IN THE SUPREME COURT OF FLORIDA

RAYMOND MORRISON, JR.,

Appellant,

vs. CASE NO SC94666

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

U.S. SUPREME COURT CASES

OTHER FEDERAL CASES

FLORIDA CASES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

IN THE SUPREME COURT OF FLORIDA

RAYMOND MORRISON, JR.,

Appellant,

vs. CASE NO. SC94666

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT AND TYPEFACE CERTIFICATE

Appellant relies on the facts and arguments stated in the initial brief, and supplements them with the replies below. Citations to pages in the initial brief shall be "IB#" and citations to pages in the answer brief shall be "AB#." Other citations shall follow the style in the initial brief. This brief has been printed in Times New Roman 14-point type.

REPLY TO APPELLEE'S STATEMENT OF FACTS

Although the State largely accepts Morrison's depiction of the facts, the State did take certain undo liberties with its "supplementation/clarification," making statements that are flatly false or imprecise. Specifically, Morrison notes the following:

1. The answer brief asserts that in a prior incident, Morrison "broke[] an

elderly man's jaw..." See AB5. That is false, and it is unsupported by the portions of the record the State cited.

2. The answer brief says Morrison "admitted entering the victim's apartment without permission." Morrison did make a statement, but he did not "admit" to entering "without permission." See AB3. Morrison set forth a series of events. Whether or not a legal inference of entry absent permission can be made in an argument, no explicit "admission" of such a legal conclusion is contained in the cited portion of the record.

3. The answer brief says Morrison "contended the victim had stabbed himself ." See AB3. However, the cited portion of the record contains no such explicit contention. The cited portion of the record speaks only in the passive voice and does not say the victim "stabbed himself."

4. The answer brief puts in quotation marks the words "no way" in an apparent attempt to suggest that Morrison's expert witness, Dr. Lardizabal, had so testified. See AB5. However, the quoted words were those of the prosecutor, not the witness.

5. The answer brief says that Morrison misstated when one of his letters to the trial court had been "written." See AB14 n.2. To the contrary, initial brief referenced dates when documents were "filed," not "written." The date referenced

in the initial brief, April 17, 1998, was the date Morrison's letter was "filed," just as Morrison told this Court. See IB29; V5R842. To the extent that dates when these documents were "executed" (the term Morrison used) is relevant or will help clarify the facts, those dates are set forth in the attached Appendix along with the corresponding filing dates. See App. 1-3.

REPLY ARGUMENT

I. THE RECORD REFUTES THE STATE'S CONTENTION THAT MORRISON MADE MERELY GENERALIZED COMPLAINTS ABOUT COUNSEL, THAT THE COURT DID AN ADEQUATE INQUIRY DESPITE REPEATED COMPLAINTS, AND THAT MORRISON THEREAFTER WAS CONTENT WITH COUNSEL

The State's answer boils down to three basic contentions: "Morrison made no more than generalized complaints about the communications between himself and his attorney," "The inquiry the court did conduct on June 26, 1998, was sufficient," and "the court was entitled to conclude that Morrison's concerns were addressed and alleviated." AB11. None of the State's contentions have merit.

A. The focus is on Morrison's various specific complaints

The State wants this Court to erroneously focus on a single concern Morrison expressed, i.e., why a witness, Fred Austin, did not testify in a hearing conducted by former defense counsel Ron Higbee on Higbee's suppression motion heard months before Refik Eler replaced Higbee. The State then said Higbee's

November 17, 1997, evidentiary hearing comprises the "relevant events" for this issue. See AB11. That grossly misstates the record and the argument. The essential facts comprising this issue were Morrison's complaints to the trial court about Higbee's successor, Refik Eler. Higbee's performance with respect to Austin is peripheral to the specific complaints for which no adequate or timely inquiry was made.

