IN THE SUPREME COURT OF FLORIDA

PAUL HAWTHORNE EVANS,

Appellant,

vs. CASE NO. SC96404

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

CAROL HAUGHWOUT
Public Defender

GARY CALDWELL
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 256919
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Paul Hawthorne Evans

ORIGINAL

TABLE OF CONTENTS

AUTHORITIES CITED

CASES PAGE

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

ARGUMENT

Appellant relies on his initial brief, except as to the following:

1. WHETHER THE COURT ERRED IN DENYING THE MOTION TO QUASH THE INDICTMENT OR DISMISS THE CHARGE.

Appellant agrees with the answer brief's general legal discussion at pages 11-13 so far as it agrees with Scott v. State, 581 So. 2d 887 (Fla. 1991). Differences between the facts of Scott and the facts here do not bar application of the rule set out in Scott. Appellant contests the relevance of the state's statement that there has been no allegation that it lost or presented compromised evidence. Claims of lost or 'compromised evidence" (presumably the state means false evidence) involve different standards than the Scott claim at bar.

Appellant also disputes the term "allegedly" when referring to the missing witnesses at page 13. The state did not disasree below that the witnesses were missing. In fact, it noted that there were also other missing witnesses. T 1817. Appellant disputes the suggestion in footnote 3 of page 13 that he needs more record support as to Mr. Megia. Below, he pointed to a police report showing Megia's account, and the state did not dispute it. Hence, there was no reason to put the report in the record. Appellee did not deny below that Megia told the police that he saw Connie commit the murder and that he had since vanished. It cannot blind-side the defense by now disputing the matter. Cf. Moore v. Trevino, 612 So.2d 604, 609 (Fla. 4th DCA 1993) (error to deny appellant's

attorney fees where appellee did not dispute underlying facts).

As to appellee's reliance on Marrero v. State, 428 So.2d 304 (Fla. 2nd DCA 1983), appellant did show below that the missing witnesses were favorable and material.

Appellant disagrees with argument on page 14 about the alibi witnesses. When the state said that other witnesses saw appellant at the fair, T 1819-20, the defense replied that the still-available witnesses would cover certain time periods, "but not the entire time line. These additional witnesses, Chris Murdock, Bill Crowley, and Mike Johnson, we expect would fill in the holes and sive a complete alibi for Paul Evans at the fair." T 1820 (e.s.). When the court asked the state if it had anything further on this point, it replied: "No, Your Honor." T 1820. The state cannot now claim that appellant failed to show what periods each witness would have covered. If there was a gap in the alibi, it had every opportunity to point out that gap to the judge.

Rivera v. State, 717 So.2d 477 (Fla. 1998) is beside the point. On post-conviction, Rivera claimed prejudice from a 6-month delay in his indictment because he may have lost a partial and weak alibi. At bar, appellant claimed a complete alibi defense which he lost because of the 6 year delay.

As for the discussion at pages 14-15 about argument that the evidence was uncontroverted, the state may argue the failure to call an alibi witness only if the defense has claimed that the witness exists, and there is a special relationship (such as a

family relationship) between the defendant and the witness such that the witness is not equally available to the state. See Lawyer v. State, 627 So.2d 564, 567 (Fla. 4th DCA 1993), Davis v. State, 744 So.2d 1091 (Fla. 5th DCA 1999), State v. Michaels, 454 So.2d 560, 562 (Fla.1984), Jackson v. State, 575 So.2d 181, 188 (Fla.1991). The record shows no special relationship between appellant and the absent witnesses and the defense did not and, because of their disappearance, could not claim before the jury that they would have supported his defense.

"Fundamental error has been defined as error that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process. See Kilgore v. State, 688 So.2d 895, 898 (Fla.1996)." Sparks v. State, 740 So.2d 33, 35 (Fla. 1st DCA 1999). Improper argument on an issue critical to the case constitutes fundamental error. See DeFreitas v. State, 701 So.2d 593, 606 (Fla. 4th DCA 1997) (Pariente, J., concurring in result)) ("Because the issue of defendant's intent was critical to the resolution of his guilt, the prosecutor's successful and completely improper attempt to prove defendant had a temper went to 'the essence of a fair and impartial trial' and thus constituted fundamental error in this case. [Cit.].").

The state's discussion of Rodrisuez v. State, 753 So.2d 29 (Fla. 2000) and Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) overlooks the "established principle that any comment reasonably susceptible of interpretation as a comment upon the defendant's

right to remain silent, or which infers that a defendant has the burden of proving his innocence, is improper. [Cit.]". Overton v. State, 531 So.2d 1382, 1387 (Fla. 1st DCA 1988).

Further, the jury below was unaware of the missing witnesses. Thus, while appellant's argument to the judge and to this Court concerns the existence of other witnesses, the jury would have taken the state's argument as commenting on appellant's failure to testify. The comment was fairly susceptible to being construed as a comment on his failure to testify. A comment, which is fairly susceptible of being interpreted as referring to a defendant's failure to testify, is error and strongly discouraged. See Rodriguez, 753 So.2d at 37. The comment at bar was uniquely unfair: after the witnesses who could contradict the state's case had disappeared, the state told the jury that appellant had failed to controvert its case.

Appellee's argument at pages 15-16 quotes out of context a single sentence of appellant's argument. Appellant did not limit argument to the loss of evidence at the Idlewild apartment. The written motion contained no such limitation. R 367. While counsel referred to anything that could have been found at the apartment as an example of lost evidence, he did not explicitly limit his argument to such evidence. T 1810-11 and 1811, lines 12-13. Of course, the loss of evidence at the apartment was prejudicial, as was the disappearance of other physical evidence.

