IN THE SUPREME COURT OF FLORIDA

CASE NO. 02-39

CHARLES GLOBE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

STEVEN L. SELIGER
Florida Bar No. 244597
GARCIA & SELIGER
16 North Adams Street
Quincy, FL 32351
(850) 875-4668
(850) 875-2310 FAX
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

ARGUMENT IN REPLY

ARGUMENT I

MR. GLOBE WAS CONVICTED OF PREMEDITATED FIRST-DEGREE MURDER AND SENTENCED TO DEATH ON THE BASIS OF ILLEGALLY AND UNCONSTITUTIONALLY OBTAINED STATEMENTS.

The State first argues, "A trial court's ruling on a motion to suppress is presumed correct" (Answer Brief at 19 (hereinafter AB), quoting Chavez v. State, 832 So. 2d 730, 751 (Fla. 2002)). The State's reliance upon this standard of review is misplaced. While Chavez contains this statement, the case also says, "In reviewing the denial of [a] motion to suppress, this Court defers to the trial court on questions of historical fact, but conducts a de novo review of the constitutional issue." Chavez,

832 So. 2d at 748-49, citing Connor v. State, 803 So. 2d 598 (Fla. 2001). In Connor, the Court receded from the "presumed correct" standard of review and adopted the *de novo* standard for reviewing suppression issues: "[A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues." 803 So. 2d at 608.[1]

A. THE JULY 3, 2000, STATEMENT WAS OBTAINED IN VIOLATION OF MR. GLOBE'S RIGHT TO REMAIN SILENT.[2]

In arguing that Mr. Globe's right to remain silent was not violated, the State relies solely on the passage of time between Agent Gootee's ceasing his attempt to interview Mr. Globe and Agent Ugliano's interrogation of Mr. Globe (AB at 20, 23). The simple passage of time, however, does not meet the State's burden of showing that Mr. Globe's July 3 statement was admissible.[3]

---

[1]In Mr. Globe's case, the trial court ruled only that Mr. Globe's motion to suppress was "DENIED. Upon a finding that the statements were made freely, voluntarily, and knowingly after full and complete advisal and waiver of Miranda rights" (R11. 2100).

[2]As the State points out, Mr. Globe's Initial Brief erroneously refers to the July 3 statement as the September 3 statement. The statement occurred on July 3.

[3]In a footnote, the State argues that Mr. Globe "failed to establish at what time Special Agent Gootee attempted to interview him" (AB at 20 n.7). Mr. Globe

Under Miranda v. Arizona, 384 U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96, 104 (1975), law enforcement must "scrupulously honor" a criminal suspect's exercise of the right to remain silent.[4] Determining whether a criminal suspect's "right to cut off questioning" has been "scrupulously honored" requires a "review of the circumstances leading to" the confession. Mosley, 423 U.S. at 104. In Mosley, the Court found that the suspect's right to silence was "scrupulously honored" based upon the following circumstances:

> A review of the circumstances leading to Mosley's confession reveals that his "right to cut off questioning" was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the Miranda warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete Miranda warnings at the outset of the second interrogation. He was thus reminded

---

was not required to establish this because the State has the burden of showing that a statement is admissible. Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999).

[4]The State criticizes Mr. Globe's citation to Edwards v. Arizona, 451 U.S. 477 (1981), and devotes much of its argument on this issue to Edwards (AB at 19-21). Florida courts have applied the Edwards rule to cases involving the invocation of the right to silence. See Zerquera v. State, 549 So. 2d 189, 192 (Fla. 1989); Moore v. State, 798 So. 2d 50, 52 (Fla. 1st DCA 2001). Regardless of Edwards, however, Mr. Globe's argument in this issue is based upon Miranda and Mosley.

> again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options. The subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. Although it is not clear from the record how much Detective Hill knew about the earlier interrogation, his questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies.

Mosley, 423 U.S. at 104-05.