The relevant facts are best illustrated in a chronological list appended to this reply brief, enumerating specific complaints Morrison made about counsel, with relevant proceedings and record citations. See Appendix 1-3. At the very least, the record demonstrates repeated, timely, specific allegations of a total failure of the attorney to communicate and consult with Morrison, an allegation that also amounts to an ethical breach under Rule Regulating The Florida Bar 4-1.4.[1] Such an allegation has been held to warrant an inquiry even in a noncapital case and

---

[1.] Rule Regulating The Florida Bar 4-1.4, Communication, provides:

> **(a) Informing Client of Status of Representation.** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> **(b) Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See, e.g., The Fla. Bar v. Robinson, 654 So. 2d 554 (Fla. 1995) (disciplining lawyer for inadequate communication with client, among other charges).

even when the complaint is made on the day of trial. See Horne v. State, 659 So. 2d 1311 (Fla. 4th DCA 1995).[2] Certainly in a capital

---

[2] In Horne v. State, 659 So. 2d 1311 (Fla. 4th DCA 1995), the court discussed the issue as follows:

> On the morning of trial, the presiding judge advised appellant that she would treat appellant's letters to Judge Rapp, in which he complained about the inadequacy of his representation, as a motion for discharge of counsel:
>
> THE COURT: Mr. Horne, did you want to address the Court?
>
> THE DEFENDANT: Yes, sir.
>
> I was trying to get my lawyer to try to get me another attorney, because I don't feel like he's representing me in the proper manner, and I don't think he's really interested in my innocence. Because he never contacted me. I never did--I don't know where my case is standing at. I don't know what my odds is as far as winning a trial or nothing. All I know is, we come to court, they tell me, hey, we're set for trial such and such as date, and so forth and so on.
>
> That ain't telling me nothing. I mean, these are very serious cases.
>
> THE COURT: What we have here this morning is a possession of a firearm by a convicted felon.
>
> THE DEFENDANT: Yeah.
>
> And I had told--I mean, I wrote to the Bar. I sent motions to Judge Sholts--to the Bar for all that. And it ain't just like I'm just trying to do this because trial come up; I've been trying to get me another lawyer.
>
> Nobody ain't never done nothing for me.
>
> THE COURT: All right. Mr. Gundling?
>
> MR. GUNDLING: Judge, the only thing I'd like to say, you know, for the record, is that it's my opinion that any attorney-client relationship that may have existed at any

time, no longer exists. Mr. Horne is totally suspicious of anything that I say, any recommendations that I make.

He refuses to talk with me. It makes it extremely difficult for me to properly represent him. He feels that I'm not accurately representing him in this matter, and I don't--at the present time, I don't really feel that there's any attorney-client relationship. I can't talk with the man. He refuses to talk with me.

I ask him questions and he just complains about what I'm saying to him. I don't think I can adequately represent him under those circumstances. That's all I want to let the Court know.

THE COURT: Fine. But I think its a little inappropriate to have this brought to my attention on the morning of the trial, after we've been on a trial docket.

When was this fella first set for trial?

THE CLERK: He was originally set for trial on June 29th of 1992.

THE DEFENDANT: I even talked--

THE COURT: June 29th of 1992?

THE CLERK: Yes.

THE COURT: Well--

MR. GUNDLING: He has previously filed, I believe, Motions to Discharge me as his attorney, and back at this time it was, I think, Judge Sholts at that time denied it, as far as my recollection goes.

THE COURT: Well, I'm going to deny this motion.

We agree with appellant that the trial court did not make "a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), adopted in Hardwick v. State, 521 So. 2d 1071 (Fla.1988).

It appears that the trial court did not follow Nelson because this problem was being brought to the court's attention on the morning of

case, where the allegation is made numerous times, in writing, filed in court, and well before trial, the same law should apply.

Even if Eler's refusal to cooperate or communicate with Morrison was not itself enough to warrant a full and timely inquiry, as the State claims, the record contains Morrison's additional allegations of ineffectiveness, not the least of which is the claim filed in court on June 29, 1998, wherein he alleged that none of the witnesses whose names he provided to his attorneys and investigators had been contacted or called. See V5R909. Yet the court did not ask any questions about such allegations until three months later, on September 28, 1998, after the jury had been selected by the allegedly incompetent lawyer. See V12T333-39.

The State principally relies on Watts v. State, 593 So. 2d 198 (Fla. 1992), and Howell v. State, 707 So. 2d 674 (Fla. 1998), but those cases are readily and materially distinguishable. First, the defendants' attorneys in those cases did in

---

> trial. If that was the reason the court did not proceed further it was factually incorrect, since, as the above colloquy shows, appellant had previously written the court to complain about the adequacy of his counsel and had voiced an earlier complaint when his case was pending before a different judge. Even if defendant's complaint had been made for the first time on the morning of trial, we know of no reason why that would be too late, since it appears that is when the complaints about inadequate counsel were made in Nelson and Hardwick.