The state's argument at pages 16-17 is remarkable in what it

does not say. It does not deny that the main issue is actual prejudice. It tacitly admits that there is no case in which any reason for delay has overcome the degree of prejudice at bar. Its only authority is United States v. Lovasco, 431 U.S. 783 (1977), where there was a delay of only 18 months, and the defense could not show how the lost witnesses would have aided the defense. Id. 786. The Court noted that the basic question is whether a violation of the fundamental conceptions of justice has occurred. Id. 790. It left to the states and lower federal courts the task of applying settled principles of due process. Id. 797. In Scott, this Court formulated rules for determining such claims. At bar, there was a violation of due process under Scott.

Page 17 of the answer brief does not really dispute that the delay was prejudicial as to penalty. The state case at penalty would be much weaker if appellant showed that he did not actually commit the murder. The state has cited no authority requiring that a defendant make a separate claim of prejudice as to penalty. Once a defendant has satisfied the burden of demonstrating error, the state, as beneficiary of the error, has the burden of showing lack of prejudice beyond a reasonable doubt. Goodwin v. State, 751 So.2d 537, 546 (Fla. 2000); State v. DiGuilio, 491 So.2d 1129 (Fla.1986). In making this determination, this Court will separately determine where there has been prejudice as to guilt or penalty. See Burns v. State, 609 So.2d 600 (Fla.1992) (improper admission of evidence at guilt was harmful only as to penalty).

2. WHETHER THE COURT ERRED IN ITS RULING ABOUT CANNABANOIDS IN THE BLOOD OF ALAN PFEIFFER.

At page 18, the answer brief contends that rulings on evidence are within the trial court's discretion under Ray v. State, 755 So.2d 604, 610 (Fla. 2000) and Alston v. State, 723 So.2d 148, 156 (Fla.1998). Both cases show that the Evidence Code restricts the judge's discretion. Ray adduced statements made by an accomplice in another crime, Whitney. After stating that evidentiary rulings are discretionary, this Court specifically ruled that the proposed evidence was irrelevant hearsay under the Evidence Code (e.s.):

> The sum of Whitney's proffered testimony was that in 1984 he had been coerced into committing a robbery with Hall, that the robbery involved a similar modus operandi, and that Hall carried an M-l rifle during the robbery, a rifle Hall named "the Enforcer." The trial court found that the proffered evidence of Hall's prior involvement with a similar crime was being offered solely to prove bad character and was otherwise irrelevant. The court, however, did permit testimony that Hall previously owned an M-l rifle, We agree with the trial court.
>
> The proffered testimony requires the jury to draw the inference that Hall's possible coercion of a cofelon in a previous robbery shows that he coerced Ray into participating in the present case. Ray did not testify during the guilt phase of his trial. The only evidence of coercion offered by the defense was Whitney's testimony. [FN omitted1 That testimony was inadmissible as it violated the rules of evidence. The bulk of Whitney's evidence consisted of inadmissible hearsay. See § 90.801, Fla. Stat. (1995). Whitney testified that the third cofelon from the 1984 robbery communicated Hall's threats to Whitney. Furthermore, Whitney assumed or inferred from other statements made by the third cofelon that acts of destruction which took place at Whitney's home were perpetrated by Hall. Ray sought to introduce Whitney's statements for the truth asserted--that Hall coerced Whitney into committing a crime with Hall in 1984. All of

> Whitney's "evidence" of this fact were hearsay statements from the third cofelon. This evidence was properly not admitted by the trial court. See Young v. State, 598 So.2d 163 (Fla. 3d DCA 1992).

This Court treated the evidentiary issue as involving questions of law. A court does not have discretion to ignore the Evidence Code.

Alston objected to a tape of himself talking to a reporter, on relevance grounds and on the ground that the prejudicial effect outweighed the probative value. This Court recited the abuse of discretion standard, but again required compliance with the Evidence Code, writing at pages 156-57 (e.s.; footnotes quoting Evidence Code omitted) :

> A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. [Citations omitted,] We **agree** with the trial court that the substance of what was said on the videotape concerned the crime for which appellant was charged and tended to prove a material fact; thus it was relevant evidence as defined by section 90.401, Florida Statutes (1995). In respect to the objection based upon section 90.403, Florida Statutes (1995), Williamson v. State, 681 So.2d 688, 696 (Fla.1996), cert. denied, 520 U.S. 1200, 117 S.Ct. 1561, 137 L.Ed.2d 708 (1997), is applicable. In Williamson, we recognized that proper application of section 90.403 requires a balancing test by the trial judge. Only when the unfair prejudice substantially outweighs the probative value of the evidence must the evidence be excluded. The trial court's decision on this issue conforms with our determination in Williamson, and we find no abuse of discretion in admittins the evidence.

Thus, in determining whether there has been an abuse of discretion, this Court will determine whether the ruling conforms to the Code.

At bar, appellee cites no authority for the odd ruling that the defense had to call the lab technician to present the results

of the blood test. This ruling had no basis in the Evidence Code. Brock v. State, 676 So.2d 991, 996 (Fla. 1st DCA 1996) states:

> ... the proponent of evidence such as a laboratory report is not necessarily required to produce an actual laboratory technician to testify. The supreme court held that a records custodian will suffice. Love [v. Garcia, 634 So.2d 158, 160 (Fla.1994)]; Davis v. State, 562 So.2d 431 (Fla. 1st DCA 1990) (presumably trustworthy laboratory report of urine sample testing positive for cocaine qualified as a business record upon testimony of the laboratory toxicologist supervisor, given as custodian of records, even though the actual conductor of the test was not called to testify).

