IN THE SUPREME COURT OF FLORIDA

DANIEL ELY PEREZ,)
)
Appellant,)
)
vs.) CASE NO. SC03-1651
)
STATE OF FLORIDA,)
)
Appellee.)
)
_________________________)

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Daniel Ely Perez appeals his conviction and death sentence for murder in the death of Susan Martin and convictions and sentences for armed burglary and robbery arising from the same incident.

The indictment charged appellant and Calvin Green with Martin's murder, burglary with assault or while armed (Count 2), and armed robbery (Count 3). I 4. Their cases were severed before trial. Appellant's jury found him guilty of felony murder, armed burglary with assault, and armed robbery. VIII 1202-03. The Court imposed a death sentence for the murder and life sentences for the other two offenses. IX 1468-75.

The jury made no finding as to whether appellant committed the crimes personally or vicariously by participation with Green. Their respective roles in the case were in dispute below and ultimately never resolved by the jury or the court.

An officer found Ms. Martin's body on the evening of August 29, 2001 in her Port St. Lucie home after a friend had tried to contact her. XVIII 875-77. A blunt force injury to the face had apparently caused a concussion, although there was no visible damage to the brain and no skull fracture. XXIV 1632-33. She would probably have survived the blow. Id. There were also a few bruises at the front of her forehead. Id. In addition there were numerous stab wounds. There were eight stab

wounds to the left side of the neck which penetrated about an inch into the body, four of which struck the jugular vein and would have been fatal. XXIV 1641. There were some scratches on the right base of the neck. Id. There were 24 stab wounds to the right torso approximately the same width and depth as those to the neck, about half-an-inch to one and-a-half inches in depth and they were about half-an-inch in length each. XXIV 1642-43. On the right side several of them went into the liver and right lung, resulting in hemorrhage of about 400 milliliters of blood into the lung, indicating that she was alive when stabbed on the right side. Id. These injuries would also have been fatal. Id. There were twenty stab wounds on the left side of the body, twenty-four in the middle to lower back, and eighteen to the abdomen. XXIV 1645-46. In all, there were 94 stab wounds, and a minor wound to the hand. XXIV 1646-47. The pathologist characterized this as a defensive wound, consistent with trying to ward off an attack. XXIV 1650.

The medical examiner testified that blood on the right side and the neck was very consistent with those wounds occurring first and the others occurring afterwards, but added: "Of course, often times things occur so quickly that you can get other wounds first, but looking at where the blood is one would say I favor the neck wounds and the ones on the right side as occurring first because of the absence of [or] little blood in

the other wounds." XXIV 1648.

The stab wounds to the neck would cause loss of consciousness within seconds to a minute or two, and brain death would occur quickly thereafter. XXIV 1649. The wounds to the liver or lung would also have been fatal within ten or fifteen minutes. Id.

The side door leading into the garage was somewhat open, and the window screen was cut, with one piece at the base of the door and the other in shrubs near the door, and the door's glass window was on some boxes inside the garage. XIX 970. The house had been ransacked. XIX 973.

Near the body was a bloody shoeprint on a newspaper. XIX 997, 1002. Treatment of the floor of the house with chemical agents revealed latent shoeprints not visible to the naked eye. XIX 1007-1008. An officer apparently left one of these latent shoeprints when the body was moved. XXI 1146, 1149.

Around 1 a.m. on August 28, Martin had called BellSouth on her cell phone to report that her house phone was not working. XXVIII 906. A telephone company employee said Martin ended the conversation by saying in a low tone, "I have to go." XXIX 926. She said Martin sounded "Not too scared but scared." XXIX 928. It was later found that the phone line had been cut. XXIX 945.

An amethyst ring and other items were stolen from Martin's home in July 2001, and she told the police that she suspected

appellant, who was married to her niece. XVIII 889-90. Rani Beasley, a deputy who was worked also a jeweler, testified that Martin came into her jewelry store often, bought jewelry, asked her to design jewelry for her, and they became friends, and Martin would help out at her store, so that Beasley was very familiar with Martin's jewelry. XXI 1207. After the murder, Beasley located an amethyst ring and a black earring belonging to Martin at "A Quality Pawn" in Stuart. XXI 1208.[1] The pawnbroker testified that appellant brought these items in at the end of August 2001. XXI 1233-34. When told in July that Martin suspected that he had stolen the items, appellant suggested that a man who had been living with Martin at the time may have committed the theft. XVIII 890-91. He also said that the man may have stolen a Picasso painting from Martin. XVIII 891. Martin owned a Picasso ceramic plate, rather than a Picasso painting, and the plate, which was not taken in the July burglary or in the burglary during which Martin was killed, was found in Martin's house on September 6. XVIII 939, XXIII 1524.