A "review of the circumstances" establishes that Mr. Globe's "right to cut off questioning" was not "scrupulously honored." Mosley, 423 U.S. at 104. The many circumstances which indicated that Mosley's right to silence was "scrupulously honored" are not present in Mr. Globe's case. The State does not dispute or even discuss these circumstances, relying only upon the passage of time.

The State does not dispute that although agent Gootee told agent Ugliano that Mr. Globe had elected to remain silent, agent Ugliano had Mr. Globe brought to the administration building for the express purpose of eliciting statements from Mr. Globe (R25. 481). Earlier, Mr. Globe had been shackled and placed in an isolation cell in another building; he had no choice about coming to the administration building.

The State does not dispute that agent Ugliano deliberately brought Mr. Globe

into contact with the emotional Mr. Busby, intending to place them in a room together (R25. 481). Busby had just spoken to his father on the telephone and was emotionally upset after that conversation (R25. 477).

The State does not dispute that agent Ugliano initiated an interrogation of Mr. Globe by asking him, "You are willing to make a statement?" The State does not dispute that Ugliano "probably" told Mr. Globe "[y]ou really need to take the load off Andy" (R25. 482-83).

The State does not dispute that during the July 3 statement, the officers never discussed Mr. Globe's previous invocation of his right to silence with him and therefore never indicated to him that they would honor any invocation of rights. The State does not dispute that the agents' administration of Miranda rights at the beginning of the July 3 statement was *pro forma* and was addressed to Mr. Globe and Busby jointly (R26. 630). The agents did not ask Mr. Globe individually if he waived his rights and did not have him sign a written waiver (R26. 630).

These facts, which the State does not dispute, show that the circumstances preceding Mr. Globe's July 3 statement included:

* After agent Gootee's attempt to interview him, Mr. Globe was shackled and placed in an isolation cell in another building.

* Mr. Globe was then brought back to the administration building by agent Ugliano for the express purpose of eliciting statements.

* Mr. Globe was placed in contact with his partner, Busby, who was extremely emotional and upset after talking to his father.

* Agent Ugliano began an interrogation of Mr. Globe, asking him, "You are willing to make a statement?" and "probably" telling him, "[y]ou really need to take the load off Andy [Busbee]."

* The agents did not discuss Mr. Globe's previous invocation of his right to silence with him.

* The agents administered Miranda warnings jointly to Mr. Globe and Busby.

* The agents did not ask Mr. Globe whether he understood each right.

* The agents did not ask Mr. Globe individually whether he waived his rights.

* The agents did not secure a written waiver from Mr. Globe.

The totality of the circumstances establishes that Mr. Globe's invocation of his right to silence was not "scrupulously honored."

B. THE JULY 7, 2000, STATEMENT WAS THE FRUIT OF THE ILLEGALLY OBTAINED JULY 3, 2000, STATEMENT.[5]

The State argues only that the July 7 statement was not inadmissible as the poisonous fruit of the July 3 statement because the July 3 statement was not taken in violation of Mr. Globe's right to silence (AB at 26). As to the illegality of the July 3

[5]As the State points out, Mr. Globe's Initial Brief incorrectly referred to the July 3 and July 7 statements as occurring in September. The statements at issue occurred on July 3 and July 7.

statement, Mr. Globe relies upon the discussion above and in his Initial Brief. As to whether the July 3 statement tainted the July 7 statement, Mr. Globe relies upon his Initial Brief.

C. THE JULY 7, 2000, STATEMENT WAS NOT MADE VOLUNTARILY, INTELLIGENTLY OR KNOWINGLY.

The State asserts that Mr. Globe "waived" his Miranda rights at the July 7 statement (AB at 25, citing R25. 488; R26. 656). The State's citations are to detective Schenck's testimony and not to the tape recording. Detective Schenck did not describe how Mr. Globe waived his rights. The transcript of the tape recording shows that when the detectives asked Mr. Globe if he would like to make a statement, Mr. Globe's response was "[i]naudible," and then the detectives proceeded with questioning him (R26. 659).