See also Baber v. State, 775 So.2d 258 (Fla.2000). It is worth noting that the medical examiner's office is a state agency. Ch. 406, Fla. Stat. Hence, the issue at bar does not present the sensitive Confrontation Clause concerns set out in Baber. Cf. § 90.803(18)(d), Fla. Stat.

For the first time on appeal, the state makes an entirely different foundation argument as to the evidence. In making foundation objections, the objecting party must be specific so that the proponent is not tripped up on a technicality. Jackson v. State, 738 So.2d 382, 386 (Fla. 4th DCA 1999) states (e.s.):

> . . . The general, non-specific objection in this case--"lack of foundation"--did not alert the state or the trial court as to what portion was missing from the foundation for the admission of business records under section 90.803(6)(a). With a specific objection not only can the trial court make an intelligent and informed decision but it would also give the state an opportunity to correct the defects, where possible, by asking additional questions of the witness or calling an additional witness who might be able to correct the defects.

Appellee now argues for the first time that appellant should have presented Dr. Bell's testimony that the report was produced in the ordinary course of business or was used in his autopsy evaluation. His testimony does make such a showing. Regardless, had appellee made this objection at the right time, more testimony would have been presented. Once the judge ruled that the defense had to call the technician, there was no reason to go through the futile effort of presenting further testimony on this point.

Thus, the cases discussed at pages 18-20 of the answer brief are beside the point. None supports the baseless objection and the erroneous ruling that the defense had to call the technician. Had appellee notified the court and appellant of its present objection, it could have been immediately cured. The state nowhere contends that this is not a routine test conducted and relied on in the autopsy process. Under Hitchcock v. State, 755 So.2d 638 (Fla. 2000), the objecting party must claim that the test was untrustworthy or that a medical examiner would not rely on such a test.

At page 20, appellee contends that, under Geralds v. State, 674 So.2d 96, 100 (Fla.1996) and Jones v. State, 580 So.2d 143, 145 (Fla.1991), a judge has wide discretion regarding cross-examination. In those cases, this Court scrutinized the rulings to see if they conformed to law. In Geralds, the defendant at resentencing denied committing the murder, and the judge allowed cross linking him to the crime. This Court reviewed governing law,

674 So.2d 99-100, in affirming the ruling. In Jones, the judge barred defense cross-examination of two witnesses on matters unrelated to their direct examination as to possible drug dealing in the past. This Court noted that the cross **was** contrary to the rules of evidence.

At bar, by contrast, the cross-examination concerned the witness's autopsy procedure and findings, and the judge's ruling has no basis in law. A judge does not have discretion to make up novel rules of evidence in limiting cross-examination. The cross at bar was proper under the authorities discussed in Geralds.

The state's argument **as** to prejudice contains the following astounding statement at pages 20-21: "The evidence showed Pfeiffer's store closed at 6:00 p.m. and he left at 7:30 p.m. for the 30 minute drive home. Further, there was ample evidence of drug use found throughout the trailer. Thus, the jury was aware Pfeiffer was involved with drugs and had the time to use them that night."

This statement flatly contradicts the theory which the state presented to the jury.[1]

It told the jury that, after leaving his office, Alan Pfeiffer "didn't stop to buy lotto tickets", "didn't stop to see a friend," but "went directly home". T 4168. Once there, he "picked up his mail at the mailbox and walked to the front door, the north door,

[1] The argument at pages 20-21 is also contrary to the state's argument at page 51 of its brief.

the door they always used, and locked the door, and he fumbled for the light switch dropping a package of cigarettes." T 4168-69.

It said that, on arriving home at 8:00, T 4168, he "managed to turn on the north porch light", and then was shot as he "leaned over to look at the [stereo] button to turn it off", T 4169.

It told the jury that Connie called Alan at 7:30 with alarming news in order to get him to come directly home: "It was a lure to get Alan to come home at 8:00 o'clock.". T 4202.

The prosecutor gave her personal assurance that Alan had not smoked: "... And I seriously doubt [Alan] **was** smoking a cigarette, **a** regular cigarette and smoking -". T 4206.

The state's theory that, immediately on arriving home, Alan bent over the stereo and was shot without warning, provided its explanation for the position of his body and how appellant was able to shoot him from behind. T 4219-20.

Thus, in its brief on appeal, the state basically concedes that the cannabanoids in Alan's blood contradict the theory it presented to the jury. The exclusion of this evidence on legally insupportable grounds requires reversal.

3. WHETHER REVERSIBLE ERROR OCCURRED WHEN THE COURT LIMITED CROSS-EXAMINATION OF DET. BRUMLEY.

The discussion of the first trial at pages 21-22 of the answer brief is irrelevant. This Court should consider the more relevant fact that the state had Det. Brumley testify to an extensive police investigation. Among other things, they sent "detectives to start neighborhood **canvases** and backgrounds on the deceased", T 3205, and

"we followed up whatever leads we had from the neighborhood canvas and followed up the - had a detective follow up the background on the deceased and the financial aspect of him." T 3316. As appellant contended below, and appellee did not dispute, the state opened the door to the leads pursued because they communicated to the jury that the officers scoured the area, following the leads. T 3328. The state did not dispute that its testimony amounted to hearsay. T 3329. The defense sought to show that it was "not accurate" that the officers had followed up all the leads. T 3328.