The police questioned appellant on April 29 and 31, 2001, and then there was an interrogation throughout the night of September 5-6, with some breaks. The police made video and audio tapes of these interrogations, and an abridged version of

[1] The state's theory was that both the amethyst ring and the earrings were stolen in July. XVIII 857-58 (opening statement of prosecutor).

the tapes was introduced into evidence and played for the jury. Det. Michael Beath testified that the edited tape fairly represented the relevant conversations about the murder investigation. XXII 1279.

On the tapes, appellant initially denied stealing anything, but acknowledged that Martin had said that he and his wife had stolen the ring in July. XXII 1311-13.[2] He later said he stole a pill bottle from Martin's house, and the ring may have been in the bottle. XXII 1326-27. When the police accused him of the murder, he said that Gary Reed, known as "Man Man", wanted to steal Martin's car with Reed's cousin, co-defendant Calvin Green. XXII 1332-33. Reed and Calvin went to steal the car, and Reed returned and gave appellant a can of coins. XXII 1333-34. Reed had told appellant that he could get ten thousand dollars from a chop shop, and would "break you off" if he showed him or told him how to get to Martin's house. XXII 1336. Appellant would get a quarter of the proceeds. XXII 1337. Appellant said he only gave them directions to the house, XXII 1339, but then said[3] that he led them there in his car. XXII

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[2] All of the statements set out here occurred during the September 5-6 interrogations. Beath gave Miranda warnings at XXII 1314-15. Appellant was told that he was not free to leave on a part of the taped interrogation that was not played for the jury, SR1 164-65, at a time that corresponds to the gap at XXII 1328. This gap covers from SR1 161 through SR2 180.

[3] The change seems sudden on the tape as played for the jury, but that tape excluded 16 pages of interrogation covered on the complete transcript of the interrogation. SR3 307-23.

1341. When they passed Martin's house, her lights were on. XXII 1344-45. Appellant parked and waited for them to steal Martin's Tahoe, but when they did not signal him with the Tahoe's lights, he drove back around to the house and saw the Tahoe in the driveway, the house door wide open, and Reed and Calvin running out of the door. XXII 1341-42. Calvin had blood all over him, and appellant took off, and one of them brought him the coins the next day. XXII 1342. When appellant drove up, Calvin "was sitting on top of her with a fucking switch-blade". XXII 1345-46. He was punching her in the head, there was blood all over the place. XXII 1346. Calvin was on top of her as she lay on her back, and had a six-inch long switchblade. XXII 1348. He hit her with a brown stick with a gold tip. Id. Appellant hit Calvin and then took off. XXII 1351. He said that this was why his shoeprints were in the house; he put his shoes in a dumpster, and bought new shoes at Wal-Mart. XXII 1351-53. Calvin was "some kind of stabbing machine" and Martin "didn't make a noise. She didn't move. She didn't do shit. She was just gone." XXII 1355.

The police asked appellant to go through the entire sequence of events from A to Z. XXII 1357. He said he told the other two where the house was, but they then wanted him to show them where it was. XXII 1358. They drove there and parked and appellant waited for them to steal the car. XXII 1358-59. The

other two "wore do-rags, so they had to have gloves". XXII 1359. After waiting for ten to fifteen minutes, appellant came around the corner, found the door wide open and the lights on in the doorway, and saw Calvin on top of her. XXII 1360. Appellant grabbed him by the shoulders and shook him a couple of times. XXII 1360-61. Then appellant was in his car driving, and "they had me toss the knife." XXII 1361. They went to Cumberland Farms, where Calvin got rid of his bloody shirt in some woods. XXII 1362. The next day they gave appellant the coins. Id. The stick Calvin hit her with had a duck head. XXII 1365.[4]

Appellant's memories of the incident were in disjointed flashes, like a strobe light. XXII 1365, 1367-68. After shaking Calvin, appellant ran into the hallway looking for Reed. XXII 1368. In the bedroom, there were "clothes, boxes, and all kind of shit just spread all over the damn place." XXII 1369. Calvin had a bag with leaves on it, entered the bedroom, and began ransacking the place. Id. Appellant backed out towards the door; a jar hit the floor and appellant stopped near the body. XXII 1369-70. He went into the bathroom, then out the front door with blood on his shoes. XXII 1370-73. He went straight to his car, and the other two ran from the house with a bag and something else. XXII 1373. At Cumberland Farms, the

[4] A brass duck head handle was found near a double sink in Martin's house. XIX 997-98.

brown bag had blood on it; appellant grabbed it, let it go, jumped in his car and left. XXII 1375.

