THE SUPREME COURT OF FLORIDA

ROBERT RIMMER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 95,318

L.T. 98-12089CF-10B

Appeal from the Circuit Court, in and for
Broward County, Florida;
James I. Cohn, Circuit Court Judge

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The preliminary statement is the same as set forth in the Appellant's Initial Brief, with an additional designation of the State's Answer Brief by the symbol "St.B." followed by the relevant page number.

STATEMENT OF THE CASE

The statement of the case is the same as set forth in the Appellant's Initial Brief.

STATEMENT OF THE FACTS

The statement of the facts is the same as set forth in the Appellant's Initial Brief.

SUMMARY OF ARGUMENT

The summary of argument is the same as set forth in the Appellant's Initial Brief.

CERTIFICATE OF SIZE AND STYLE OF TYPE

The Appellant hereby certifies that the size and style of type used is font size Times New Roman - 14.

POINT I ON APPEAL

THE TRIAL COURT ERRED IN DENYING ROBERT RIMMER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE; A PERSONAL ORGANIZER AND/OR ITS CONTENTS WERE NOT ITEMS AUTHORIZED TO BE SEIZED BY A SEARCH WARRANT FOR DEFENDANT'S AUTOMOBILE.

In its answer brief, the state argues that because the police were in a place that they had a right to be, they were entitled to seize the subject personal organizer and contents because its "incriminating character" was "immediately apparent". (St. B. 17-21) A review of the record, however, shows the police to be in their position only because of a questionable warrant authorizing a general search and further, that the ultimate item sought to be suppressed (a lease agreement found within the organizer), had no apparent incriminating nature. There can be no "plain view exception" if the incriminating nature of the evidence seized was not immediately apparent on its face. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971); *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149 (1987)

The search warrant issued for the search of defendant's 1978 Oldsmobile authorized a seizure of the following items:

PROPERTY SOUGHT:

1. Fingerprints belonging to suspect (Latent/non-latent)
2. Firearms used by the suspect
3. Shell casings or projectiles, ammunition used during the commission of the crime.
4. Any Trace/microscopic evidence of this/these crimes
5. Blood and/or other body fluids belonging to the victims or suspect
6. Materials transferred from the scene of the crime by the suspect
7. Duct tape used during the commission of the crime
8. Various personal property belongings of Aaron Knight, Bradley Krause, Joe Moore taken during the commission of this crime
9. Cellular phone or parts thereof taken from victim Joe Moore during the commission of this crime.
10. A pair or parts thereof of Kicker brand, and Solo-Baric Brand sound system taken during the commission of this crime
11. Motor vehicle stereo sound system parts or components parts and motor vehicle alarm systems, components, parts thereof taken in the commission of this crime.

(SR 180-189)

For the most part, these sought after items were identical to those sought and ordered seized pursuant to search warrants for Robert Rimmer's blue Ford Probe, his residence on 14th Terrace, and his self-storage rental on Sunrise Boulevard. (SR 200-207, 208-216, 190-199) The very non-specific nature of items two through eleven is best demonstrated by the statement of the affiant, detective Anthony Lewis at the suppression hearing, that he didn't have any idea what "probably would be inside" the

Oldsmobile until he searched it. (SR 102-103)

This matter is governed by the principles set forth in *Green v. State*, 688 So.2d 301 (Fla. 1996) In *Green* the police obtained a warrant authorizing them to search for "the clothing Joseph Green was wearing the evening of the [crime], the weapon used in the murder of [decedent] and other evidence related to the fatal shooting". The legal requirement of particularity was summarized by this court as follows:

> For a search warrant to be valid it must set forth with particularity the items to be seized. U.S. Const. amend. IV; Art. I § 12, Fla. Const; § 933.04, Fla. Stat. (1991). This particularity requirement makes general searches impossible and limits the executing officer's discretion when performing a search. *See Carlton v. State*, 449 So.2d 250 (Fla. 1984). While this requirement must be given a reasonable interpretation consistent with the character of the property sought, *id*., when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other. *See North v. State*, 159 Fla. 854, 857, 32 So.2d 915, 917 (1947).
>
> 688 So.2d at 306

In agreeing with Green's claim that the subject search warrant failed to describe the items to be seized with sufficient particularity this court observed:

