

IN THE SUPREME COURT OF FLORIDA

No. SC14-2276

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RANDY W. TUNDIDOR,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

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On Appeal from the Circuit Court of the  
Seventeenth Judicial Circuit of Florida  
(Broward County)

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REPLY BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

The state says (AB 3) Mendieta performed a MapQuest search for the landlord's address at Appellant's request. Although she testified to this, R20 3370-71, no evidence of such a search was found during extensive forensic testing of her computer by the secret service. R21 3611-12, 3618-20.

Contrary to state's assertion at AB 10, Randy H. knew where Appellant lived. Although Randy H. could not give the exact address on the stand, he had lived there in the past. R19 3243-44.

Although the state says (AB 10) the knife "had to be seven or eight inches long," the medical examiner actually said that, although the deepest stab wounds were seven and eight inches long, R17 3043, the knife could have been two or three inches shorter because the body is compressible. R17 3051.

The state says (AB 13) Randy H. testified that both he and Appellant turned off their phones at Gator Tint. Actually, he said that he turned off his own phone, but he did not say whether Appellant's phone was turned off. R19 3265. The inactivity of Appellant's cell phone during this period was consistent with the defense claim that he was at the office - where he would have had use of the office phone and computer. Oddly, the state chose not to present records for the Gator Tint phone.

Contrary to the statement as page 21 of the state's brief, phone records do not show that Shawn "was on the phone at home at the time of the murder." The records show only that he was within two miles of a cell tower near his home at 11:23 when the call began and was in that area when it ended at 12:13. They do not show where he was during the call - he could have "moved all over Florida in that 50 minutes." R21 3594-96. Mendieta thought he did not leave the house, but she was not sure. R20 3417. The murder happened sometime between 12 and 12:30. R21 3616.

#### ARGUMENT

I. IT WAS ERROR TO LET THE STATE USE THE LEAD DETECTIVE'S HEARSAY ACCOUNT OF RANDY H.'S APRIL 29 STATEMENT.

The state says the defense raised the evidentiary issue of Randy H.'s plea deal on cross-examination, so that the state was entitled to present detailed police testimony about his prior statement of April 29. AB 28-31.

In fact, both the April 29 statement and the plea deal were brought up on direct examination - by the state.

On direct examination by the state, Randy H. said he decided to testify against Appellant because "he was sitting here and saying that it was me and my brother who did this and planned this." R19 3302-03.

He said on direct that when he was arrested he made a statement about persons with made up names like Tito Ortiz be-

cause "I didn't want to get charged with no murder." R19 3304.

(This was his April 5 statement.)

Still on direct, he said he changed his story to inculcate himself and Appellant in his April 29 statement. R19 3306. The state brought out on direct that he entered his plea agreement based on the April 29 statement to Det. Kendall:

Q: Now, in addition to the conversation with Mr. Kendall, you also did something very similar with me at one point in time, didn't you?

A: Excuse me?

Q: You also did something similar that you did today at another point today. You sat in court on that witness stand and you gave me a story like the one you gave me here, today?

A: Yes.

Q: After you did that, that proffer, that's when you changed your plea?

A: Yes, sir.

R19 3309 (emphasis added). He said the only promise he got for his plea was that he would not get a death sentence. *Id.*

The foregoing testimony on direct was then addressed on cross. Randy H. said he made the April 29 statement for the same reason as the plea agreement - to make a deal to escape punishment:

Q: So on that date you told the detective that you were not going to give them any information for nothing. And that you wanted your attorney and the State to have a conversation; right?

A: Yes.

R19 3341-42.

So what we have is that the state put before the jury that Randy H. was always motivated by a desire to escape punishment, and told a series of stories to that end. Further, the state put before the jury that he decided to inculcate Appellant because he was "saying that it was me and my brother who did this and planned this." R19 3302-03.

These facts negate the theory that the state now offers for the first time for having an detective testify to the details of Randy H.'s statement inculcating Appellant. The state now says this narrative was admissible under *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), to rebut a claim of motive or recent fabrication. AB 29-30.

In *Rodriguez*, it was the defense that first brought up the plea agreements in an attempt to show an improper motive to fabricate. Hence, the state was allowed to introduce statements made "prior to the plea negotiations and therefore prior to the existence of both witnesses' motive to fabricate." *Id.* at 500.

At bar, the state brought out Randy H.'s motive. Further, the state established that his April 29 statement was made after his motive to minimize his involvement and inculcate Appellant. His motive on April 29 was the same as his motive at trial.

The state's direct examination showed that the April 29 statement was similar to his trial testimony accusing Appellant

and the defense did not dispute that fact. Hence, this case is not like *Rodriguez*.

On these facts, it does not make any sense to say that the state can put before the jury that Randy H. made a pre-trial statement inculcating Appellant, and then, even though the defense never disputed that he made such a statement, call a police officer to testify in detail about the statement. To allow this procedure guts the hearsay rule.