The State properly recognizes that the determination of whether a statement was made voluntarily, intelligently and knowingly requires an examination of "the totality of the circumstances" and that the State has a "heavy burden" to establish by the "preponderance of the evidence" that a waiver of Fifth Amendment rights was voluntary, knowing and intelligent (AB at 26-27). See Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999). However, the State then fails to shoulder this burden, conducting no analysis of "the totality of the circumstances."

Rather than analyze the totality of the circumstances, the State argues that law enforcement is not required to determine that a suspect being read his Miranda rights understands each right individually (AB at 27). The State also argues that a waiver need not be explicit (AB at 27-28).

The State fails to recognize that these facts are part of "the totality of the circumstances" establishing that Mr. Globe's supposed waiver was not voluntary, intelligent and knowing. In Ramirez, this Court found a Miranda waiver invalid where the circumstances leading to the confession included that the Miranda warnings "were administered orally," that there was "no careful and thorough" administration of Miranda warnings, and that "the waiver of the rights was not in writing." 739 So. 2d at 578.

The State then argues, "Review of the record further reflects that Appellant's decision to speak to Inspector Schenck and Agent Ugliano on July 7th was a deliberate choice and with knowledge of the rights being given up and the consequences thereof" (AB at 28). The State does not present any specifics from the record which support this contention, but argues that some of the circumstances which Mr. Globe's Initial Brief discussed "do[] not somehow render the valid waiver involuntary" (AB at 28). Again, the State does not analyze "the totality of the circumstances."

D. THE JULY 7, 2000, STATEMENT WAS TAKEN IN VIOLATION OF RULE 3.130, FLA. R. CRIM. P., AND IN VIOLATION OF MR. GLOBE'S RIGHT TO COUNSEL.

Mr. Globe relies upon his Initial Brief.

E. ADMISSION OF MR. GLOBE'S STATEMENTS WAS NOT HARMLESS.

The State argues that admission of the July 3 and July 7 statements was harmless because other evidence "implicated [Mr. Globe] in the murder" (AB at 31-32). The State has not met its burden of showing beyond a reasonable doubt that the July 3 and July 7 statements did not "contribute to" the outcome of the guilt/innocence or penalty phases. Arizona v. Fulminante, 499 U.S. 279, 296 (1991); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

Rather than applying this standard, the State's argument constitutes a sufficiency-of-the-evidence or correct result test, both of which are improper. DiGuilio, 491 So. 2d at 1139. The United States Supreme Court has explained that harmless error inquiry must consider "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Thus, a harmless error inquiry looks "to the basis on which 'the jury *actually rested* its verdict.'" Id., quoting Yates v. Evatt, 500 U.S. 391, 404 (1991) (emphasis

in original). The Court has emphasized that the harmless error question "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan, 508 U.S. at 279 (emphasis in original).

Mr. Globe's Initial Brief describes the impact of the July 3 and July 7 statements, which contained numerous details of the murder which the State's other evidence could not provide. The State's Answer Brief does not address this discussion and makes no attempt to show that the details in the July 3 and July 7 statements "did not contribute to" Mr. Globe's conviction and death sentence. Indeed, the Statement Of The Case And Of The Facts section of the Answer Brief includes an entire page of facts whose only source is the July 3 and July 7 statements (AB at 3-4). As indicated by the Answer Brief itself, the facts from these statements were clearly significant and clearly "contributed" to Mr. Globe's conviction and death sentence.

ARGUMENT II

THE ADMISSION OF CODEFENDANT BUSBY'S STATEMENTS VIOLATED MR. GLOBE'S CONFRONTATION RIGHTS AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

The State first argues that codefendant Busby's statements in the July 3 joint

interview of Mr. Globe and Busby were properly admitted based upon Florida's "adoptive admissions" hearsay exception (AB at 34-37). The State then contends that no Confrontation Clause violation occurred because the "adoptive admissions" hearsay exception is "firmly established" (AB at 37-38).

First, the State did not make the state law "adoptive admissions" argument in the trial court (See R25. 511-16). This argument is therefore not preserved for appeal.