Asked how they had gotten in the house, appellant said one of them told him he had unscrewed an exterior light, tried to get in through a window which would not break, then went in through another window and let the other one in through the front door. XXII 1376. When appellant asked why they had gone into the house, "He said because homeboy couldn't figure out how to get the damn Tahoe unlocked." XXII 1377. When they left, Calvin got in appellant's car, and appellant did not know what happened to Man Man. XXII 1388.

Appellant said he did not see Man Man in the house. XXII 1391, 1395. In all, appellant was in the house about four minutes and Calvin was inside for 20 minutes or more. XXII 1392. Calvin said he got into the garage, made a noise, and Martin opened the door and started screaming. XXII 1398. Appellant did not hear the screaming because he was listening to music in his car. XXII 1400.

The police told appellant that investigators had found the Tahoe unlocked. XXIII 1403. Appellant asked Det. Beath to promise that his wife and kids would not be hurt by Man Man. XXIII 1409. Beath replied: "Okay." Id. Appellant said he was afraid of Man Man, and repeated his request, and Beath said: "Go ahead with your statement. Go ahead. I'm gonna' do - I'm

gonna' do just like you said." XXIII 1411. Appellant again said, "But please, tell me." and Beath replied: "I'm telling you. Okay? I'm going to do everything I possibly can to take care of that request that you just made. Okay? All right? I promise you that." XXIII 1411.

Appellant then said he and Calvin drove to Martin's house, and appellant parked and waited for Calvin to steal the Tahoe. XXIII 1411. Instead, as Calvin told appellant later, Calvin noticed that the car was locked and tried to get into the house through a window. XXIII 1411-12. As Calvin tried to go in a door, Martin came into the garage and screamed. XXIII 1412. Calvin jumped at her, put her to the ground and murdered her. XXIII 1412-13. Meanwhile, because the Tahoe had not moved, appellant ran through the woods into the yard and saw the window and saw the door open and went inside. XXIII 1413. Calvin "had her on the ground and he was just jugging the shit out of her." XXIII 1414. "She wasn't moving. She was just gargling, like, like, there was a gargling sound." Id. Appellant flipped out, and he and Calvin went running through the house, and Calvin started throwing stuff around and filling his bag. Id. Appellant followed Calvin around as Calvin ransacked the house. XXIII 1415. Calvin found the key in a sheath and gave it to appellant, who threw it down. XXIII 1416. Calvin ran out to the Tahoe, and turned the ignition but then ran back and

followed appellant, who was running back to his own car. XXIII 1416-17.

Calvin had white or gray socks on his hands, XXIII 1421, 1423-24, and appellant took off his own white anklet socks and put them on his hands when he went inside. XXIII 1421-22. Calvin left the first pair in the house, and picked up another pair of socks in the house. XXIII 1423.[5]

Man Man was not at the house, but "hooked us up together." XXIII 1429. He told appellant to show Calvin where the Tahoe was, and they were to contact him afterward. Id. Man Man did the planning. XXIII 1429-30. Appellant had not known Calvin before. XXIII 1431. After stabbing Martin, Calvin came back and stabbed her some more times. XXIII 1433-34. After going to Cumberland Farms, where Calvin disposed of his shirt, they drove to Stuart where appellant told Calvin to take his stuff and go. XXIII 1436-37. There was the bag, a phone, a radio, and a big can of coins. XXIII 1437. Appellant did not want any of it. Id. Calvin later sent some diamonds to his girlfriend in Atlanta. XXIII 1438.

Det. Kelso asked appellant to go through it again, which appellant did. XXIII 1440-59. He said Calvin threw the knife out as they went over a bridge. XXIII 1450.