II. IT WAS ERROR FOR THE STATE TO INTRODUCE A DISCOVERY DEPOSITION UNDER SECTION 90.804(2)(a), FLORIDA STATUTES.

A. Section 90.804(2)(a), Florida Statutes, authorizes admission of certain types of prior testimony as substantive evidence. The trial court admitted the discovery deposition under that rule:

THE COURT: Okay. Thank you.

All right. Under 908.02 [sic] subsection 2A:

Former testimony. Testimony given as a witness at another hearing on the same or a different proceeding or in a deposition taken in compliance with the law and in the course of the same or another proceeding.

So, there is nothing that precludes the deposition testimony to be used.

R23 3785-86.

The state does not now deny that the judge erred in admitting the discovery deposition under the statute. Instead, it asks this Court to review - for an abuse of discretion - a rul-

ing that the judge never made. This argument asks this Court to substitute itself for the trial court and make a discretionary decision of the kind that rests with trial judges.

In this regard, it says the deposition was admissible under the rule of completeness set out in section 90.108, Florida Statutes, which provides for the correction of misleading impressions arising from statements taken "out of context" by bringing out "the remainder of the statement." *Larzelere v. State*, 676 So. 2d 394, 401 (Fla. 1996).

That provision does not authorize introduction of otherwise inadmissible hearsay as substantive evidence. *See United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("Moreover, even if, as Wilkerson claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.").

The state relies on *Vazquez v. State*, 700 So. 2d 5 (Fla. 4th DCA 1997), but that case does not support admission of the deposition at bar. In that case, the defense was entrapment, based on inducements made to the defendant by an informant in recorded conversations. Obviously, the entire course of the conversations bore directly on this issue, and not as substantive evidence to show the truth of the matter asserted. The truthfulness of the informant's inducements was immaterial - they were important only as to their effect on the defendant.

The specific issue in *Vazquez* was that the trial judge refused to let the defense reopen cross-examination to introduce additional recordings of these conversations. The judge plainly erred under this Court's decision in *Hahn v. State*, 58 So. 2d 188 (Fla. 1952) (holding trial court abused its discretion in not letting defense reopen cross in order to lay predicate for impeachment), and the Fourth District so held. *Vazquez*, 700 So. 2d at 7 (quoting and following *Hahn*).

Although the Fourth District briefly referred to the rule of completeness, *id.* at 8-9, it was unnecessary to the decision.

*Vazquez* is not like the present case. At bar, the defense introduced the witness's testimony at the bond hearing about a statement made by Shawn on one occasion. Even though there was nothing confusing or misleading about this testimony, the state was then allowed to introduce the witness's deposition - taken on a later day - about a different statement made by Shawn.

As already noted, the rule of completeness allows "the remainder of the statement" in order "to avoid the potential for creating misleading impressions by taking statements out of context." *Larzelere*, 676 So. 2d at 401 (emphasis added); *Calhoun v. State*, 138 So. 3d 350, 360 (Fla. 2013); *Metz v. State*, 59 So. 3d 1225, 1226 (Fla. 4th DCA 2011). At bar, the defense presented nothing out of context. It presented the witness's entire testimony at the bond hearing as to what Shawn told her on the

day after Randy H.'s April 7 arrest, and as to the facts that she told a detective about the statement and that Shawn then threatened her. R23 3792-95.

Since she had talked to the detective, the state was aware the statement. It was also free to investigate the witness before the bond hearing and it was free to call Shawn at the bond hearing.

The defense did not present the statement out of context in the bond hearing testimony. The subsequent deposition about other discussions with Shawn at other times did not put in context anything taken out of context.

At bar, the state introduced the deposition as substantive evidence. Its present argument that it merely clarified matters taken out of context is meritless. See *J.L. v. State*, 4D14-4649, slip op. at 3 (Fla. 4th DCA June 15, 2016) ("However, the State's clear position at trial was that the statements were being admitted as substantive evidence. When this is the position taken at trial, we are unable to accept an argument on appeal that the statements were actually used to impeach. *Ellis v. State*, 622 So. 2d 991, 996 (Fla. 1993).").

B. The state says (AB 34-35) the deposition testimony was admissible because it says Shawn - one of the state's main witnesses - was a pathological liar who kept changing his stories. It is odd for the state to be arguing for admission of this

opinion testimony. The state could have introduced this opinion without getting into the hearsay statement putting Appellant at the scene of the crime.

Regardless, the bond hearing testimony did not present anything "out of context" and was not part of the same statement as the subsequent deposition. It was not admissible under the rule of completeness.

C. The state also suggests that the discussion of a lie detector test at the deposition was somehow "crucial for the jury to put her previous testimony into context." AB 35. This is nonsense. Lie detector testing was not mentioned in the bond hearing testimony.

The deposition showed Sanchez discussed taking a lie detector test, but then the police contacted Shawn and he threatened her. Due of this threat, she backed out of any further involvement. R23 3818-20. None of this put into context anything about her previous bond hearing testimony. This lie detector testimony was not part of "the remainder of" the bond hearing testimony.