Second, the State's argument fails to recognize that state evidentiary rules must yield to constitutional imperatives. See Washington v. Texas, 388 U.S. 14, 19-23 (1967). Evidentiary rules must serve the interest of fairness and reliability. Crane v. Kentucky, 476 U.S. 683, 690 (1986).

Here, the evidentiary rule upon which the State relies serves neither fairness nor reliability, especially in light of the fact that the tape recording does not identify who is speaking. The State points to no express statements by Mr. Globe indicating adoption. The State admits that the tape does not identify the speakers, but argues that this fact does not matter: "[W]hile it is not apparent from the transcription who described how the murder was committed, Globe himself could have given the statements" (AB at 36). Deciding a constitutional question on the basis of who "could have given the statements" does not serve fairness and reliability. The presumptive unreliability of a codefendant's confession, Ohio v. Roberts, 448 U.S. 56, 66 (1980),

is overcome only if the confession bears sufficient "indicia of reliability." Lee v. Illinois, 476 U.S. 530, 543 (1986). Where, as here, the identity of the speakers are not known, there are no such indicia.

ARGUMENT III

MR. GLOBE'S JURY WAS MISLED BY COMMENTS AND PENALTY PHASE INSTRUCTIONS WHICH VIOLATED CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), AND RING V. ARIZONA, 122 S.CT. 2428 (2002).

The State first argues that Mr. Globe's Sixth Amendment claim that instructions informing the jury their penalty phase decision was "advisory" or a "recommendation" violated Ring v. Arizona, 122 S. Ct. 2428 (2002), is procedurally barred (AB at 41-42). The State cites McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001), and Barnes v. State, 794 So. 2d 590, 591 (Fla. 2001), in support of this argument. However, the State fails to recognize that McGregor and Barnes are not capital cases. In capital cases, this Court has consistently addressed the merits of claims under Ring or Apprendi v. New Jersey, 530 U.S. 466 (2000), without mentioning whether or not the claim was raised in the trial court. This is true whether the claim was presented on direct appeal[6], in post-conviction,[7] or even in a motion for rehearing[8] or notice of

[6]See Lawrence v. State, 2003 WL 1339010 at *8 (Fla. Mar. 20, 2003); Lugo v. State, 2003 WL 359291 at *28 n.79 (Fla. Feb. 20, 2003); Kormondy v. State,

supplemental authority.[9] Mr. Globe's claim is before the Court on the merits.

As to the merits of Mr. Globe's Sixth Amendment claim, the State argues that Mr. Globe is attempting "to create a constitutional right beyond that enumerated in Ring" (AB at 42). The State misunderstands Mr. Globe's claim. The State recognizes that Ring held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" (AB at 42, quoting Ring, 122 S. Ct. at 2432). The State fails to understand that there can be no "jury determination" of a fact when the jury is told that its decision is only

---

2003 WL 297027 at *10 (Fla. Feb. 13, 2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Cox v. State, 819 So. 2d 705, 724-25 (Fla. 2002); Hurst v. State, 819 So. 2d 689, 702-03 (Fla. 2002).

[7]See Jones v. State, 2003 WL 21025816 at *5 (Fla. May 8, 2003); Chandler v. State, 2003 WL 1883682 at n.4 (Fla. Apr. 17, 2003); Banks v. State, 2003 WL 1339041 at *4 (Fla. Mar. 20, 2003); Jones v. State, 2003 WL 297074 at *9 (Fla. Feb. 13, 2003); Spencer v. State, 842 So. 2d 52, 72 (Fla. 2003); Lucas v. State, 841 So. 2d 380, 389 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122, 1136 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Sireci v. Moore, 825 So. 2d 882, 888 (Fla. 2002); Mills v. Moore, 786 So. 2d 532 (Fla. 2001).

[8]See Butler v. State, 2003 WL 1786712 (Fla. Apr. 3, 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002).

[9]See Marquard v. State, 2002 WL 31600017 at *10 n.12 (Fla. Nov. 21, 2002).