On further interrogation, appellant again went through the

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[5] Officers found a gray sock in the hallway and a white sock near Martin's head. XIX 1002.

murder, saying he understood he could go to jail for burglary or dealing in stolen property, but he had not stabbed Martin. XXIII 1461. He said they knew Martin was home because they saw the lights on. XXIII 1465. Calvin cut the phone line with a switchblade. XXIII 1466. Appellant stopped and put on his socks before going through the door; he wore off-brand shoes from Payless that "looked like white Nikes" and were very old. XXIII 1468. He could see Martin from the back yard and saw Calvin go in the door. XXIII 1469. When appellant went in, Martin was on the floor, not moving. Id. He saw the duck thing and Calvin with the knife. XXIII 1469-70. Calvin said, "She bucked on me. She started screaming. She fucking bucked on me. She bucked on me. She didn't have to buck on me." XXIII 1470. As appellant came into the house, he heard "no screaming or none of that shit. ... . It was more of - it was more of (sound effect) like, boom, boom, like - like if you were to get up and go like this on the wall." XXIII 1478.

On the afternoon of September 6, appellant drove around with officers to various places related to the case. A tape of this part of the interrogation was played for the jury. They went to a place on A1A where appellant threw a bag over a gate. XXIII 1484. They then went to appellant's place of employment, All County Moving, where he led them to the Tahoe key, a watch and a pen. XXIII 1485. They also went to a dumpster where he said

he had thrown his shoes, XXIII 1490, but his shoes were not found.

Det. Beath went to a mall with a photo of the shoeprint from the murder scene, and found a pair with soles that he considered similar in a Foot Action store. XXIV 1568-70. He then sent Dale Burns, appellant's father-in-law, to the same store with instructions to see if he could find any shoes similar to appellant's and that, if he was one hundred percent sure, he was to come out and point them out to Beath, which he did. XXIV 1571, XXV 1677-78. Two other family members were unable to locate shoes similar to appellant's at the store. XXIV 1577-78. A criminologist testified that he compared photographs of the shoeprint in the blood with these shoes and "was able to tell that they were of the same pattern and the same size of pattern based on what I could see in the photographs", adding: "When I say size it's physical size of the pattern, not the footwear or the foot size that somebody would purchase." XXV 1682. The individual characteristics of the bloody shoeprint were insufficient "to make a positive I.D. to any shoe even if you had the exact shoe." XXV 1683.[6]

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[6] The state introduced into evidence a pair of shoes taken from Calvin Green after his arrest. There was no expert testimony regarding these shoes, but defense counsel said in final argument to the jury without objection: "And then you've got Mr. Green's shoes. I want you to look at them. It's got the same V's, same chevron shapes as [the shoe print in the blood]." XXVI 1801.

One night around August 29, 2001, appellant went to a Cumberland Farms store in Stuart and told the manager that he had come in with his sister with some coins the night before and had exchanged them for cash. XXI1199-1200. He and his sister said the coins belonged to their grandmother, and the manager exchanged the coins back for them. Id. Around that time, appellant went to A Quality Pawn Shop and said that he had some coins. XXI1234-35. The pawnbroker said he could not tell him how much he would give for the coins without seeing them. XXI1235. Appellant came back with a bag of coins the next day, saying he had gotten them from Cumberland Farms. Id.

At the penalty phase, a detective testified that appellant had a prior conviction for attempted murder of Michael Witt arising from an incident in appellant's house. Witt and some friends had gone to appellant's home, and appellant asked them to leave. He called Witt into the kitchen area as they were leaving, an argument ensued, and he grabbed a knife off the kitchen counter and slashed at Witt's throat and then stabbed him in the chest. XXVIII 1960.[7]

The state also presented statements from Margie Barnes, a friend of Martin, and Grace Burns, Martin's niece, regarding Martin's positive traits. XXVIII 1966-69.

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[7] Appellant discussed this incident with Det. Beath in a part of his taped statement which was not played for the jury. SR1 84-86, 90-91.

Members of appellant's family testified for the defense. Before appellant was born, there was another Daniel Perez born to the family - Daniel, Jr. - who lived only 19 days before dying from birth defects involving an undeveloped lung and fused spine. XXVIII 1972, 1994, XXIX 2018. Appellant also had an older sister, Carolyn. Appellant was born in 1977, and the parents divorced in 1980. XXIX 2017-18. Before the divorce, the family moved around a lot, including to Germany, because the father, Daniel Perez, Sr., was a Green Beret. XXVIII 1973, XXIX 2075. The father was very strict and very straight on house rules, and had no problems with appellant. XXIX 2026. At the time of the divorce, appellant could not sit still, was always doing something, a little hyper. XXIX 2022-23. After the divorce, the mother moved to Georgia and sent the children to Puerto Rico to live with her parents. XXVIII 1996. The father was badly injured in Army parachuting accidents, and retired to Puerto Rico, honorably discharged with a one hundred percent disability. XXIX 2019-22. He developed a nervous disorder in the Army, and had to take medication "to keep me down to earth". XXIX 2028-29. During the marriage, the father was sometimes verbally abusive to the mother, and physically abusive once or twice. XXVIII 1997. Her second husband was physically and verbally abusive. Id. When the stepfather was beating her up,

appellant tried to defend her. XXIX 2035, 2052, 2072.[8]