Further, the state knew about the lie detector discussions at the time of the bond hearing since they involved Det. Kendall - a state agent. In fact, Kendall testified at the bond hearing. R12 2069.

Moreover, the lie detector testimony did not require admission of the hearsay putting Appellant at the scene of the crime.

C. The state makes a somewhat unusual harmless error argument. It says the deposition was harmless because Shawn was an important state witness. AB 35-36. But he never testified that he personally saw Appellant at the scene of the crime. Via the deposition, however, the state introduced his statement that he saw Appellant at the scene. R23 3814. Further, it corroborated the testimony of the murder victim's wife about other persons being present at the time of the murder, and turned defense counsel into a prosecutor by introducing damaging evidence against his client.

As "the beneficiary of the error," the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). The burden on the state to prove harmless error is "most severe." *Holland v. State*, 503 So. 2d 1250, 1253 (Fla. 1987). The state has not met this severe burden.

III. AS SHAWN DID NOT ACT "UNDER THE DIRECTION" OF THE POLICE WHEN HE SECRETLY RECORDED HIS CONVERSATION WITH APPELLANT IN APPELLANT'S HOME, THE RECORDING WAS INADMISSIBLE.

A. The state says that when Shawn suggested that he "wear a wire" the officers agreed so that their "adoption of a plan first suggested by Shawn means that plan became part of their investigation and Shawn was, in fact, under their direction and

supervision." AB 37-38. It says the police "authorized Shawn to record the conversation." AB 40.

Simply adopting or authorizing Shawn's plan is not the same as directing or supervising him. The Legislature did not intend that someone can become a state agent so easily as the answer brief suggests.

The state would rewrite the statute to change the statutory requirement that the recording be made "under the direction" of an officer to "with the authorization of" an officer. Imagine a statute providing that a person can use police equipment under an officer's direction. It would not be enough for the police to give persons tasers or pepper spray, show them how to use them and then let them loose to use them as they wished. It may be said that a secret recording device is different because it hurts no one. But a secret recording harms and directly violates our constitutional right to privacy. The statute effectuates this right and it must be strictly construed - not rewritten to meet the needs of a particular case. *See State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978).

Imagine also a statute that lets private persons execute search warrants "under the direction" of a law enforcement officer. To justify such an invasion of privacy by civilians, there would have to be strict control by the officer. The "di-

rection" would have to involve more than just giving someone a search warrant and letting him or her execute it.

The state relies on *Mead v. State*, 31 So. 3d 881 (Fla. 4th DCA 2010). But as noted in the initial brief, Mead only argued that the officer had to be involved or present during the recording. The court was not called upon to consider the issue at bar. Regardless, *Mead* failed to read the statute strictly in favor of the right to privacy and in effect rewrote it to lessen the statutory requirement that the recording be made "under the direction" of an officer.

So far as *Mead* held that mere "authorization" was enough, it was contrary to the rule - not disputed by the state - that the statute's provisions "must be strictly construed." See *Fla. Att'y Gen. Op.* 2002-56 (2002), n. 10 (citing cases).

B. The state says the error was harmless because "there was substantial evidence of Tundidor's guilt." AB 40-41. This is the wrong standard. The state has been told again and again that "the applicable test 'is not ... a substantial evidence ... test.'" *DiGuilio*, 491 So. 2d at 1139." *Cooper v. State*, 43 So. 3d 42, 42-43 (Fla. 2010). Harmless error analysis does not view the evidence in the light most favorable to the state. See *Barnes v. State*, 743 So. 2d 1105, 1114-15 (Fla. 4th DCA 1999). The state has a "most severe" burden to prove beyond a reasonable doubt

that the error did not affect the verdict. *Holland*, 503 So. 2d at 1253.

The state was faced with terrible problems with the credibility of its main witnesses, Randy H. and Shawn. The state itself presented one witness's assessment that Shawn was a "pathological liar." The state sought to get around this problem by spending large parts of its final argument playing and discussing the illegal recording. R23 3867-73, 3887-91.

Among other things, the state told the jurors: "And that is tape. Take a look at back in there when it goes back with all the other evidence. Play it. And listen to it. It will not change." R23 3873. "The audio recording that Shawn did. Does that comport with the other evidence in the case? Not this theory or story or imagination. Does it comport to the other evidence? Of course it does. Of course it does." R23 3949. When the state thus urges jurors to consider such evidence, it is in no position to say it did not affect their verdict. Courts are "less likely to find an error harmless where the State relies on the erroneously admitted evidence during its closing argument." *Tripoli v. State*, 50 So. 3d 776, 781 n.3 (Fla. 4th DCA 2010) (discussing cases).