"advisory" or a "recommendation." Although Justices Lewis and Pariente have recognized this, see Bottoson v. Moore, 833 So.2d 693, 731-33 (Fla. 2002) (Lewis, J., concurring in result); Id. at 723 (Pariente, J., concurring in result), the State does not address their views.

The State also argues, "any contention that the jury did not find an aggravating circumstance before recommending that death be imposed ignores the language and operation of Florida's penalty phase jury instructions" (AB at 42-43). Again, the State misunderstands Mr. Globe's argument, which is that a jury told that its function is merely "advisory" or a "recommendation" is not a Sixth Amendment jury. Moreover, Mr. Globe's jury recommended death by a vote of 9 to 3 (R11. 2159). Thus, it is possible that three jurors did not find an aggravating circumstance or did not find the aggravating circumstances were sufficient to support a death sentence.

The State separates out Mr. Globe's contention under Caldwell v. Mississippi, 472 U.S. 320 (1985), from Ring, relying upon this Court's decisions holding that Florida's capital penalty phase instructions comply with Caldwell and arguing that it is proper to instruct a Florida jury that its role is advisory (AB at 43-44). However, Ring has established that the precedent upon which the State relies is no longer valid. See Bottoson v. Moore, 833 So.2d 693, 731-33 (Fla. 2002) (Lewis, J., concurring in result); Id. at 723 (Pariente, J., concurring in result).

ARGUMENT IV

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. GLOBE OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

The State first argues that Mr. Globe's claim is procedurally barred because Mr. Globe did not raise a claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), in the trial court (AB at 45-47). Again, to support this argument, the State cites McGregor and Barnes (AB at 46-47), which are not capital cases. As Mr. Globe contends in Argument III above, this Court has consistently ruled on the merits of Ring and Apprendi claims in capital cases, and Mr. Globe's claim is before the Court on the merits. See Argument III and nn. 6, 7, 8 & 9, supra.

The State argues that Ring did not overrule other United States Supreme Court cases upholding Florida's capital sentencing process (AB at 47). Mr. Globe recognizes that this Court's plurality opinions in King v. Moore, 831 So. 2d 143 (Fla. 2002), and Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), said as much. However, Ring overruled Walton v. Arizona, 497 U.S. 639 (1990). Ring, 122 S. Ct. at 2443. In overruling Walton, Ring necessarily also overruled Hildwin v. Florida, 490 U.S. 638 (1989), and its precursors upholding Florida's capital sentencing procedure. The Walton decision had treated these Florida precedents as controlling and had regarded

the Florida and Arizona capital sentencing procedures as indistinguishable. Walton, 497 U.S. at 647-48. Ring also recognized the unbreakable link between Walton and Hildwin. Ring, 122 S. Ct. at 2437-38.

The State argues that Mr. Globe is not entitled to relief under Ring because "the jury did make the finding of at least one aggravating circumstance" (AB at 47). First, Mr. Globe's jury recommended death by a vote of 9 to 3 (R11. 2159). Thus, it is possible that three jurors did not find an aggravating circumstance or did not find the aggravating circumstances were sufficient to support a death sentence. Second, the Florida capital sentencing statute requires more than the finding of one aggravating circumstance in order for a defendant to be eligible for a death sentence. The statute also requires that "sufficient aggravating circumstances exist" to allow consideration of a death sentence and that mitigating circumstances sufficient to outweigh the aggravating circumstances do not exist. Sec. 921.141(3), Fla. Stat. The jury did not make these findings.

The State argues that Mr. Globe is wrong to rely upon Ring to argue that a Florida penalty phase jury's vote must be unanimous (AB at 48). Mr. Globe's argument is that the combination of Ring and Florida law establishes this unanimity requirement, as members of this Court have recognized. See Bottoson v. Moore, 2002 WL 31386790 at *18, 19 (Fla. 2002) (Shaw, J., concurring in result only); Butler

v. State, 2003 WL 1786712 at *15 (Fla. 2003) (Pariente, J., dissenting as to sentence).