The state's brief puts forward no authority for the proposition that it could put before the jury that it received and pursued leads about a murder, and then prevent the defense from informing the jury of what those leads were.

Appellant disagrees with the statement at page 24 of the answer brief that Brumley did not testify about actions taken in response to the canvas. He said that the police followed up on the leads they had from the neighborhood canvas. The defense sought to refute this and show it was "not accurate" that they followed up the leads. It was error to bar cross-examination on this point.

Page 23 of the answer brief says about cases cited in the initial brief (e.s.): "These cases deal with instances where the admission of one part of a hearsay statement may dictate admission of the balance in order not to leave the jury confused or with a wrong impression. Such is not the case here." Appellant agrees with the characterization of the cases, but argues that they do

apply at bar. Appellee did not deny below that it had put hearsay[2] before the jury, nor that it led jurors to believe that the police had followed up every lead. It said the facts were undisputed and "we know" the facts of the case. Appellant was correct in contending that the detective's testimony on direct examination would leave the jury confused or with a wrong impression. At bar, the inescapable inference was that the information received by the police was that the shooting occurred **at 8:00** p.m. Hence, the state argued to the jury that "we know" about Connie's 8:00 p.m. "iron-clad alibi". T 4179.

Crump v. State, 622 So.2d 963 (Fla. 1993), which the answer brief maintains "is on point", involves a different situation. There, the state did not put before the jury that the police had interviewed witnesses in the area of the crime and followed up on resulting **leads.** The defense brought the matter up. Crump did not involve the state maintaining that "we know" the facts of the case. It did not involve derogation of the right to present evidence "in order not to **leave** the jury confused or with a wrong impression" (to quote the state's brief again). Prejudicial error occurred at bar. cf. Royster v. State, 741 So.2d 606, 607 (Fla. 2nd DCA 1999) (error in excluding defense evidence prejudicial 'particularly in light of statements made by the **state** attorney during closing whereby he criticized the defense" for not producing such evidence;

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[2] See Postell v. State, 398 So.2d 851, 853 (Fla. 3rd DCA 1981) and Keen v. State, **25** Fla. L. Weekly S754 (Fla. Sept. 28, 2000).

citing Garcia v. State, 564 So.2d 124, 128-29 (Fla.1990)).

4. WHETHER THE COURT ERRED IN CLOSING INDIVIDUAL VOIR DIRE TO THE PUBLIC AND APPELLANT'S FAMILY.

The state's brief presents the notion that a judge may bar all but one member of the public from court proceedings without any compelling reason to do so. This Court should reject this proposition and order a new trial.

Appellant does not dispute the general discussion of cases at page 29 of the answer brief. The cases on page 30 do not help appellee. In Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975), the bailiff briefly refused to let people in or out of the courtroom, but the judge "quickly changed" this action. 'There were no restrictions placed on the defendant, his counsel, family or witnesses or even spectators then in the courtroom. The incident was entirely too trivial to amount to a constitutional deprivation." Id. 230. In Aaron v. Capps, 507 F.2d 685, 687 (5th Cir. 1975): "The prosecutrix' relatives, the defendant's relatives, all those necessary to the conduct of the trial, other attorneys, defendant's clergyman and the press were allowed in the courtroom; other members of the public were barred." At page 688, the court contrasted the case before it to one where proceedings were held in chambers. Cf. also Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965) (barring public from room in home where judge and officials took testimony of bedridden prosecutrix violated Sixth Amendment).

Ayala v. Speckard, 131 F.3d 62, 70 (2nd Cir.1997) states(e.s.)

It may be doubted whether trial judges can make

> meaningful distinctions between "compelling" and "overriding" interests or can distinguish between whether such interests are "likely to be prejudiced" or whether there is a "substantial probability of" prejudice. We believe the sensible course is for the trial judge to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an important interest in ordering any closure, and to realize that the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest. After all, a word like "overriding" is really not a calibrated measure of the gravity of an interest; it reflects a conclusion that a particular interest asserted, together with the likelihood of risk to that interest, is sufficient to justify the degree of closure sought.

As an example of a proper closure, the court cited a case excluding the defendant's family after they had threatened a witness.

In United States v. Brazel, 102 F.3d 1120, 1155 (11th Cir. 1997), on which appellee greatly relies, the "partial closure" amounted to checking the identity of persons entering the courtroom during the third week of the trial and arresting the girlfriend of one defendant on a state warrant. There and in Douglas v. Wainwrisht, 739 F.2d 531, 532-33 (11th Cir.1984), the court noted that a "partial closure" occurs if the press and family members of the defendant and witness are allowed in while others are excluded. There was not a "partial closure" at bar. At first, the judge let no one in the room. Later, he allowed in one person at a time; appellant's family was excluded.[3]

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[3] Other cases cited on page 31 are also irrelevant: U.S. v. DeLuca, 137 F.3d 24 (1st Cir.1998) (spectators to organized crime trial required to provide identification); U.S. v. Osborne, 68 F.3d 94 (5th Cir.1995) (one spectator excluded while child victim

Relying on a 1960 case, appellee suggests a failure to preserve this issue for review. In Levine v. United States, 362 U.S. 610 (1960), Levine refused to answer grand jury questions. In keeping with grand jury secrecy, a judge held a closed-door hearing where the relevant portion of the grand jury proceedings were read. Levine again refused to answer, and the judge held him in contempt. The Court upheld the contempt conviction noting that it was proper to conduct a closed-door hearing as to what had happened in front of the grand jury, and that Levine waived any claim that the judge should have re-opened the courtroom where no "reference was made to the exclusion of the general public" by counsel. Id. 614. Appellee does not show how this summary contempt case involving a grand jury has any bearing on the murder trial at bar at which the judge excluded the public from large portions of jury selection. Regardless, Johnson v. U.S., 520 U.S. 461, 468-69 (1997) listed denial of the right to a public trial as a "structural defect" that may be raised for the first time on appeal.