The harmless error rule is a rule of fairness. It puts the burden on the beneficiary of the error for good reasons. This is especially so when prosecutors present questionable evidence

over objection: they make a calculated gamble that the evidence is admissible or that, if it is not, the appellate court will find the error harmless. This encourages risk-taking in criminal trials. The state would not risk reversal unless the evidence is important to its case. Hence, "the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Chapman v. California*, 386 U.S. 18, 24 (1967) (citing 1 J. Wigmore, *Evidence* § 21 (3d ed. 1940)). The heart of due process lies in the use of fundamentally fair procedures.

We cannot see or hear jury deliberations, but reason and human experience show that each juror will bring to the table unique insights into different aspects of the evidence. One juror may place the greatest reliance on the individual credibility of this or that witness. Another may look largely to the objective evidence. A third may rely on details that arise during the trial that the lawyers and judge may consider trivial. Although the jurors work together, each may take a separate path to the result - just as judges may do.<sup>1</sup> No evidence should be

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<sup>1</sup> See, e.g., *Beal Bank, SSB v. Almand & Associates*, 710 So. 2d 608 (Fla. 5th DCA 1998) (each member of panel issued a separate opinion), *decision approved in part, quashed in part sub nom. Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45 (Fla. 2001). A particularly famous example is *Furman v. Georgia*, 408 U.S. 238 (1972), in which each of the nine Justices issued a

mechanically treated as inconsequential to the unanimous verdict of the jury panel so comprised.

Further, unlike the appellate court, the attorneys at trial see the jury and know the strengths and weaknesses of the trial presentations. Experienced prosecutors trim their cases, so far as possible, to obtain a verdict from the jury in the courtroom, not some abstract average jury. If they hazard to use doubtful evidence, one may reasonably take it that they think the evidence will have an impact on the jury.

Our law puts a "most severe" burden on the state to prove the error did not affect the verdict. *Holland*, 503 So. 2d at 1253. This rule serves a major institutional purpose. The more skeptically judges view prosecution claims of harmless error, the less likely it will be that prosecutors will choose to lay bad evidence before the jury.

IV. THE TEXT MESSAGES BETWEEN RANDY H., SHAWN AND APPELLANT SHOULD NOT HAVE BEEN ADMITTED IN THE STATE'S REBUTTAL CASE OVER DEFENSE OBJECTION.

Appellant relies on his initial brief.

V. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO DISQUALIFY THE JUDGE.

A. The state makes a hyper-technical argument that Appellant's written declaration under oath was defective. AB 45-47.

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separate opinion.

At bottom, this argument seems to be based on the fact that the motion did not have page numbers. But the unpaginated motion unequivocally shows that: The defendant swore that he had read the motion, although the jurat called it "this Amended Application for Judicial Disqualification." SR15 38. The motion stated that he "fear[ed] Judge Imperato may show favoritism towards the State in the DUI prosecution in order to gain an advantage in her case." SR15 36. There were no disputed facts. The state was completely aware of the judge's arrest and Appellant's concerns, as discussed at the hearings before Judge Backman.

Regardless, the state did not argue this ground in the trial court, R28 4347-58 and it was not the basis of the judge's ruling.

The state cannot sit on its rights in a situation like this and then raise such an argument long after the fact when the alleged error could have been corrected immediately. See *Stephens v. Dichtenmueller*, 216 So. 2d 448 (Fla. 1968) (where plaintiff filed affidavit in opposition to motion for summary judgment, and affidavit was rejected by trial court for reasons not stated in its order, but assumed by district court to be for failure to show affirmatively that affiant was competent to express opinion contained in affidavit and for vagueness of affidavit, such deficiencies in affidavit were largely technical and subject to correction by affiant and plaintiff should have

been afforded opportunity to amend or supplement affidavit); *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966) (cited and followed in *Stephens*); *United Auto. Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So. 3d 127, 130-31 (Fla. 3d DCA 2010) (following *Stephens* and numerous other cases); *United Auto. Ins. Co. v. Peter F. Merkle, M.D., P.A.*, 32 So. 3d 159, 161 (Fla. 4th DCA 2010) (same). This rule applies in criminal proceedings. See *Duhart v. State*, 767 So. 2d 1257 (Fla. 3d DCA 2000) (if motion is denied because jurat is legally insufficient, movant must be allowed to correct jurat).

Neither the state nor a defendant may leave such an alleged error undetected in order to take advantage of it in later proceedings. *Cf. Alba v. State*, 541 So. 2d 747, 748 (Fla. 3d DCA 1989) (defect arising from complete failure of prosecutor to swear to allegation in information must be timely raised); *State v. Polo*, 242 So. 2d 457, 458 (Fla. 1970) (objection to information cannot be raised after conviction though alleged defect in how it was sworn to was not apparent on face of information and arose from alleged practice of prosecutor in sending information to court clerk with affidavit already signed).

Although the state cites *Barnhill v. State*, 834 So. 2d 836, 842 (Fla. 2002), that case did not address the question of whether the state may wait until years after the fact to raise a technical objection to the form of an oath where the error could

easily have been remedied in the trial court. *Barnhill* in no way overruled *Stephens*, and this Court does not overrule cases sub silentio. See *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002).