The State argues that Mr. Globe is mistaken to rely upon Ring to argue that aggravating factors must be charged in the indictment (AB at 48). Again, Mr. Globe's claim does not rest solely upon Ring, but upon how Ring affects the application of Florida law and United States Supreme Court cases such as Jones v. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000), to capital cases. The State does not address these arguments.

The State argues that Ring did not address Mr. Globe's argument that the penalty phase jury instructions shifted the burden of proof to Mr. Globe (AB at 49). Again, the State misses the point. Ring has cast a new light on this Court's prior decisions rejecting this claim.

The State's last argument is that Mr. Globe is not entitled to relief under Ring because he has a prior violent felony conviction (AB at 49). Mr. Globe recognizes that this Court has accepted this argument in several cases. However, Mr. Globe submits that this position is incorrect, as is explained in Mr. Globe's Initial Brief.

ARGUMENT V

THE TRIAL COURT'S SENTENCING ORDER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State first argues that this claim is procedurally barred because it was not

raised in the trial court (AB at 51). In support of this argument, the State cites Ray v. State, 755 So. 2d 604, 611 (Fla. 2000), and Johnson v. Singletary, 695 So. 2d 263, 266 (Fla. 1996). These cases are inapposite. Ray involved an alleged error under Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993), to which the defendant did not object. Johnson was a post-conviction case in which the Court said that an issue regarding deficiencies in the sentencing order should have been raised in earlier proceedings.

Neither of these cases holds that a defendant must object to the contents of the sentencing order before raising issues regarding the order on appeal. Nor does the State cite any cases which contain such a requirement. Mr. Globe's counsel has been unable to discover any such cases. This makes perfect sense because issuance of the sentencing order is generally the last proceeding in a capital trial, and there is no opportunity to raise objections to it. This Court has always addressed sentencing order issues without requiring a contemporaneous objection and should do so here.

The State evinces a fundamental misunderstanding of the merits of Mr. Globe's claim, characterizing it as an attack on the weight the trial judge assigned to aggravating and mitigating factors. Rather, Mr. Globe's argument is that the trial court considered impermissible nonstatutory aggravation and improperly discounted mental health mitigation because Mr. Globe was sane. Most of the State's arguments do not

address these issues.

The State attempts to address the issue regarding mitigation, arguing:

> Appellant apparently believes that in determining the *weight* to apply to mental health nonstatutory mitigating circumstances, the trial court cannot properly consider whether Globe knew the difference between right and wrong, understood the nature and consequences of his behavior, understood the criminality of his conduct, or had the capacity to conform his conduct to the requirements of the law.

(AB at 69) (emphasis in original). This is precisely what Mr. Globe is arguing, and the argument is based upon cases such as State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cited in Mr. Globe's Initial Brief. The State argues that Dixon does not say that a defendant's sanity may not be used to disallow mental health mitigation because this Court has said, "[t]he finding of sanity, however, does not eliminate *consideration* of the statutory mitigating factors concerning mental condition" (AB at 69-70, quoting Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (emphasis added by AB)). However, this statement from Campbell supports Mr. Globe's argument because it establishes that mental health mitigation must be considered even when the defendant is sane.

REMAINING ARGUMENTS

As to his remaining arguments, Mr. Globe relies upon his Initial Brief, with one exception. In Argument VIII, the State argues that this sentencing order claim is

procedurally barred, citing the same cases cited in the procedural bar contention as to Argument V (AB at 84). The State's argument is incorrect, as explained above in Argument V.

CONCLUSION

Based upon the foregoing, the record and the arguments presented in his Initial Brief, Mr. Globe respectfully urges the Court to order a new trial and a new penalty phase.

STEVEN L. SELIGER
Florida Bar No. 244597
GARCIA & SELIGER
16 North Adams Street
Quincy, FL 32351
(850) 875-4668
(850) 875-2310 FAX
COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was typed using Times New Roman, 14 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this ____ day of June, 2003, to **Cassandra K. Dolgin**, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399.

STEVEN SELIGER