> We find that in this case the warrant is

> facially overbroad. There was nothing in the warrant to assist the police in narrowing the scope of their search once they arrived at Green's hotel. Given the description of the clothing in the warrant, it was not possible for an officer to look at the warrant and decide with reasonable certainty which articles of clothing the officer was empowered to seize. This is not a case in which a broad description is permissible because the items to be seized are unique or otherwise distinguishable. Further, it is not relevant to this analysis that the officer who actually executed the warrant had information not contained in the warrant. As we found in *Carlton*, the language of the warrant should not be scrutinized or compared to the knowledge of the officer seeking the warrant. *Carlton*, 449 So.2d at 251 Because the search warrant's broad description of the items to be seized failed to rein in the officer's discretion when executing the search, we find the fruit of this search must be suppressed.
>
> 688 So.2d at 306

Finally, in rejecting the state's contention that a "good faith exception" could save the exclusion of the subject items seized, this court stated:

> The State argues that even if the warrant is overbroad, the good-faith exception from *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) should apply. However, the facial invalidity of the warrant precludes the application of the exception. *See id*. at 923, 104 S.Ct. at 3420-21. This is so because the executing officers,

> relying on a warrant which fails to particularly describe the items to be seized cannot reasonably presume the warrant to be valid. *Id.; Sims v. State*, 483 So.2d 81, 82-8 (Fla. 1st DCA 1986); *State v. Ross*, 471 So.2d 196 (Fla. 4th DCA), *cert. denied,* 474 U.S. 945, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985).
>
> 688 So.2d at 306

The remaining evidence sought and ordered seized was item number one "fingerprints belonging to the suspect". (SR 180-189) Searching for latent fingerprints of Robert Rimmer in an automobile owned and operated by him cannot possibly yield evidentiary matter. If every search warrant contained an order to search for the known occupant's latent fingerprints, it would allow for limitless searches of the subject premises in all cases. If a warrant issued for a suspect's residence based on a belief that illegal elephants would be found therein, an additional order for a seizure of that suspect's latent fingerprints from his known residence would allow the police to open the suspect's reading material. The request and order for seizure of defendant's latent fingerprints from his own motor vehicle in which he was physically arrested was nothing more than an attempt to allow a general search without limitation of the officer's discretion when performing it. Because latent fingerprints of the owner of the property are naturally expected to be found thereon, their evidentiary value is meaningless and thus the request to search for such latent prints is merely a

ruse so as to allow the executing police officers to conduct a general exploratory search of every crevice of the target premises. *see Rhoden v. State*, 227 So.2d 349, 351 (Fla. 1st DCA 1969)(the presence of latent fingerprints on a person's own car is of little evidentiary value)

It is submitted that the search warrant used by the police to seize the day planner/organizer from Robert Rimmer's automobile was of questionable validity as authorizing a general search. As such, the use of the personal papers (rental agreement whose incriminating nature was not immediately apparent on its face) found within the organizer and the fruits thereof in the form of stolen property should have been excluded from use as evidence.

As previously detailed in defendant's initial brief, the introduction of the thirty-seven boxes taken from the storage facility and which had contained various stereo equipment formed a substantial part of the prosecution's presentation. (Initial brief, pgs. 52-54) As such, the improper admission of this evidence cannot be considered harmless beyond a reasonable doubt since there is a reasonable probability that the error affected the verdict. Reversal of defendant's conviction is appropriate.

POINT II ON APPEAL

THE TRIAL COURT ERRED IN NOT EXCLUDING THE PRETRIAL AND TRIAL IDENTIFICATIONS OF ROBERT RIMMER BY EYEWITNESSES JOSEPH MOORE AND KIMBERLY DAVIS-BURKE; THE IDENTIFICATION PROCEDURE EMPLOYED BY THE POLICE WAS UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION.

The state, in its answer brief, asserts that the suggestive statements made by police detective Anthony Lewis to witnesses Joseph Moore and Kimberly Davis-Burke were not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. (St.B. 24-25) To the contrary, the suggestive elements in the process leading up to the live line-up made it all but inevitable that these two eyewitnesses would select Robert Rimmer whether or not he was in fact the gunman.

Eyewitness to the crime, Joseph Louis Moore, was advised by the police before the live line-up, that the person that the witness had previously selected from a photospread had been arrested and was in possession of the witness' wallet. The

detective also told Mr. Moore that his girlfriend, Kimberly Davis-Burke, had picked the image of defendant.

Ms. Davis-Burke, when shown a photospread, selected an image other than defendant as being the perpetrator of the crime charged. The witness only made a second selection of Robert Rimmer when advised by the detective that her boyfriend, Joseph Moore, had done so. In a subsequent live line-up attended by these two eyewitnesses, the defendant was the only person standing whose image was in the photospreads.