It would cast a shroud of impropriety over these proceedings and be contrary to the ends of justice to rule that the order denying a motion to disqualify a judge for criminal conduct should be upheld on hyper-technical grounds not addressed by or even raised in the trial court.

B. The state suggests that Judge Imperato continued to be on the case even though she was no longer presiding and Judge Backman was presiding. In this regard, it mentions rule 3.231, which refers to situations in which a judge is unable to continue with a case "by reason of death or disability." Although a situation like the one at bar was not imagined when it was written, the rule is not limited to physical disabilities. Under the extreme situation in which a judge has been arrested and has left the criminal division and another judge has taken over the case, it was reasonable for counsel at bar to believe that Judge Imperato was no longer able to continue with the case.

As to rule 3.231, Judge Backman said that for the case to go back to Judge Imperato "each and every one of you, including Mr. Tundidor, would have to waive the issue presented by her situation." R28 4329-30. Defense counsel said Appellant objected

to Judge Imperato continuing with the case and that there should be a new trial or sentencing with a new judge. R28 4331-32.

The state said the defense should put its position in writing, and the judge said the chief judge (not Judge Imperato) would have to hear any motion. R28 4332-33. Judge Backman again said the matter was for the chief judge and the chief administrative judge to decide who would preside:

You can try to figure out where it properly should be. I will talk to the chief judge, the chief criminal administrative judge. Then I guess they will make whatever decision they think the law provides, including involving Judge Imperato, if that is what needs to be done.

R28 4333-34.

Judge Backman said the division was assigned to him. He then signed an order at the state's request regarding another issue in the case, and said he (not Judge Imperato) would schedule a status hearing for early the next month. R28 4335-37.

On these facts, defense counsel thought, with reason, that Judge Imperato was no longer on the case, and hence had a good faith belief that there was no need to move to disqualify her. Judge Backman said she could preside only if all parties agreed - something the defense did not do. R28 4329-30.

C. The state's foregoing arguments are to the effect that the defense lawyer bungled the disqualification issue.

A criminal defense attorney is the fiduciary of the defendant's liberty, and holds in trust the client's rights. Appellant had a strong interest in having the judge removed and had the absolute right to pursue that interest within the law. There can be no dispute about the fact that everyone knew below that Appellant and counsel did not want Judge Imperato to preside after her arrest. R28 4331-32. Appellant had the constitutional right to have counsel pursue this goal competently. Art. I, § 16, Fla. Const.; Amends. VI and XIV, U.S. Const.

There was no strategic reason not to file the motion and in fact counsel did undertake to do so, although the state says he made a hash of it. In such circumstances, where - as the state argues - counsel's actions are patently unreasonable and the prejudice to the client is obvious and there is no plausible justification for the actions of trial counsel, the remedy is to reverse on direct appeal on the ground of ineffective assistance of counsel. *See Monroe v. State*, 41 Fla. L. Weekly S192 (Fla. Apr. 28, 2016) (holding on direct appeal that trial counsel was ineffective as "it would be a waste of judicial resources to wait until Monroe seeks postconviction relief for ineffective assistance of counsel when the unreasonableness of the actions of trial counsel and the prejudice to Monroe are indisputable from the face of the record before us").

D. On the merits of the motion, the state says *Moskowitz v. Moskowitz*, 998 So. 2d 660 (Fla. 4th DCA 2009), does not apply because the judge there had to decide issues about drug use and he himself was arrested for using marijuana. This reads that case far too narrowly. Regardless, the judge's arrest at bar involved substance abuse and she had to decide issues about the credibility of substance abusers (Randy H. and Shawn), and she had to decide issues about the weight to be given to evidence of Appellant's substance abuse. Further, while facing her own criminal charges, she had to assess the credibility of persons charged with crimes.

As the Fourth District wrote in *Moskowitz*, it "hardly generates a ... supposition that litigants in cases over which [a judge] presides while his [or her] own criminal charges are unresolved need have no reason to fear his [or her] impartiality has been impaired." *Id.* at 662.

VI. THE STATE PRESENTED IMPROPER EXPERT OPINION TESTIMONY THAT APPELLANT WAS PHYSICALLY CAPABLE OF COMMITTING THE MURDER. THE EXPERT DID NOT HAVE A FACTUAL BASIS FOR THE OPINION.

The state points to nothing in the record showing Dr. Bertot knew how the crime occurred. In fact, there was no such evidence. Hence, as he did not know how it happened, he could not say whether Appellant was able to commit the crime.

The state says Appellant presented Dr. Bertot "in an attempt to show he was not capable of committing the crime." AB 53. If that were so, defense counsel would have asked him about the crime. He did not.

Defense counsel disavowed any intent to show Appellant was incapable of committing the crime. R23 3907-08.

VII. THE COURT ERRED IN FINDING THAT RANDY H.'S STATEMENTS AT THE MEETING IN THE JAIL WERE PRIVILEGED.

A. The state says the jail meeting was covered by the common interest or joint defense doctrine regarding the attorney-client privilege. AB 59-60. This assertion ignores that the testimony was that the privilege did not apply.