659 So. 2d at 1312-13.

fact address the courts and the clients, in a timely manner, discussing the allegations in full. That did not happen here. Second, this case has multiple specific grounds of alleged ineffectiveness, not just the single complaint lodged in Watts. Third, the complaints here were numerous and occurred over a long period of time well before trial. The trial court had the duty, the notice, and the time to address these concerns. A full and timely hearing would have been a simple, quick, and inexpensive way to resolve the problems, to do justice, and to avoid reversible error.

B. The June 26 "inquiry" was not at all focused on this issue

The State argues that what little discussion did take place in court on June 26, 1998, satisfied the requisite standard. See AB11. However, the record unambiguously points to the contrary. The only subject the judge raised and discussed in that courtroom was the nullification of Morrison's pro se pleadings. Morrison was given no reason to believe the judge wanted to discuss the substance of his counsel complaints. Moreover, by telling Morrison that his pleadings would not be adopted by counsel and were considered a nullity by the court, the court was effectively telling Morrison that the contents of his pleadings -- which included his allegations and repeated requests for replacement counsel -- would not even be entertained. His counsel complaints were thereby rejected without even being

heard.

C. Morrison's subsequent specific complaints demonstrate he remained concerned about the ineffectiveness of counsel

The State claims that from Morrison's silence this Court can infer that he accepted counsel's performance. Yet, as the record shows, see App. 1-3, he continued to make specific complaints repeatedly, including a specific complaint about the failure to adequately investigate defense witnesses even after the trial ended, see V7R1163. Morrison filed a lengthy complaint with the court on June 29, 1998, days after the court's "hearing" on whether his pro se pleadings would be adopted, and he included an allegation that none of the witnesses whose names Morrison provided to his attorneys and investigators had been contacted or called. See V5R909. Morrison subsequently did not file any papers rescinding his complaints of June 29. Nonetheless, the court chose not to address any complaints about the failure to investigate defense witnesses until three months later, on September 21, after jury selection had concluded.

In an attempt to soften that issue, the State in a footnote appears to suggest that the court's inquiry on September 21, 1998, was directed not to the June 29 letter but to an April 9, 1997 letter (to which no record citation was included) in which the state claims Morrison made allegations against Eler's predecessor. See

AB20 n.5.[3] However, the State's suggestion should cause even more grave concern, because it proves beyond doubt the failure of the trial court to act in a timely manner. On the one hand, the State's suggestion means the trial court neglected Morrison's complaints for more than two years. On the other hand, the State's suggestion means that the trial court never at all addressed the letter Morrison filed on June 29, 1998.

The State also implies that the appointment of second chair on the eve of trial somehow supports its argument, but the State does not say how. See AB11. The reason, apparently, is that no such argument can be made on this record. First, all of Morrison's concerns about counsel were directed to overall performance and/or guilt phase performance, whereas Christopher Anderson was appointed to assist in the penalty phase. Second, Anderson was appointed only at the last minute. Thus, he was unable to assist Eler in the many months prior to trial, when all the allegations of ineffectiveness arose and were being filed. Third, the fact that Eler waited until the Friday before trial to ask for the assistance of a second lawyer in a capital murder case supports Morrison's prima facie claim that Eler was acting ineffectively. But the court did not inquire as to why Eler waited until the last

---

[3] Presumably, the letter to which the State referred is contained in the record at V1R31-36. However, the transcript gives no indication that the trial court was in fact referring to that letter in doing its untimely inquiry.

minute, a duty the court should have undertaken.

II. JUROR STAPLES SAID HE SUPPORTED THE DEATH PENALTY BUT WAS MERELY UNSURE AS TO WHETHER HE WOULD "PUSH" FOR IT HERE WHEN HE HAD NOT HEARD THE FACTS YET, SO THERE WAS NO REASON TO "REHABILITATE" HIM OR TO ASK HIM TO "SET ASIDE HIS BELIEFS CONCERNING THE DEATH PENALTY"

The State seems to want to shift the blame of error to the defense for not rehabilitating juror Staples. See AB 21, 23. There is no merit to such argument, and the case on which the State principally relies, Sanders v. State, 707 So. 2d 664 (Fla. 1998), fully supports Morrison's claim of error. The State's argument presumes that there was something to rehabilitate. That simply is not the case. As this Court said in Sanders,

> Our holdings []set forth the general principle that defense counsel must be afforded an opportunity to rehabilitate jurors who have expressed objections to the death penalty or conscientious or religious scruples against its infliction.