When appellant was about nine years old, he was sexually abused by two men who lived next door. XXVIII 2001, XXIX 2010-11. Appellant was already in special education classes, and he began not wanting to go to school and was being defiant, and they started medicating him with lithium when he was 9 ½ or 10 years old, and was placed in various psychological hospitals or mental health units, including Savannahs and Sandy Pines. XXIX 2011.

He was diagnosed with a bipolar disorder. XXVIII 1974. Because of his disability he would be up at night and wanted his mother's attention all night, and she had to stay up all night with him. XXIX 2013. He spent three birthdays and three Thanksgivings in hospitals. XXIX 2012. At age 10, he was in a special education class and later attended Challenger, a school

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[8] Appellant's mother, Rosa, testified about this incident in more detail at the Spencer hearing: Dwayne would drink a lot and after the couple separated he came to the house drunk and started fighting and took a knife from the kitchen and started making noise. XXX 2249. It was a large carving knife. XXX 2251. Appellant "came shooting like -- he was smaller -- came shooting down, you know, running down the hall and hit his legs, Dwayne's legs, and grabbed the knife and then he didn't put up a fuss because he was too drunk. So it wasn't anything like fighting. He took the knife away from him after he fell and he threatened him. He said if you touch my mother again, you know, I will beat you up or something like that, but he didn't do anything with the knife." Id. There was no struggle because "Dwayne was too drunk to struggle." XXX 2252. Appellant made "no threat. There was no -- he was just angry at him. Actually Daniel loved Dwayne a lot. Dwayne was good with Danny. He just got drunk." Id.

for mentally and physically handicapped children. XXVIII 1998, 2000. He became a patrol leader in Boy Scouts, gaining merit badges and trophies. XXVIII 1999-2000. He finished the ninth grade in a program like Challenger, and later obtained his GED while in jail. XXIX 2012. After Carolyn married and moved out, appellant would prepare dinner for his mother and have it ready for her. XXIX 2013.

There was little contact with the father after the divorce until appellant was 12 or 13, when he went down to spend two weeks with his father in Puerto Rico. XXVIII 1996, XXIX 2023-25. Appellant was fine except that he was "still hyped-up, anxious." XXIX 2039. The father believed that the divorce had a very strong effect on appellant, and he had heard that he acted weird, like he was crazy, acting like he was GI Joe, always doing things military style as if to follow in his father's footsteps. XXIX 2024-25.

The father came to stay with appellant shortly before appellant's 1999 wedding. XXIX 2029-30. At the time, appellant was "like somebody going a hundred miles an hour in neutral", which he attributed to appellant's nature rather than to any nervousness about the wedding. XXIX 2048. He stayed with appellant and his wife, Rebecca, until the birth of their first child. XXIX 2030. In 2001, appellant and Rebecca moved to Puerto Rico, and lived in an apartment that the father had

gotten for them, and his father got him a job as a plumber's helper. XXIX 2031. Appellant and his father made plans about opening a welding business. XXIX 2031-32. There were problems because appellant spoke very little Spanish and Rebecca spoke none, and she wanted to go back with her family, and after a few months, they returned to Florida. XXIX 2032-33. Rebecca left first, and appellant followed. Id. Back in Florida, he supported the family by working at All County Moving. XXVIII 1986. Appellant was a very good father and husband. XXVIII 1987.

Dr. Michael Riordan, a psychologist, testified for the defense. He noted many disruptions in appellant's household while he was growing up. XXIX 2071. After the parents divorced, a man named Dwayne married appellant's mother, but the marriage did not last, and other men moved in and out; appellant was sent to live with relatives while the mother pursued an education, so there was separation from his mother and father figures during his development. Id. The male figures in his life tended to be abusive, and Dwayne was abusive to the mother. XXIX 2071-72. Appellant had to intervene to try to protect his mother from Dwayne. XXIX 2072. The various adult males could not put up with appellant's behavior, and he felt responsible for his mother's breakups. Id.