Mr. Lewis testified there was no joint defense agreement at the time of the meeting:

Q: Was there any type of joint Defense agreement that was in place at that point in time?

A: No joint Defense agreement. It was a meeting that Mr. Pappacoda and I were trying to get to the truth about what happened.

SR6 715 (emphasis added).

Likewise, Mr. Pappacoda testified there was no joint defense agreement, and he made clear at the meeting that it was not covered by attorney-client privilege. SR7 768-69.

B. The state says Pappacoda could have testified to what Randy H. said. But the judge had already ruled the statements inadmissible. A party does not have to undertake the futile act

of flouting a judge's ruling by trying to present evidence already ruled inadmissible. See *Hunt v. State*, 613 So. 2d 893, 898, n. 4 (Fla. 1992) ("futile efforts are not required to preserve matters for appeal"); *State v. Davis*, 834 So. 2d 898, 899, n. 1 (Fla. 3d DCA 2002). ("The state's failure to present evidence that Davis qualified as a prison releasee reoffender is of no moment as the trial court had ruled on the waiver issue and stated its intention to offer Davis a guidelines sentence. [Cit.] It is well settled that the law does not require a useless or futile act."); *Rodriguez v. State*, 494 So. 2d 496, 498 (Fla. 4th DCA 1986) (once court had ruled admissible testimony from one witness, it would have been futile to object to similar testimony from another witness: "The trial court overruled his objection and thus to continue fruitlessly objecting to the line of interrogation and argument thereon would seem just that ... fruitless. Cf. *Simpson v. State*, 418 So. 2d 984 (Fla. 1982).").

C. The state also argues the error was harmless, saying the judge heard from inmates about the Randy H.'s inculpatory statements. That fact does not make harmless beyond a reasonable doubt the refusal to allow the testimony of Randy H.'s own attorney that Randy H. admitted that Appellant did not commit the crime, as explained in the initial brief.

VIII. THE RECORD DOES NOT SHOW THAT THE COURT USED THE CORRECT STANDARD IN DENYING THE MOTION FOR NEW TRIAL ON THE GROUND THAT THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Appellant relies on his initial brief.

IX. THE SENTENCE SHOULD BE REVERSED BECAUSE, CONTRARY TO HIS PROFESSIONAL JUDGMENT AND DUTY, COUNSEL SURRENDERED TO THE CLIENT THE DECISION WHETHER TO CALL MITIGATION WITNESSES.

A. The state's argument is one of "heads I win, tails you lose." Under the state's position, it wins if the lawyer surrenders to the defendant's desire not to call witnesses, and the state also wins if, as in *Puglisi v. State*, 112 So. 3d 1196, 1206 (Fla. 2013), the lawyer overrides the defendant's request. But as the Fourth District once observed: "The state cannot have it both ways." *Daniels v. State*, 806 So. 2d 563, 564 (Fla. 4th DCA 2002).

B. The state relies on *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001) and *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), but those cases are unlike this case.

In *Muhammad*, the defendant waived counsel for sentencing. *Id.* at 361. Hence, he had no issue as to counsel's exercise of professional judgment in the calling of witnesses.

*Koon* was a post-conviction case involving claims that (1) counsel was ineffective in that he acquiesced in his client's demand not to call mitigation witnesses, and (2) counsel abdi-

cated his independent judgment in recalling a witnesses at his client's insistence.

As to the first issue, this Court cited *Pettit v. State*, 591 So. 2d 618 (Fla. 1992), and *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988), for the proposition that a defendant had the right to waive presentation of mitigating evidence.

Both *Pettit* and *Hamblen* waived counsel and acted pro se at penalty. *Pettit* 591 So 2d. at 620; *Hamblen*, 527 So. 2d at 801. Hence, they were like the defendant in *Muhammad*. By waiving counsel, a defendant gains control of the decision whether to present evidence, including the right to present mitigating evidence.

It is respectfully submitted that this fundamental distinction was overlooked in *Koon*, so that the resulting discussion is fatally flawed.

Regardless, the dispute on this issue in *Koon* was whether counsel incompetently failed to investigate mitigation. It was undisputed that defense counsel said he did not present mitigation witnesses because "he was afraid that ... Koon would make a scene in front of the jury." *Koon*, 619 So. 2d at 249. *Koon* argued on post-conviction that he was entitled to relief under *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991), which held: "we do not see that counsel conducted a reasonable investigation into the availability of mitigating evidence, or

that there was a strategic reason for not presenting such evidence." See *Koon*, 619 So. 2d at 249-50.

Thus, the real issue in *Koon* as to this point did not concern the separate issue presented here and in *Puglisi*.

This fact is made clear by the discussion in *Koon* of the second issue - the claim that counsel abdicated his responsibility to exercise independent professional judgment respecting the calling of witnesses.