707 So. 2d at 668 (emphasis supplied) (citations and footnote omitted). Here, however, juror Staples never expressed "objections to the death penalty or conscientious or religious scruples against its infliction." To the contrary, he supported the death sentence, and offered no objections to the death penalty that required rehabilitation.

The State also cites Fernandez v. State, 730 So. 2d 277 (Fla. 1999), see

AB23, but that case, too, supports Morrison. Fernandez correctly noted that "equivocal" jurors must be asked "whether they could follow the law and set aside their beliefs concerning the death penalty." Id. at 281. Here, however, juror Staples was not equivocal; he supported the death penalty; he said he could follow he law; and asking him to "set aside [his] beliefs" would require him to set aside his support of the death penalty.

III. THE PEREMPTORY CHALLENGE ISSUE CERTAINLY WAS PRESERVED THROUGHOUT THE PROCEEDINGS, THERE WAS NO CONCESSION, AND THE ISSUE HAS MERIT

There is no need to go through the State's procedural bar argument, for the initial brief details precisely where and how Morrison adequately preserved this issue for review by raising it in the trial court and objecting when the peremptory strikes were exercised. See IB43-46.

The only remark worth discussing is the State's claim that Morrison is foreclosed from making this argument because his lawyer "conceded" that the State had the right to use a peremptory challenge. See AB25. The record plainly shows no such "concession," and the State takes the remark out of context to stretch it into an obviously unintended meaning and consequence.

The so-called "concession" occurred during the cause challenge inquiry regard juror Staples, see Issue II, supra, not during the peremptory challenge

discussion as to jurors Baugh and Jones, the subject of this claim, Issue III. The colloquy is fully quoted, in proper context, in Issue II of the initial brief. See IB37-38.

Moreover, the defense did not concede that a peremptory challenge, if exercised, would in fact be valid. The defense did not concede that if the State exercised a peremptory challenge to juror Staples, there would be no additional objection (precisely as occurred when jurors Baugh and Jones were peremptorily challenged). The defense properly argued that when a juror cannot be discharged for cause, the challenging party (the State) would have to seek another means to exclude the juror, i.e., a peremptory challenge, if permissible -- or else accept the juror. That is a correct statement of the law, and San Martin v. State, 705 So. 2d 1337 (Fla. 1997), upon which the State relies, has no bearing on this issue.

A contrary reading of the record would defy the plain language of what was said in court. A contrary reading of the record would defy common sense. A contrary reading of the record would require this court to infer the waiver of a constitutional right, when it cannot be said that there was a clear, knowing, and voluntary waiver in the record. See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938). A contrary reading of the record would defy the due process requirement that ambiguities of such a magnitude in a criminal case must be read in favor of the

accused. See U.S. Const. amend. XIV; art. I, § 9, Fla. Const.

As to the merits, San Martin is just another case repeating the general rule that Morrison has asked this Court to reexamine, and it stated no rationale to undermine the merits as argued in the initial brief. Moreover, the State wholly neglected to rebut Morrison's independent constitutional attack lodged under the Florida Constitution. See IB 52.

V. THE STATE'S ARGUMENT IS BASED ON UNSUPPORTED CLAIMS AND INAPPLICABLE CASES

The State asserts as fact that Short -- Richardson's training officer -- "did not know that [Richardson] was an ordained minister." See AB33. However, that is not a fact. To the contrary, it is merely Short's bald and unsupported assertion, an assertion contradicted by Officer/Minister Richardson himself, as well as by Richardson's unrebutted testimony that Richardson's status as an ordained minister "was common knowledge in the police department." See V8R1306, IB65. The State's assertion is not supported by the order of the trial court, either, for the court made no such finding of fact. See V5R796-802.

The State goes to some length to distinguish this case from the "Christian burial technique" cases. See AB38-39. Why? This is just a "straw man" argument in which the State created an issue merely to knock it down, even though the issue is peripheral to the argument presented in this case.

The State claims as fact that Morrison, not Short, first brought up the subject of religion. See AB39. However, Officer/Minister Richardson admitted that it was he -- Richardson -- who first brought up the subject of religion. See V8R1271, IB58.