Indeed, appellee concedes at page 33 that, where there has been a total closure, a defendant can raise the issue for the first time on appeal. At bar, the judge initially would not let anyone into the room. Only later, did he allow only one person. There

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testified; de novo review); U.S. v. Farmer, 32 F.3d 369 (8th Cir. 1994) (defendant's family had threatened child victim, barred during her testimony); U.S. v. Sherlock, 962 F.3d 1349 (9th Cir. 1989) (defendants' families excluded when child victim testified; judge saw them giggling and making faces during her testimony); U.S. v. Galloway, 937 F.2d 542 (10th Cir.1991) (defendant's family not excluded during la-year-old victim's testimony).

was a total closure at bar. There is no procedural default.

Denial of a public trial is a 'structural" error, which cannot be harmless. Neder v. United States, 119 S.Ct. 1827, 1833 (1999), Williams v. State, 736 So.2d 699 (Fla. 4th DCA 1999).[4]

5. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION FOR STATEMENT OF PARTICULARS AND LETTING THE STATE ARGUE ITS ALTERNATIVE PRINCIPAL THEORY.

Appellee's brief cites cases regarding a court's broad discretion as to motions for statement of particulars. Its primary case was decided in 1949, well before this Court enacted rule 3.140(n), which says that the court "shall order" the state to furnish a statement of particulars if the indictment fails to provide sufficient information to enable preparation of the defense. The two DCA cases cannot overrule rule 3.140(n). In State v. Covinston, 392 So.2d 1321 (Fla.1981), this Court disapproved of charging documents which merely track the statute and do not specifically apprise the accused of what he must defend against. In such cases there must be supplemental description of the alleged misconduct. Id. The indictment at bar had the same defect: it let the state present directly contradictory theories of the facts contrary to due process.

At pages 38-39, appellee claims that appellant now makes an argument different from his argument below. As below, he now contends that the state could not legally present theories so

[4] As noted in the initial brief, courts in other states have followed Williams.

inconsistent with each other as those at bar. To decide this matter, this Court must consider the due process analysis set out in Schad v. Arizona, 501 U.S. 624 (1991), which entails review of the common law. Appellant does not dispute the elements of murder, nor that 'a co-assailant may be convicted of first-degree murder even though he was not the actual killer" as stated at page 39 of appellee's brief. He also does not dispute that one who hires another to commit murder is also culpable of the crime.

Instead, **appellant contends that** the state may not present factual theories so disparate as those at bar without requiring jury unanimity as to either theory. Notwithstanding that, as appellee contends at pages 40-41, present statutes differ from the common law, the state must comply with due process. And due process analysis under Schad requires consideration of what the common law allowed.

The answer brief tacitly admits that the common law would not allow the prosecution at bar. It does not dispute that the theories below involved separate elements. It does not explain how the prosecution at bar was constitutional under Richardson v. United States, 526 U.S. 813 (1999).

6. WHETHER REVERSIBLE ERROR OCCURRED IN THE STATE'S GUILT-PHASE FINAL ARGUMENT.

As to the state's reliance on Breedlove v. State, 413 So.2d 1, **8** (Fla.1982), this Court wrote in Gore v. State, 719 So.2d 1197, 1200 (Fla. 1998) (e.s.) :

While wide latitude is permitted in closing argument, see

Breedlove v. State, 413 So.2d 1, 8 (Fla.1982), this latitude does not extend to permit improper arsument.

This Court will reverse for improper argument unless the appellee can demonstrate that its argument **was** harmless beyond a reasonable doubt. See Martinez v. State, 761 So.2d 1074, 1083 (Fla.2000); Breedlove (court will reverse where it is reasonably evident that argument "might have" influenced verdict). With this in mind, appellant does not dispute the general discussion at pages 43-44 of appellee's brief.

At page 45, appellee's brief concedes that the court overruled several defense objections. Hence, this Court is to consider both preserved and unpreserved issues in determining prejudice. See Ruiz v. State, 743 So.2d 1, 7 (Fla. 1999).

Regardless, fundamental error occurs where improper arguments pervade the state's presentation. See Caraballo v. State, 762 So.2d 542 (Fla. 5th DCA 2000) (cumulative effect of improper prosecutorial comments amounted to fundamental error); Quaggin v. State, **752** So.2d 19, 26 (Fla. 5th DCA 2000) (fundamental error where cumulative effect went "to the very heart of the case"); Cochran v. State, **711** So.2d 1159 (Fla. 4th DCA 1998).