As to this second issue, this Court agreed that counsel does have such a responsibility. It held that *Koon's* lawyer exercised his professional judgment by acting "to prevent *Koon* from making a scene in front of the jury," which was "a reasonable response under the circumstances and did not constitute an abdication of the decision-making authority." *Koon*, 619 So. 2d at 251.

Unlike *Koon*, Appellant was always scrupulously polite with counsel and in court and there was no issue of him making a scene in front of the jury. Counsel abdicated the decision-making authority, and hence *Puglisi* controls this issue.

So far as *Koon* indicated on the surface both that a defendant may compel an attorney to waive mitigation and that an attorney has the decision-making authority as to calling witnesses, this seeming paradox is also explained by the fact that *Koon* seemed to draw a distinction between the "guilt" phase as a

sixth amendment proceeding and the "penalty" phase as an eighth amendment proceeding. That distinction has been collapsed by *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Under both *Koon* and *Puglisi*, defense counsel has the duty to determine what witnesses to call and what defense to present. See also *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983). "An appointed counsel must not be a captive counsel bound by the legal stratagems of his client." *Dickey v. McNeal*, 445 So. 2d 692, 696 (Fla. 5th DCA 1984).

X. THE COURT ERRED IN GIVING LITTLE WEIGHT TO MITIGATION FOR ARBITRARY REASONS AND REASONS CONTRARY TO LAW.

A. *Appellant's age as mitigation.*

The state's brief makes the fundamental mistake of treating the age mitigator as applying only to immature persons. The word chosen by the Legislature is not "immaturity" or "youth" or anything of the sort. The Legislature says the defendant's "age" is a mitigating circumstance. § 921.141(7)(g), Fla. Stat. ("The age of the defendant at the time of the crime."). The statute must be construed strictly in favor of the defendant.

B. *Appellant's lack of a significant criminal history.*

The state's brief (AB 81) relies on *Gonzalez v. State*, 136 So. 3d 1125 (Fla. 2014). But in that case, the state had available "a number of other convictions to disprove the mitigator."

*Id.* at 1163. At bar, the PSI showed no prior criminal history at all. R6 1144, SR12 1776.

The state's argument ignores the Legislature's intent that lack of a criminal record "be weighed favorably for a defendant in a capital case." *Mikenas v. State*, 367 So. 2d 606, 610 (Fla. 1978).

The state also says (AB 81-82) the mitigator deserves very little weight because of the nature of the crime. This is an unconstitutional argument and contrary to law.

This Court has determined that such evidence is mitigating even though it does not diminish the defendant's culpability for the crime before the court at sentencing:

Evidence indicating potential for rehabilitation, although not mitigating in the sense that it diminishes the defendant's culpability for the crime he committed, is clearly mitigating in the sense that it might serve as a basis for a sentence less than death. *Cf. Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (testimony regarding defendant's conduct while in prison would not relate specifically to culpability for the crime but would be mitigating in the sense that it might serve as basis for a sentence less than death). *See also State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (death is unique punishment in its finality and total rejection of the possibility of rehabilitation), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

*Cooper v. Dugger*, 526 So. 2d 900, 902 (Fla. 1988).

*C. Appellant was forced to leave school at an early age.*

The state's argument on this point (AB 82) is conclusory in the extreme. It gives no justification for the judge's ruling.

Notably, the state does not dispute that a discretionary ruling must be supported by "logic and justification for the result." *Canakariss v. Canakariss*, 382 So. 2d 1197, 1203 (Fla. 1980); *Nordlicht v. Discala*, 139 So. 3d 951, 953 (Fla. 4th DCA 2014). The state offers no logic or justification.

*D. Appellant's gainful employment and running a successful business.*

The state's argument (AB 82) is self-contradictory. It says the judge was not focusing on the crimes, but then says the judge was focusing on the robbery, which was part of the crime and used to support the aggravating circumstances.

The assignment of weight to mitigation is separate from the weighing of mitigation and aggravation against each other.

Mitigation must be given full effect regardless of the nature of the crime. The Supreme Court has rejected the notion underlying the state's argument and the trial court's ruling - that there must be a nexus between the mitigating evidence and the crime. In *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004), the Supreme Court wrote that any requirement of a nexus would "screen out any positive aspect of a defendant's character because good character traits are ... no[t] typically traits to

which criminal activity is 'attributable.'" *Id.* at 284-85. In *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court repeated that it had "rejected the ... 'nexus' requirement in *Tennard*." It wrote that the "nexus" test was "a test we never countenanced and now have unequivocally rejected." *Id.*

*E. Appellant's work as a Red Cross volunteer and community work.*

The state offers no logic or justification for the trial court's ruling on this point.

*F. Appellant's good behavior in jail.*

The state's brief does not dispute that good behavior in jail is important mitigating evidence under *Skipper v. South Carolina*, 476 U.S. 1 (U.S. 1986). It offers no justification at all for giving it slight weight. The state does not dispute that it is irrational to decide that good behavior in incarceration is of little consequence when the only decision for the court is whether to sentence the defendant to death or life imprisonment.