The State suggests that federal cases are per se "more persuasive precedent" than state law cases on issues of constitutional law. See AB41 n.12. The State, of course, offers no support for that proposition, and Morrison is aware of none. The State's position means that if this Court disagrees with any federal court in any jurisdiction on a question of federal constitutional law, this Court's interpretation should yield to what must necessarily be the "more persuasive" federal court interpretation. Certainly that is not the law, nor does it make logical sense. Cf. Williams v. Taylor, 146 L. Ed. 2d 389, 408 (2000) (rejecting the nonsensical assertion that the views of one reasonable judge should "always have greater weight than the contrary, considered judgment" of another reasonable judge); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (state courts are "presumptively competent" to adjudicate federal claims).

The State's argument boils down to three cases, see AB39-40, none of which do anything to undermine Morrison's position. United States v. Barlow, 41 F.3d 935 (5th Cir. 1994), is wholly inapplicable because it states no facts about the

interrogation, and does not even discuss whether police had been accused of using religion improperly or in a coercive manner. In Barrerra v. Young, 794 F.2d 1264 (7th Cir. 1986), religion played a very small role in voluntary polygraph test where Barrerra had consulted his lawyer, both he and his lawyer consented to the test, and Barrerra knew his lawyer was present just on the other side of the door, ready and available to stop the questioning at any time. In Welch v. Butler, 835 F.2d 92 (5th Cir. 1988), after Welch had given a tape-recorded confession, a devout Christian officer -- not an ordained minister -- discussed forgiveness and salvation and prayed with him, after which Welch gave a second confession. Welch already had expressed his religious concerns before the officer discussed religion with him, totally unlike the present case. Also, the officer was not urging Welch to talk to the police, unlike the present case.

VI. THE ERRORS IN PREVENTING SANDRA BROWN'S IMPEACHMENT WERE NOT HARMLESS

The State claims that the error of preventing the examination of Sandra Brown was harmless because Detective Short testified in cross-examination that he had read Brown her Miranda[4] rights and thought she "could possibly have played a

[4.] Miranda v. Arizona, 384 U.S. 436 (1966).

role" in the homicide. See AB43 & 43 n.13. However, that testimony, see V14T638, underscores rather than diminishes the weight of the error. Corroborated by Short's testimony, the answer Brown was prevented from giving would have established her motivation of self-interest and self-protection in making the statements that she made at the time she was custodially interrogated.

The State also argues that the error in preventing the defense from having Delores Tims impeach Brown's reputation for truthfulness was harmless given that Georgia Bell Morrison had given reputation testimony. Yet here, too, the corroborating impact of the testimony actually makes the impact of the error stronger. The jury had an obvious reason to discount the evidence Georgia Bell Morrison gave about Brown's reputation as a liar. Georgia Bell Morrison is, after all, Morrison's mother. But Tims had no such relationship to Morrison, so her evidence was likely to carry far more weight with the jury.

Alone or cumulatively, the impact of these impeachment errors -- especially when combined with the corroborating testimony of Short and Georgia Bell Morrison -- shows that the jury was deprived of meaningful evidence seriously undermining the State's key witness.

VII. THE REHEARING DECISION IN DELGADO REQUIRES REVERSAL FOR A NEW TRIAL; AND THE STATE WHOLLY IGNORES THE CONTROLLING PRECEDENT OF KIRKLAND AND THE TOTALITY OF CIRCUMSTANCES IN ITS

SUFFICIENCY ARGUMENT ON PREMEDITATION

A. Delgado requires a new trial

Despite Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000) (Delgado I), the State specifically and expressly relies on Ray v. State, 522 So. 2d 963 (Fla. 3d DCA 1988) and its progeny to support the burglary/felony murder rationale. See AB53. Ray, however, is not a correct statement of the law, as Morrison pointed out in his initial brief, see IB92, wherein he cited Delgado I as having expressly rejected Ray. On rehearing, this Court recently reaffirmed its refutation of Ray. See Delgado v. State, 25 Fla. L. Weekly S631 (Fla. Aug. 24, 2000) (on rehearing granted) (Delgado II).

More importantly, however, Delgado II held that when a jury is asked to consider the Ray theory of burglary in a multi-theory first-degree murder prosecution, the jury has been instructed to consider a "legally inadequate" theory, and reversal is required no matter how many theories the jury heard and how sufficient the supporting evidence of any theory may have been. See Delgado II, 25 Fla. L. Weekly at S633-34 (citing Yates v. United States, 354 U.S. 298 (1957)); see also Stromberg v. California, 283 U.S. 359 (1931) (reversing for new trial when one of three alternative theories upon which the jury was instructed was legally inadequate); 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 one of the prosecution's theories was legally inadequate under state law).