At the suppression hearing, detective Anthony Lewis testified to these unnecessarily suggestive identification procedures as follows:

> Q. When you were taking the, conducting the identification process, with witness Kimberly Burke, what date was that?
>
> . . .
>
> A. This is the date. It was May 8th.
>
> . . .
>
> Q. As you told Mr. Magrino Kimberly Davis selected two people, first number six, which does not correspond to my client, Mr. Rimmer?
>
> A. Yes.
>
> Q. During this time, did you ask her why did you say you have a second choice, did you ask her that question?
>
> A. Yes, I did.
>
> Q. And in fact was not her answer to you as follows, "because after you

told me that Joe picked him, I paid more attention to it. I paid more attention to it and thought it sort of looked like him." Was that her answer?

A. Yes, sir, but understand –

Q. Was that her answer?

A. Yes.

Q. Wasn't that her answer in direct response to your question why did you say you have a second choice?

A. Yes, sir.

Q. And also after these, the photographic line-up procedures occurred, you did advise I think by your own testimony, did you not, that you told Mr. Moore and Ms. Davis they both selected No. 3?

A. Yes, sir.

Q. That was before the live line-up occurred, obviously, on July 13, two months later?

A. Yes, sir.

Q. And you also told before this – strike that. You also told, before the live line-up, you advised Mr. Moore that his wallet had been recovered?

A. Yes, sir.

(SR 94-97)

A lineup must be conducted in a manner that is not suggestive or conducive to irreparable misidentification. Any form of suggestion on the part of the police might

foster an unjust result. *Pearson v. United States*, 389 F.2d 684 (5th Cir. 1968) In *Pearson* the court noted:

> ...the fairness of the pre-trial line-up depends on a number of factors such as the general age, racial and other physical characteristics of the participants, including any body movement, gesture, or oral statement that is required. Its result could be tainted if the witnesses were allowed to view the line-up together and discuss among themselves their conclusions, or if they were allowed even accidentally to see the defendant in police custody just prior to the line-up. Any form of suggestion on the part of the police might foster an unjust result.
>
> 389 F.2d at 688

The hazards of an initial identification by photograph were recognized in *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968). In *Simmons* the court observed:

> Improper employment of photographs by police may sometime cause witnesses to err in identifying criminals...Even if the police subsequently follow the most correct photographic identification procedures and show him (the witness) the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among

> which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.
>
> 390 U.S. at 385

It is submitted that even when viewed under the "totality of the circumstances" standard, there existed in the instant case a substantial likelihood of irreparable misidentification. *see Grant v. State*, 390 So.2d 341, 343 (Fla. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987 (1981) Because the prosecution failed to show reliability based solely upon the two witnesses' independent recollection of the offender at the time of the crime, uninfluenced by the suggestiveness of the procedure, these pretrial and trial identifications of defendant should have been excluded. *see Edwards v. State*, 538 So.2d 440, 442 n.5 (Fla. 1989)

It is submitted that the suggestive identification procedures employed by detective Lewis violated Robert Rimmer's right to a fair trial resulting in a denial of due process. The live line-up and in-court identification of defendant by witness Joseph Louis Moore should have been suppressed from use as evidence. Likewise, the photospread, live line-up, and in-court identification of defendant by witness Kimberly Davis-Burke should have been suppressed. Reversal is appropriate.

POINT III ON APPEAL

THE TRIAL COURT ERRED IN EXCUSING PROSPECTIVE JURORS DAVID VANDERVENTER AND GWENDOLYN STHILAIRE; THE FORMER WAS IMPROPERLY DISMISSED FOR CAUSE BASED ON HIS DEATH PENALTY VIEWS WHILE THE LATTER WAS EXCUSED PEREMPTORILY WITHOUT A SUFFICIENT RACE NEUTRAL REASON

The state argues that prospective juror David Vandeventer was properly excused per the prosecution's cause challenge based on his equivocation regarding an ability to recommend the death penalty. (St.B. 35-38) This case is not one where the venireman stated he was "bound to follow a higher law" as suggested by the state. *e.g. Castro v. State*, 644 So.2d 987, 989 (Fla. 1994) Rather, prospective juror Vandeventor voiced a general objection to the death penalty without reaching an unmistakable and final assertion that he could not in any way recommend a death sentence. Accordingly, he was not subject to a challenge for cause on that basis. *see Penn v. State*, 574 So.2d 1079 (Fla. 1991)