*G. Ability to adjust to prison life.*

The state's brief does not dispute that the judge erred in refusing to find this constitutional mitigator.

Further, it does not dispute that this circumstance is crucial to the decision whether to sentence someone to death or to life imprisonment.

*H. The state has not sustained its burden as to harmless error.*

The state's burden to prove harmless error is "most severe." *Holland*, 503 So. 2d at 1253. It does not meet that burden by such conclusory argument as it provides in its brief, which amounts to nothing more than a variant of a claim of overwhelming evidence. It has not shown beyond a reasonable doubt that a proper assessment of the defense mitigation would have resulted in a death sentence for a man who has been a positive and contributing member of society throughout his life.

XI. THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED.

The state does not seem to dispute that for a death sentence to be proportionate it must be both (1) the most aggravated and (2) the least mitigated category of capital offenses. *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999).

Instead, it relies on the trial court's conclusory and unreasonable assessment of the mitigating circumstances. When deciding between life imprisonment and a death sentence, the mitigation at bar weighs heavily in favor of life imprisonment for a crime completely out of character for a man who has lived his life without crime as a contributing member of society. There is no likelihood of recidivism or that Appellant will be a danger in the prison system.

The state also puts great stress on the aggravating circumstances, which are irrelevant to the question of whether this case is one of the "least mitigated of murders."

The state's argument about the trial judge's subjective individual decisions as to mitigating and aggravating circumstances moves us away from the capital sentencing decisions this Court envisioned in *Dixon v. State*, 283 So. 2d 1 (Fla. 1973):

...the discretion charged in *Furman v. Georgia, Supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

283 So. 2d at 10 (emphasis added). See also *Proffitt v. Florida*, 428 U. S. 242, 250 & 252-53 (1976).

#### XII. FLORIDA'S DEATH PENALTY LAW IS UNCONSTITUTIONAL.

The state says (AB 90-91) that *Hurst v. Florida*, 136 S. Ct. 616 (2016) does not apply because Appellant waived mitigation and the jury unanimously recommended a death sentence. Appellant waived the presentation of evidence in a form of proceeding which has been found unconstitutional. The state does not dispute that the jury was told repeatedly and unconstitutionally that its action was only a recommendation and that the sentencing decision was up to the judge. Because the proceeding was invalid, the waiver was invalid. Appellant was sentenced under an unconstitutional statute.

XIII. THE DUAL CONVICTIONS FOR ATTEMPTED MURDER AND ATTEMPTED FELONY MURDER VIOLATE DOUBLE JEOPARDY. TWO OF THE CONVICTIONS MUST BE VACATED. THEIR USE AT SENTENCING REQUIRES RESENTENCING.

The state's brief does not dispute that the dual convictions violate double jeopardy.

Instead, the state says Appellant should have raised this issue by a motion under criminal rule 3.800(b) or 3.851. AB 95.

By its own terms, Rule 3.800(b) "shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the Supreme Court." *See Lynch v. State*, 841 So. 2d 362, 375 (Fla. 2003) (defendant does not need to raise sentencing issue in capital case by rule 3.800(b) since rule does not apply to such cases).

Further, until this Court vacates the dual convictions, there is no sentencing issue. *See Johnson v. State*, 744 So. 2d 1221 (Fla. 4th DCA 1999) (reversing one of two convictions because of double jeopardy violation and remanding for resentencing as to remaining offense: "Since we are unable to conclude that appellant's sentence would have been the same had the trial court used a properly prepared scoresheet, we remand for resentencing.").

Rule 3.851 is irrelevant because it applies only after "issuance of the appellate mandate affirming the death sentence."

The state also asks this Court to substitute itself for the trial court, arguing that Appellant would have been sentenced to death even without the unconstitutional convictions being laid against him.

Reliance on an invalid aggravator - here two unconstitutional convictions - requires resentencing unless the state proves beyond a reasonable doubt that the same sentence would have been imposed without them. See *Parker v. Dugger*, 498 U.S. 308 (1991). In non-capital cases, resentencing is required unless the record "conclusively shows" that the trial court "would have imposed the same sentence using a correct scoresheet." *Brooks v. State*, 969 So. 2d 238, 241 (Fla. 2007) (emphasis in original). Use of a illegal conviction in capital sentencing violates the Due Process Clause of the state constitution and is not "merely cumulative"; it requires resentencing. *Burr v. State*, 576 So. 2d 278, 281 (Fla. 1991); Art I, § 9, Fla. Const.

CONCLUSION

The conviction and sentence should be reversed, or the Court should grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 5 July 2016 a copy hereof has been electronically filed with this Court, and an electronic copy was furnished to Leslie T. Campbell, Esq., Assistant Attorney General, Counsel for Appellee, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida, 33401 by email to: CapApp@MyFloridaLegal.com.

/s/ Gary Lee Caldwell  
Attorney for Appellant

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

/s/ Gary Lee Caldwell  
Attorney for Appellant