Appellant disagrees with appellee's reliance on State v. Lewis, 543 So.2d 760, 768 (Fla. 2nd DCA 1989). That opinion takes **a** permissive attitude toward statements of personal opinion, ruling that the state's use of such terms **as** "we know", "I think", and "I believe" were not erroneous or prejudicial. Other cases strongly disapprove such remarks. See, e.g., Silva v. Nightingale, 619

So.2d 4 (Fla. 5th DCA 1993) (reversing for five statements of personal opinion, only two of which were objected to); Kaas v. Atlas Chemical Co., 623 So.2d 525 (Fla. 3d DCA 1993) (five statements of personal opinion); Stokes v. Wet 'N Wild, 523 So.2d 181 (Fla. 5th DCA 1988); Muhammad v. Tovs "R" Us, Inc., 668 So. 2d 254, 258 (Fla. 1st DCA 1996) (citing cases).

State v. Lewis was limited to its specific facts, where the prosecutor said that "we know through other testimony the [defendant's] story is a lie". At bar, the argument as a whole united claims of personal knowledge, argument that the evidence was uncontroverted, statements unsupported by the evidence, claims that the facts were 'accepted", and other improper argument. State v. Lewis did not involve the state's exclusion of evidence controverting its case. A statement that "we know" the facts is particularly harmful if based on an improper evidentiary record. Cf. Delsado v. State, 573 So.2d 83, 85 (Fla. 2nd DCA 1990) (state compounded error of admission of collateral crime evidence by telling jury: "[W]e know that Velma was there when he said he was going to go over to kill, and that he had killed before, that he was going to kill here and he would kill again. We know that.") ; Garcia.

Appellee's argument at pages 45-50 ignores the overall effect of the pervasive use of the first person. While individual remarks may not have amounted to reversible error, the court must consider the total effect of the argument. The argument at bar was much worse than the argument in cases like Silva and Kaas.

The argument at page 51 is contrary to argument at pages 20-21 as to to Pfeiffer's actions before the murder. It did not present its statements as a set of logical inferences - it presented them as actual fact, which it shored up with statements of personal belief in the veracity of its main witnesses and other improper arguments.

As to the state's argument at page 52, it again ignores that it did not present its assertions as mere inferences. The trial court erred in overruling the objection: it effectively told the jury that the state's factual contentions were correct.

As to argument that it **was** uncontroverted that no one saw appellant between 6:30 and 9:30, appellee overlooks that, in fact, he told the police that various persons saw him at the fair over that period. T 4056-57. It is significant that he did not claim for the first time at trial that someone uniquely available to him provided an alibi. The state may argue the failure to call a witness only if there is a special relationship between the defendant and the witness such that the witness is not equally available to the state. See Lawyer v. State, 627 So. 2d 564, 567 (Fla. 4th DCA 1993), Davis v. State, 744 So. 2d 1091 (Fla. 5th DCA 1999), State v. Michaels, 454 So. 2d 560, 562 (Fla. 1984), Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991). This Court should reverse unless the comment was harmless beyond a reasonable doubt. Cf. United States v. Hasting, 461 U.S. 499 (1983) (comment that defense did not challenge government case).

As to the comment that no one heard shots after 9:30, the state argues, with no authority, that it may bar evidence and then comment on its absence. Clark v. State, 7.56 So. 2d 244 (Fla. 5th DCA 2000) refutes this argument. There, the judge correctly granted a defense objection, and excluded as irrelevant evidence that the defendant had drugs when arrested. But then, after keeping the evidence out, the defense commented on the absence of such evidence. The Fifth DCA found this action so egregious as to amount to manifest necessity for a mistrial. See also Weiand v. State, 732 So.2d 1044, 1056 (Fla.1999) (exclusion of evidence of prior domestic violence let state discredit defense in final argument). At bar, assuming, arsuendo that evidence of shots after 9:30 was properly excluded, it was manifestly improper for the state to comment on the absence of the evidence which it had successfully kept from the jury.

Part D of the argument at page 54 presents no argument except to refer to the fundamental error rule. There was a violation of due process under Schad, so that fundamental error occurred at bar.

At page 56 of its brief (e.s.), appellee said that it "argued that if its presentation was not believable, i.e., that it did not carry its burden of proof, then the jury should acquit." But of course, the state did not include the underlined phrase in its argument to the jury. It told the jury to acquit only if it did not believe anything its witnesses said. T 4229. This presented a much lower standard of proof than the Due Process Clauses of the

state and federal constitutions impose.

> The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.

Gore v. State, 719 So.2d 1197, 1200-01 (Fla.1998). See also Freeman v. State, 717 So.2d 105, 108 (Fla. 5th DCA 1998) (finding fundamental error where state, among other things, told jurors that "'the question' was who they wanted to believe").

Appellee cites no case authorizing the argument it presented to the jury. While appellee's brief correctly says at page 56 that its argument "relates to the evidence presented and requested the jury to determine guilt from it", it presented the jury with an incorrect burden of proof.

Appellee concludes by listing a number of improper arguments which has engaged in other cases, but did not employ at bar. Answer brief, pages 56-57. This hardly justifies the argument it made to the jury at bar.

9. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

Appellee's brief maintains that appellant was the "mastermind" of this murder. Appellee's evidence and presentation at trial was that Connie Pfeiffer conceived a plan to murder her husband, asked different persons to do the crime until Donna Waddell volunteered awwellant for the job. Appellee contended that Connie needed

someone else to commit the crime so that she would have an "iron clad" alibi. The record does not show whether the details of the planning were appellant's or whether he was simply following out a plan made by Connie. In fact, it suggests the latter. When Connie's plan to have the husband murdered while she was out of town fell through, she arranged another supposedly iron clad alibi - that she would be at the fair with her lover. The record does not show that Connie, who received a life sentence, was the subject of appellant's control in any way. It refutes any such claim.