Contrary to the State's argument of lack of preservation, the peremptory challenge by the state of prospective juror Gwendolyn Sthiliaire was timely and

properly objected to as a discriminatory use of a peremptory challenge. Defense objection was timely because an objection to the discriminatory use of peremptory challenges raised during the voir dire or selection process is timely if made at any time before the jury is sworn. *Foster v. State*, 767 So.2d 525, (Fla. 4th DCA 2000) *see Blackshear v. State*, 521 So.2d 1083 (Fla. 1988); *Fernandez v. State*, 746 So.2d 516 (Fla. 3rd DCA 1999) (and citations therein) The defense objection was proper because as acknowledged by the State, there was nothing in the record to support the prosecutor's explanation. (St.B. 47) *see Burris v. State*, 748 So.2d 332 (Fla. 4th DCA 2000)(although the explanation from the proponent of a strike does not have to be persuasive, or even plausible, it still has to have record support) If an unsupported reason is provided, there exists the possibility that the prosecutor used the challenge to "mask a strike actually motivated" by an improper reason. *John v. State*, 741 So.2d 550 (Fla. 4th DCA 1999)(Warner, J., concurring specifically) *see also Blackshear v. State* __So.2d __ (Fla. 4th DCA 2000)(prosecutor's attempt to exercise a peremptory challenge on a black female, when he had no race neutral reason, was not only unprofessional, but would have, if allowed, violated juror's constitutional right to serve on a jury) The state's peremptory challenge of venire member Gwendolyn Sthilaire violated Robert Rimmer's constitutional right to a trial by an impartial jury.

POINT IV ON APPEAL

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY FROM POLICE OFFICER KENNETH KELLY REGARDING HIS ABILITY TO SEE WITHOUT PRESCRIPTION EYEGLASSES; THE WITNESS' EYESIGHT WAS NOT RELEVANT TO REBUT TESTIMONY THAT ROBERT RIMMER HAD VISION DEFICIENCIES FOR WHICH HE WORE GLASSES.

Officer Kenneth Kelly's rebuttal testimony was not offered as expert witness testimony but rather was related only to his own personal experiences as a vision impaired driver. As such, the witness' personal experiences were not relevant to the issue of Robert Rimmer's need of corrective eyeware to be able to function in daily life. *see Jones v. State*, 748 So.2d 1012, 1024-25 (Fla. 1999)(witness' personal experiences as a drug addict would not be relevant to any of the issues); *see also Huff v. State*, 495 So.2d 145 (Fla. 1986)

The state mistakenly asserts that Officer Kelly's testimony "was relevant and probative to rebut appellant's defense that he could not be the shooter because he wears eyeglasses all the time". (St.B. 52) In the very next paragraph, however, the state changes positions by alleging that "Officer Kelly's testimony was not offered...to prove what appellant could or could not see, but instead, only to prove what a person

with similar vision could see without eyeglasses". (St. B. 53) By the state's own argument, the subject testimony was irrelevant because there existed no factual predicate that all impaired visions are the same. For Officer Kelly's testimony regarding his personal ability to see without corrective eyeware to have relevancy, there would have to be an underlying scientific premise that visual acuity of the same notations but in different individuals are identical. To the contrary, **it is a basic principle of ophthalmic examination that not all 20/20 visions (or 20/400 visions) are equal**. *see A. Keeney, M.D., D.Sc. Ocular Examination (1970)*

The testimony of Officer Kelly amounted to opinion testimony regarding defendant's eyesight without corrective lenses, an opinion he was not qualified to offer. *see Holland v. Florida*, 25 F.L.W. S796 (Fla. October 5, 2000)(it is not enough that the witness be qualified to propound opinions on a general subject; rather he must be qualified as an expert on the discrete subject on which he asked to opine)

Officer Kevin Kelly's testimony should have been excluded. Reversal with instructions for a new trial is appropriate.

POINT V ON APPEAL

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AS A RESULT OF A PROSECUTORIAL REFERENCE TO THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT; THE PROSECUTOR IMPROPERLY MADE INQUIRY OF DEFENDANT'S WIFE AS TO THE ABSENCE OF HER HUSBAND'S DENIAL OF THE CRIMES CHARGED.

The state asserts that by placing his wife on the witness stand, Robert Rimmer put "her credibility at issue" to the extent that she could be cross-examined concerning conversations with her husband about the double murder. (St.B. 58-60) No legal authority is cited that would allow for prosecutorial inquiry regarding confidential martial communications or defendant's failure to even address a particular subject matter with his spouse.