That is precisely the argument Morrison made in his initial brief. See IB92-94. The State submitted to the jury an indictment in which the "legally inadequate" theory of burglary was alleged, see V1R7-9;[5] Morrison argued in his motion for a judgment of acquittal that "there is no evidence of forced entry, or consistent with any kind of burglary,"see V15T822 (emphasis supplied); the jury was instructed to consider the "legally inadequate" theory for both felony murder and burglary; see V16T120, V16T1031-36, V6R956, V6R965-68; and the jury returned a general verdict, see V6R983. The possibility that the jury may have relied in part on the "legally inadequate" Ray theory cannot be eliminated. Thus, a new trial should be ordered.

B. The State mischaracterized and unduly narrowed the issue, ignored the totality of the circumstances, and ignored indistinguishable precedent on premeditation

While the State is permitted to draw reasonable inferences, it is not

---

[5.] Count I alleged burglary generally without spelling out either theory. Count III expressly alleged both legally inadequate and valid theories of burglary.

permitted to distort, mischaracterize, or make "straw man" arguments. Yet that is what the State has done here. The State claims that Morrison in his brief argued that the injuries were "minor," even using the word twice in one paragraph. See AB49. Nowhere in the initial brief did Morrison make that assertion. The State's premeditation argument is predicated on the false assertion that Morrison claimed to have only produced a "minor wound," which the State then rebutted with evidence that the victim suffered serious, fatal neck injuries. Of course he suffered serious injuries, and Morrison never said anything to the contrary. But circumstantial evidence of the injuries is not enough to prove premeditation beyond a reasonable doubt. This Court must look to the totality of the circumstances, which Morrison detailed in his initial brief. See IB89-92. It is also worth noting that the State was unable to distinguish the principle case on which Morrison relied, Kirkland v. State, 684 So. 2d 732 (Fla. 1996).

VIII. THE STATE ERRONEOUSLY ASSERTS THE EXISTENCE OF A PER SE RULE REQUIRING THE FINDING OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR

Morrison relies on his initial brief but feels compelled to point out a serious problem in the State's answer, the assertion that "Stabbing murders are by their nature heinous, atrocious and cruel." See AB57. The State thus asks this Court to

announce a per se rule for HAC whenever the victim is stabbed. Neither Florida nor federal law permit this Court to create a per se, automatic, bright-line rule to always find an aggravating circumstance proved. It is particularly inappropriate to do so where the aggravator is so amorphous and fact-specific that it is often hard to distinguish cases finding the aggravator from those rejecting it. Is one stab wound enough? Two? Three or more? Where is the line? Is a cutting or slashing wound qualitatively different from a stabbing wound? If a robbery victim is accidentally impaled when falling on a sharp object, has that person necessarily been killed in a heinous, atrocious, or cruel manner? Moreover, a per se rule is even more inappropriate when the aggravator is among the weightiest of all.

X. THE STATE CHARACTERIZES MORRISON'S INTELLIGENCE LEVEL AS BEING IN THE "HIGH" BORDERLINE RANGE, BUT NO SUCH TESTIMONY WAS PRESENTED

Morrison relies on his initial brief. Nonetheless, he feels compelled to address one assertion made in the answer brief. The State claims that Morrison's intelligence was in the "high borderline range." See AB61. The State cites no record support for that precise diagnosis because no such testimony was presented in this record, and no evidence of what constitutes a "borderline range" was presented. Instead, the expert testimony in this case was that, among other disorders, Morrison's intelligence was merely "borderline," just one level above

retardation, in the "seventh or eighth percentile of the overall population." See V17T1221-23. The State should not be permitted to create facts out of whole cloth in an answer brief.

CONCLUSION

For the reasons stated above and in the initial brief, this Court should reverse and remand for a new trial, or alternatively, remand for a new penalty phase or imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy of this reply brief of appellant has been furnished by delivery to Curtis M. French, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and by mail to appellant Raymond Morrison, Jr., on this ___ day of _____, 2000.

Respectfully submitted,

_____
CHET KAUFMAN
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
FLORIDA BAR NO. 814253

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

C:\Supreme Court\03-21-02\94666rep.wpd