutional errors are harmless beyond a reasonable doubt under Clemons.

18. WHETHER IT VIOLATED THE SPEEDY TRIAL, DUE PROCESS, OR CRUEL UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION TO CONDUCT THE SENTENCING PROCEEDING AND SENTENCE APPELLANT MANY YEARS AFTER THE CRIME.

Appellant relies on his initial brief, except to note that the state has made no claim that the constitutional errors are harmless beyond a reasonable doubt under Clemons.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the 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 by mail to Kenneth S. Nunnelley, Assistant Attorney General, 5th Floor, 444 Seabreeze Boulevard, Daytona Beach, FL 32118, this 27 day of August, 1999.

Attorney for James Hitchcock

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