The failure of Robert Rimmer to discuss his then pending legal predicament with his spouse was clearly not an appropriate area for prosecutorial inquiry. It is settled law that the state has a "fundamental obligation to refrain from eliciting comments on the exercise of the right to silence". *Smith v. State*, 492 So.2d 1063, 1065 (Fla. 1986)(the obligation is upon the state to exercise proper restraint and the defense should not be penalized for presuming that the state will act within the bounds

of propriety); *see also Willinsky v. State*, 360 So.2d 760, 762 (Fla. 1978)(impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process) By placing his wife on the witness stand to testify about his alibi, defendant did not waive his custodial right to remain silent. *see State v. Hoggins*, 718 So.2d 761, 768-70 (Fla. 1998)(state constitutional law prohibits use of post-arrest silence and this prohibition extends to all evidence and argument, including impeachment evidence and argument, that is fairly susceptible of being interpreted by the jury as a comment on silence)

It was error for the prosecutor to question Robert Rimmer's wife regarding his failure to deny involvement in the crimes charged. The value of defendant's constitutional privilege was destroyed simply because he relied on it. *see also Darden v. Wainwright*, 477 U.S. 168 (1986)(in evaluating whether prosecution comments so infected a trial with unfairness as to make the resulting conviction a denial of due process, court must give special attention to those comments that implicate specific rights of the accused such as the right to counsel or the right to remain silent); *Portunodo v. Agard*, ___ U.S. ___ (2000) (where the exercise of constitutional rights is insolubly ambiguous as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant) (Ginsberg, J. dissenting) *citing Griffin v. California*, 380 U.S. 609 (1965)

and *Doyle v. Ohio*, 426 U.S. 610 (1976)

Reversal with instructions to afford Robert Rimmer a new trial is appropriate.

POINT VI ON APPEAL

THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS VARIOUS COMMENTS BEFORE THE JURY; THESE NUMEROUS IMPROPER AND HIGHLY PREJUDICIAL STATEMENTS DENIED ROBERT RIMMER A FAIR TRIAL

The state dismisses the prosecutor's numerous improper remarks as "legitimate argument"...in order to effectuate...enforcement of the criminal laws". (St. B. 62) The record indicates otherwise.

Much has been written of late regarding prosecutorial misconduct during closing arguments. *e.g. Thomas v. State*, 748 So.2d 970, 985 (Fla. 1999)(we again reiterate our close scrutiny upon prosecutor's comments during closing arguments and our continuing firm stance that improper comments by prosecutors will not be tolerated) This court's recent effort to express intolerance for improper prosecutorial arguments and comments has prompted requests for the outright dismissal of cases as the only appropriate remedy to deter such conduct. *e.g. Izquierdo v. State*, 746 So.2d 1220, 1222 (Fla. 3rd DCA 1999)(Sorondo, "J", dissenting)(the prosecutor's behavior which was continuing in nature, violated the defendant's right to due process of law and therefore the only appropriate remedy to deter such conduct is to bar the

defendant's prosecution even if it does not represent the institutionalized policy of the State Attorney's Office) [1] Writers in the Bar News call for more civility as lawyers by invoking John F. Kennedy's inaugural address comments that "Civility is not a sign of weakness" and Eric Hoffer's quote in the Passionate State of Mind that "Rudeness is a weak man's imitation of strength". Greer, *Making a Case for Civility*, Fla. Bar News (April 2000) There simply is no room for a representative of the State of Florida to characterize any accused, no matter how heinous the charge, as a "worthless piece of fecal matter" as this prosecutor did at the *Spencer* hearing.

All of the improper prosecutorial remarks as detailed in the initial brief, coupled with the prosecutor's impermissible reference to defendant's pretrial silence, deprived

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[1] There is certainly an argument to be made that prosecutorial misconduct in closing statements has become an accepted practice in the State Attorney's Office of the Seventeenth Judicial Circuit. For example, prosecutor Alberto Milian has been cited repeatedly over the years for misconduct but still remained in his employment. *e.g. Klepak v. State*, 622 So.2d 19 (Fla. 4th DCA 1993)(prosecutor Milian's conduct described as deplorable); *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993)(prosecutor Milian's conduct demeaned the trial court and was totally unacceptable for a member of the Bar of this state); *Cochran v. State*, 711 So.2d 1159 (Fla. 4th DCA 1997)(prosecutor Milian violated the ethical standards of conduct required in prosecuting attorneys); *Barnes v. State*, 743 So.2d 1105 (Fla. 4th DCA 1999); *reh'g denied* 743 So.2d 1109 (Fla. 4th DCA 1999); *cert denied* _So.2d __ (Fla. 1999)(prosecutor Milian continues to demonstrate attorney unprofessionalism and has repeatedly brought discredit to the office of the state attorney by his failure to comply with the Cannons of Advocacy; prosecutor Milian referred to the Florida Bar for disciplinary action for his improper and unethical trial tactics); *State of Florida v. Alberto Milian*, case no. 99-016927CF-10A, Circuit Court, 17th Judicial Circuit, In and For Broward County, Florida (prosecutor Milian convicted of contempt of court based on a physical battery of defense attorney) *affm. Milian v. State*, 764 So.2d 860 (Fla. 4th DCA 2000) *The Florida Bar v. Alberto Milian*, SC00-306 (January 2001)(Alberto Milian reprimanded for professional misconduct following an unlawful act or conduct that is prejudicial to the administration of justice.) The continued employment of such an unethical prosecutor is certainly consistent with an institutional policy of condoning misconduct.