The state's "mastermind" theory at bar differs from the situations in cases where this Court has found a death sentence proportionate for a "mastermind". In Sexton v. State, 25 Fla. L. Weekly S818 (Fla. Dec. 21, 2000), Sexton "ruthlessly utilized his own simple-minded and abused son" to commit the murder. In Larzelere v. State, 676 So.2d 394 (Fla.1996), the actions of Larzelere closelymirroredthose of Connie Pfeiffer, not appellant. In Antone v. State, 382 So.2d 1205, 1208 (Fla. 1980), Antone hired the two men who committed the murder, supplied the gun, paid the money from his pocket, and pressured them to complete the task. In Fotopoulos v. State, 608 So.2d 784, 792-94 (Fla.1992), the defendant hatched an elaborate scheme to kill his wife, dragging his girlfriend into the scheme by blackmailing her.

The judge wrote that appellant was the mastermind in that he planned and carried out the murder, established the alibi, selected the weapon arranged to steal it, and disposed of evidence

connecting him to the murder scene. R 511.

The record does not support this ruling. The record shows that the murder was Connie's idea and that Donna brought appellant into the plan. According to the state, it was Connie's plan to have someone else commit the murder while she had an iron clad alibi. Donna Waddell specifically testified that she, Sarah and appellant jointly decided to get her father's gun. T 3803, 3804. Donna suggested the idea of getting the gun. T 3809. Appellant was not more culpable than Connie by reason of disposing of evidence - she carefully arranged the crime so that there would be no evidence at **all** linking her to the crime, according to the **state:** "Connie Pfeiffer would need an iron-clad alibi. An iron-clad alibi. She couldn't kill her husband herself. She would have to hire someone to do it." T 4179. Thus, not only did Connie make sure there was no evidence linking her to the crime, she lured the young co-defendants into her murderous scheme. Accordingly, she was not less culpable than appellant. She was a gainfully employed grown-up motivated by a desire to obtain money to make her **car** payments and buy a property.

Further, the sentencing order does not show that she had as much mitigation as appellant. Hence, this case is not like Bradley v. State, No. SC93373 (Fla. Mar. 1, 2001). Bradley was a 36-year-old operator of his own business who committed a murder for between $100,000 to $200,000; he duped two teenagers into participating in the murder; the wife's mitigation was much stronger than Bradley's.

Appellant, on the other hand, was an unemployed teenager brought into the plan by two older women. He received almost nothing while the wife reaped substantial benefits.

Appellee's brief relies on Larzelere and Ventura v. State, 560 So.2d 217 (Fla.1990). Larzalere presented no mitigating evidence and claimed in mitigation only that she could adjust to life in prison and was not the shooter. Thus, hers was not among the least mitigated murder cases. Further, she relied on the claim that the sentence was disproportionate because the alleged shooter was acquitted. At bar, the instigator of the murder, against whom the aggravators would most heavily apply was convicted of first degree murder, but was not sentenced to death. In Ventura, the defendant presented no proportionality argument, and this Court did not even discuss the issue of proportionality. Hence, Ventura does not bear on the issue at bar. Further, there were no mitigators at all in Ventura.

Appellee's argument at pages 75-76 misapprehends appellant's argument. Appellant does not argue that the law forbids capital punishment for a murder committed by a 19-year-old. LeCroy v. State, 533 So.2d 750 (Fla.1988), is beside the point. It involved a double homicide with three aggravating circumstances, and no clear proportionality discussion. In Nelson v. State, 748 So.2d 237 (Fla.1999), there were also three aggravators. Nelson beat his victim with a baseball bat. When the victim begged for his life, Nelson cut his throat with a box cutter. Kimbroush v. State, 700

So.2d 634 (Fla.1997), also involved three aggravators. The defendant raped and beat the victim to death and there was only 'weak nonstatutory mitigation". In Henyard v. State, 689 So.2d 239 (Fla.1996), the defendant raped and shot a mother in the presence of her two little daughters, then abducted and murdered the two girls. There were four aggravating circumstances. These cases had much more aggravation and less mitigation than the case at bar.

Also beside the point is Mordenti v. State, 630 So.2d 1080 (Fla.1994). Mordenti, age 50, committed **a** murder for $17,000. The person who hired him later killed himself, so that he did not receive disparate treatment by the court. In Bonifav v. State, 680 So.2d 413 (Fla.1996), there were 3 aggravators, and "not only was the defendant in Bonifay hired to commit the murder; when the murder actually occurred, Bonifay callously killed the wrong person. The facts of that case indicated that the defendant broke into the store where the murder occurred and, after he did so, the victim **was** lying on the floor begging for his life and talking about his wife and children. The defendant told him to shut up and shot him twice in the head." Snipes v. State, 733 So. 2d 1000, 1008 (Fla. 1999). On appeal, Bonifay did not even argue that his death sentence was disproportionate, and the person who paid for the murder was himself sentenced to death, Archer v. State, 673 So.2d 17 (Fla.1996), so there was no disparate treatment.

In Downs v. State, 572 So.2d 895 (Fla.1990), the person who hired Downs died shortly after the murder. Hence, he was never

brought to justice, so that again there **was** no issue of disparate treatment of equally culpable persons. (Downs was obviously more culpable than another person whom Downs himself recruited, since Downs committed the murder.) Also Downs involved 3 aggravators.