Robert Rimmer of a fair trial. Reversal with instructions to try defendant anew is appropriate.

POINT VII ON APPEAL

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DR. JACOBSON REGARDING DEFENDANT'S EXTENSIVE CRIMINAL HISTORY; THIS EVIDENCE WAS NOT ADMISSIBLE SINCE THE PSYCHOLOGIST DID NOT RELY UPON IT TO ANY SIGNIFICANT DEGREE IN HER EVALUATION AND OPINION AS TO THE EXISTENCE OF A MENTAL DISORDER.

The state alleges that defense expert witness, Dr. Martha Jacobson, "relied upon [Robert Rimmer's] prior criminal history in forming her opinions in this case". (St. B. 82) Her testimony, however, indicates just the opposite.

Psychologist Jacobson's proffer outside the presence of the jury was clear and to the point:

> THE COURT: You may call your next witness.
>
> MR. SCHANTZ: Call Dr. Martha Jacobson.
>
> THE COURT: Folks, I need to ask you to step back in the jury room a couple minutes here. Don't discuss the facts of the case. Keep an open mind until the case is submitted to you.
>
> (Exit jurors)

THEREUPON:

MARTHA JACOBSON

a witness, being of lawful age, and having been first duly sworn in the above cause, testified on her oath as follows:

CLERK: State your name and spell your last name for the record.

THE WITNESS: Martha Candice Jacobson, PhD., J-A-C-O-B-S-O-N

THE COURT: You want to inquire or you want the Court or you want Mr. Magrino?

MR. SHANTZ: I guess I can attempt to do it. I'm taking the position he's not using that information.

THE COURT: Let's don't taint the witness now. Mr. Magrino, you want to inquire?

MR. MAGRINO: Thank you, Judge.

THE COURT: Since you're the objecting party.

DIRECT VOIR DIRE EXAMINATION

BY MR. MAGRINO:

Q. Ma'am, you evaluated Defendant Rimmer, correct?

A. Yes, I did.

Q. Part of that evaluation was you administered some tests to him; is that correct?

A. Yes, I did.

Q. And you conducted a clinical interview; is that correct?

A. Yes, I did.

Q. And you received information from Mr. Rimmer during that interview process, correct?

A. Yes.

Q. And the information that you received from Mr. Rimmer you utilized in formulating your opinions with respect to Mr. Rimmer in this case, correct?

A. That's correct.

MR. MAGRINO: That's all I have, Judge.

THE COURT: Any questions?

CROSS VOIR DIRE EXAMINATION

BY MR. SCHANTZ:

Q. Dr. Jacobson, there was an indication in your deposition that you took a history from Mr. Rimmer concerning his prior criminal convictions and arrests?

A. That's correct.

Q. **Did that information play a significant or relevant part of your evaluation of his present mental condition now and at the time of the alleged offense?**

A. **No, it did not.**

THE COURT: Any redirect?

REDIRECT VOIR DIRE EXAMINATION

BY MR. MAGRINO:

Q. So that information that the defendant told you about, his prior prison sentences and prior criminal history was not utilized by you in any way, shape or form in formulating your opinions in this case?

A. Mr. Magrino, you need to be more specific as to what opinion. **It did not affect my opinion as to the presence of mental illness.**

MR. MAGRINO: **Judge, I will stand on the question that I just asked her.** She does not dictate to me, I'm sorry, Judge. I will stand on the question I asked her.

THE COURT: Any additional questions of the witness?

MR. SCHANTZ: No. sir.

THE COURT: Ma'am, I'll ask you to step out just a minute, please.

(Exit witness)

Despite this unequivocal testimony by Dr. Jacobson that defendant's criminal history did not "play a significant or relevant part" of her evaluation of any present or past mental condition, the trial judge improperly allowed its admission before the jury. Any evidence of Robert Rimmer's prior arrest and/or convictions was simply not relevant. *see Carroll v. State*, 636 So.2d 1316, 1319 (Fla. 1994)(prosecutor's cross-examination of psychiatrist as to whether defendant had been in state custody for most of the last ten years was erroneous and defense objection should have been sustained)

Even if defendant's prior criminal history had some probative value, its admission was prohibited because of the risk of unfair prejudice to the defendant. *see Florida Statute 90.403* (1999) The introduction via cross examination of Robert

Rimmer's eight prior felony convictions was done solely to demonstrate defendant's bad character and propensity to commit crimes. *compare Parker v. State,* 476 So.2d 134, 139 (Fla. 1985)(the testimony of the defense expert that he based his opinion regarding defendant's non-violent nature on defendant's past personal and social developmental history, opened the door for cross-examination of other criminal offenses committed by defendant); *Johnson v. State*, 608 So.2d 4, 10-11 (Fla. 1992)(cross-examination of defendant's mental health experts as to his past illegal drug use proper). The present case is governed by *Maggard v. State*, 399 So.2d 973 (Fla.), *cert. denied*, 454 U.S. 1059, 102 S.Ct. 610 (1981) In *Maggard* this court held that the state's presentation of evidence of the defendant's prior criminal record to rebut the mitigating factor of no significant prior criminal history, upon which the defendant had explicitly waived reliance, constituted reversible error. *Id.* at 977-78.

As a result of allowing cross-examination into an area not relied upon by Dr. Jacobson, the jury was improperly informed of Robert Rimmer's "eight prior felony convictions". Reversal with instructions to conduct a new penalty phase proceeding is appropriate.

POINT VIII ON APPEAL

THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS VARIOUS COMMENTS DURING THE PENALTY PHASE PROCEEDINGS; THESE IMPROPER AND PREJUDICIAL STATEMENTS DENIED ROBERT RIMMER A FAIR SENTENCING DECISION.

The state argues that the prosecutor's references to Florida's parole of prisoners on "conditional release" was required "in order to meet the first aggravator". (St.B. 78) To the contrary, a fair reading of the transcript reveals that the prosecutor was suggesting to the jury the possibility that Robert Rimmer could some day be released if sentenced to life imprisonment rather than death.

On several occasions in his penalty phase argument, the prosecutor made reference to Florida's release of sentenced prisoners through its "conditional release program". (R 1951-1952, 1959) These repeated comments were misleading since the only sentence options in the case were death or life without possibility of parole. *see section 775.082 (1), Florida Statutes* (Supp. 1994)(making life without possibility of parole applicable sentencing option for capital offenses committed on or after May 25, 1994) A fair reading of the record reflects an improper attempt by the prosecuting

attorney to have the jury believe that a life recommendation, rather than one for death, could somehow ultimately allow for defendant's release from prison. *see Brooks v. State*, 762 So.2d 879, 905 n. 36 (Fla. 2000)(in sentencing phase of trial, it was improper for prosecutor to suggest that "early release" was in any way possible should jurors dispense mercy to convicted capital defendant)

As recently noted by a member of this court, "jurors are naturally interested in how long a convicted murderer will actually be imprisoned in making a choice between life and death". *Booker v. State*, 25 F.L.W. S803, case no. SC93,422 (Fla. October 5, 2000) (Anstead, J. concurring in part and dissenting in part) Obviously the most significant factor would be the availability of any "early release". *see Kearse v. State*, 25 F.L.W. S507, case no. SC90,310 (Fla. June 29, 2000)(juror indicated during voir dire that she could recommend a life sentence if she "was assured that there would be no chance of parole at any time"); *see also Norris v. State*, 429 So.2d 688 (Fla. 1983)(trial judge raised his concern over possibility of defendant's parole)

Given the importance of this issue, the impact of the prosecutor's suggestions that while Florida no longer has parole, it does release prisoners through a "conditional release" program, cannot be minimized as having no effect on the jury's penalty phase recommendation. The *Booker* dissent observed that misleading information concerning parole is a violation of the United State's Supreme Court's

decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) where the plurality opinion stated:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. ... The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.
>
> 512 U.S. at 161-162

Robert Rimmer's jury was affirmatively misled by the prosecutor as to the true meaning and effect of the sentencing alternatives presented to it.