In Ventura, there was no mitigation, and Ventura presented no proportionality argument. As in Mordenti and Downs, the person who hired Ventura **was** not brought to justice: the case against him was dismissed on speedy trial grounds.

In view of the foregoing, the argument at pages 78-79 that Connie's life sentence does not constitute disparate treatment under Mordenti and Ventura is incorrect: in those **cases,** the persons who paid for the murders were never brought to justice, so that the courts never had a chance to give then equal treatment.

10. WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE OR UNCONSTITUTIONAL WHERE THE STATE PRESENTED THE JURY WITH THE ALTERNATIVE THAT APPELLANT DID NOT DIRECTLY PARTICIPATE IN THE MURDER AND WAS GUILTY AS AN ACCESSORY.

Page 79 of the answer brief says, "the State did not argue Evans was not the shooter nor that he was a minor player."

Appellee forgets that it told jurors they could convict on the basis of unscrewing a light bulb and providing an alibi, T 4172-74, 4207-11, 4228-29, and said: "Half of you could go back there and think that Paul Evans is the shooter and half of you could believe that he is so actively involved in this crime that he's involved as a principal, that you can find him guilty of first degree murder. You don't have to agree as to which theory." T 4172-74.

Stepping lightly over the fact that the jury may have based its verdict on the alternative principal theory, the state now contends that appellant was the shooter, saying that a "major participant" in a felony murder may be eligible for the death penalty under Van Povck v. State, 564 So.2d 1066 (Fla. 1990). "Armed to the teeth", Van Poyck and his co-defendant assaulted prison guards in an attempt to free an inmate from custody. The co-defendant killed a guard, and he and Van Poyck tore off with guns blazing in a high speed chase in which many people were endangered. Van Povck has no bearing on the case at bar.

Rogers v. State, 511 So.2d 526, 536 (Fla.1987) does not help appellee. There, this Court wrote (e.s.) : 'By finding Rogers guilty of first-degree murder, the jury decided he was present at and had committed the murder. A special verdict to this effect was unnecessary." At bar, the verdict may or may not reflect a finding that appellant was present and committed the murder.

In Archer, the defendant (like Connie Pfeiffer) hired a teenager to commit a murder. The state's principal theory at bar was far different, and Archer does not help the state.

The state's claim of procedural default overlooks the repeated objections to the state's presentation of its alternative theories. R 398-99, T 2137-38, 2147-56, T 4089-92. Once the court ruled against counsel, there was no obligation to flout the court's patience by beating a dead horse and arguing the point yet more times, See Simpson v. State, 418 So.2d 984 (Fla.1982), Thomas v.

State, 419 So.2d 634 (Fla.1982), Williams v. State, 414 So.2d 509 (Fla.1982), Ssurlock v. State, 420 So.2d 875 (Fla.1982), Holton v. State, 573 So.2d 284 (Fla.1991), Hunt v. State, 613 So.2d 893 (Fla.1992).

Appellee's argument as to Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) rests on a false premise. One convicted of first degree murder is eligible for a death sentence only if there are "sufficient aggravating circumstances" and the mitigators do not outweigh them. § 921.141(2) and (3), Fla. Stat. Hence, a death sentence cannot be imposed unless there are additional factual findings as to sentencing circumstances. The Apprendi plurality noted that the jury need not make findings as to the sentencing circumstances once the jury has already "found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death". 120 S.Ct. at 2366 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257, n. 2 (1998) (Scalia, J., dissenting)). The Court wrote in Jones v. United States, 526 U.S. 227, 249-51 (1999), that the cases cited at page 82 of the answer brief do not dispose of the issue at bar: in Walton v. Arizona, 497 U.S. 639 (1990), the Court considered that one convicted of first degree murder in Arizona automatically qualified for the death penalty; Spaziano v. Florida, 468 U.S. 447 (1984), "contains no discussion of the sort of factfinding" involved at bar; in Hildwin v. Florida, 490 U.S. 638 (1989), as the answer brief concedes at page 82, the question was whether the jury

had to "specify" the aggravators that it found; Proffitt v. Florida, 428 U.S. 242 (1976) merely approved section 921.141 in broad terms. At bar, contrary to the Florida Constitution's unanimity requirement, the jury did not unanimously determine any sentencing circumstance beyond a reasonable doubt, so that appellant's sentence also violates the state constitution.

11. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S PENALTY ARGUMENT.

Appellant relies on his initial brief except to note:

Appellee's brief repeatedly says that improper argument is harmless if it did not directly affect the sentencing order, citing to Bertolotti v. State, 476 So.2d 130 (Fla.1985). Appellee overlooks that, since the judge relied on the jury's penalty verdict, error in the jury phase infected the sentence. See Espinosa v. Florida, 505 U.S. 1079 (1992).

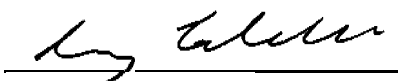
Appellee's brief makes no defense of its argument that jurors should contrast appellant with teenage soldiers in World War II "hitting the beaches and . . . pouring out of those boats". T 4432.

CONCLUSION

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

Respectfully submitted,

CAROL HAUGHWOUT
Public Defender
15thJudicialCircuitof Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600



GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Leslie Campbell, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier 5 March 2001.

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Attorney for Paul Hawthorne Evans

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this 5th day of March, 2001.

Attorney for Paul Hawthorne Evans