Further, the prosecutor improperly made statements derogatory of Robert Rimmer's mental health mitigation in characterizing it "as some mental mumbo-jumbo". (R 1958) Such denigration of defense mental health testimony is prohibited. *see e.g. Rosso v. State*, 505 So.2d 611, 612 (Fla. 3rd DCA 1987)(prosecutor's comments derogatory of defendant's legitimate insanity defense constituted

fundamental error despite overwhelming evidence of defendant's commission of the charged criminal acts, in light of equivocal evidence of defendant's insanity)

Based on the arguments and authorities set forth in Point VI above (improper prosecutorial conduct in guilt phase closing arguments), it is submitted that Robert Rimmer's death sentences must be vacated. Reversal with instructions to conduct a new penalty phase hearing is appropriate.

POINT IX ON APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE TWO MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL; NO EVIDENCE WAS PRESENTED TO DEMONSTRATE ANY INTENT ON DEFENDANT'S PART TO INFLICT A HIGH DEGREE OF PAIN OR TO OTHERWISE TORTURE THE VICTIMS.

The State asserts that the "fear and emotional strain" of the robbery itself, even though unaccompanied by any additional acts of physical or mental torture, is sufficient in these instantaneous deaths to satisfy the aggravating circumstance of heinous, atrocious or cruel. (St.B. 84-87) The record fails to support this conclusion.

In reviewing a trial court's determination of heinous, atrocious, or cruel, this court must ensure that the finding is supported by substantial competent evidence. *see Mansfield v. State*, 758 So.2d 636, 645 (Fla. 2000); *Hildwin v. State*, 727 So.2d 193, 196 (Fla. 1998), *cert. denied*, 120 S.Ct. 139 (1999). The evidence in the present case fails to meet that standard since the shootings themselves were, as the trial judge acknowledged, "quick deaths", unaccompanied by evidence which would demonstrate any intent on Robert Rimmer's part to inflict a high degree of pain or to otherwise

torture the two decedents.

The trial judge below stated that he found HAC because of the "fear, emotional strain, and terror" of the victims. (R 2390-2391) This conclusion was based on the "twenty minutes" of abduction while the robbers stripped the store's inventory and the victims laid duct-taped on the floor. There was, however, no evidence beyond the mere fact of abduction that demonstrated any intent on Robert Rimmer's part to inflict a high degree of pain or to otherwise torture Bradley Krause, Jr. and/or Aaron Knight. A finding of heinous, atrocious, or cruel is unsupported by this record. *e.g. Knight v. State*, 721 So.2d 287, 298-299 (Fla. 1998)(evidence did not support aggravator that murder was especially heinous, atrocious, or cruel in absence of evidence as to what occurred during time that victims were abducted until time they were murdered); *see also Way v. State*, 760 So.2d 903, 919 (Fla. 2000)(victim must be aware of his or her impending death to support the aggravating circumstance of heinous, atrocious, or cruel) This matter should be remanded for resentencing.

POINT X ON APPEAL

THE TRIAL JUDGE ERRED IN PERMITTING THE JURY TO CONSIDER VICTIM-IMPACT EVIDENCE IN THEIR SENTENCING DECISION; ALTHOUGH TOLD NOT TO USE THIS EVIDENCE IN SUPPORT OF AGGRAVATION OR IN REBUTTAL OF MITIGATION, THE JURORS WERE NONETHELESS ADVISED THAT VICTIM-IMPACT EVIDENCE COULD BE CONSIDERED IN THEIR ADVISORY SENTENCE.

The State recites that the instruction given by the trial court regarding victim impact testimony adequately advised the jury how to consider the evidence in their sentencing decision. (St.B. 90-93) Such a position is tenuous given that the jurors were told to consider the victim impact evidence but not to use it in support of aggravation or in rebuttal of mitigation.

If it is difficult for lawyers and judges to reconcile the admission of victim impact evidence in view of instructions that the jury not use it in aggravation, how can lay persons be expected to do so? The present scheme is directly contradictory to the concept that a trial court "should not give instructions which are confusing, contradictory, or misleading". *Wadman v. State*, 750 So.2d 655, 658 (Fla. 4th DCA 1999)(quoting *Bulter v. State*, 493 So.2d 451, 452 (Fla. 1986)) It has always been the

goal to ensure that the sentencer's discretion be channeled and guided by clear, objective, and specific standards. *see Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gregg v. Georgia*, 428 U.S. 153, 201 (1976) Florida's present scheme is certainly not clear but rather is confusing, contradictory and misleading.

Reversal of defendant's death sentence with instructions to conduct a new penalty phase proceeding is appropriate.

CONCLUSION

Based on the foregoing arguments and citations of authority, it is requested that Robert Rimmer's conviction and/or sentence of death be vacated with appropriate instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the office of the Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida, by delivery/US Mail this President's Day, 2001

PATRICK C. RASTATTER/164634