Appellant felt abandoned over and over again in his

childhood: he felt abandoned by his father and other male figures, by his mother, and then by his sister when she left home. XXIX 2072-73. The residential moves pulled him away from friends who did not pursue relationships with him. XXIX 2073. He became suicidal after being the victim of child abuse by a middle aged man. Id.

Appellant had bipolar disorder, a major mental illness which involves swings from feeling on top of the world to feeling suicidal. XXIX 2073-74. There was a history of the disease in his family. XXIX 2074. He had hernia surgery and several head injuries as a child, and was involved in car accidents. XXIX 2075. He had problem behavior in school, and was considered emotionally disturbed, and, when interventions were unsuccessful, "was classified as more severely disturbed in the school system." Id. He was moved to Challenger, a school for disturbed children. Id.

Appellant was classified as being severely emotionally handicapped. XXIX 2076. He exhibited borderline personality type behavior, depression, affective dis-control, poor self-esteem and a negative view of others at Challenger. XXIX 2078-79. The dia-gnosis was "elements of mood disorder, mood swings which are consistent with Bipolar Disorder, that those descriptions were made at the time of the emotionally handicapped assessment" for Challenger. XXIX 2080.

As his difficulties worsened, he was moved into Savannahs Hospital, and part of his education occurred at mental health facilities rather than regular schools. XXIX 2075-76.

Appellant made four suicide attempts. XXIX 2076. The first was at age seven, another was at age nine after the sexual abuse incident. Id. In addition to the four suicide attempts, he was hospitalized for suicidal risk. Id. Two other suicide attempts involved attempted overdoses of medications which he had saved up for that purpose. XXIX 2077.

At age 14, he spent six weeks at Sandy Pines, a mental health facility for intensive outpatient treatment. It was "one step away from an inpatient admission facility where there is round the clock services such as someone who is suicidal may need." XXIX 2078-79. The next year, he was sent to Savannahs; diagnosed with bipolar disorder, he was prescribed Lithobid and Prolixin. XXIX 2079-80. He was admitted in November 1992 for suicidal thoughts. XXIX 2080. In December 1992, he was diagnosed with "Bipolar Mood Disorder, Circular Type, Attention Deficit Disorder and borderline personality traits at Savannahs ... . There was also consideration of psychotic features to that Bipolar Disorder that was actually a more severe form than some of the other types of Bipolar Disorder." XXIX 2081. In October 1993 he was readmitted to Savannahs for 42 days, "diagnosed with Bipolar Moderate Mixed Depression, ADHD and

Oppositional Defiant Disorder". Id. He was prescribed half a dozen medications with only partial success, but not enough for him to be discharged. XXIX 2081-82. He was taken to Martin Memorial Hospital for several days after a suicidal overdose of lithium. XXIX 2082.

He was admitted to Sundial Residential Program, where he was diagnosed with Organic Affective Syndrome, Oppositional Defiant Disorder, Bipolar Disorder, Attention Deficit, Hyperactivity Disorder and borderline traits. XXIX 2082-83.

In August 1995, at the time of the stabbing in Stuart, he spent 3 weeks at Sandy Pines Hospital with manic symptoms and paranoid delusions. XXIX 2083. Manic symptoms include pressured speech as though the patient cannot stop talking, overactivity, racing thoughts, a condition of being easily distracted. XXIX 2083-84. A person with manic symptoms often may engage in behaviors with harmful consequences. XXIX 2084.

At the 1995 sentencing, the judge remarked that had not seen a case with such serious psychological mitigators. Id. While in prison, records indicated that on two occasions he seemed clinically stable and was told he no longer needed medication. XXIX 2085. Dr. Riordan testified that in fact, although the symptoms may go into remission, a person is not cured of bipolar disorder, and it was wrong to tell him he was cured and no longer needed the medicine. XXIX 2085-86. In jail, after his

arrest for murder, he was prescribed lithium for bipolar disorder. XXIX 2086.

The elements for developing appellant's personality disorders "were there since probably before the age of nine, age seven probably." XXIX 2094.

Riordan tested appellant and found a mild level of suicidal risk. XXIX 2087. His observations and test results were consistent with bipolar disorder. When he first saw him, appellant was hypomanic, with a high level depression, resulting in a mixed episode of bipolar disorder. XXIX 2088. The second time, his depression was less, but his hypomanic behavior still appeared to be very much there. Id. The third time, he was more stable, but exhibited behavior of wanting to continue talking and not having the judgment to realize that he had made his point and come to a conclusion. XXIX 2089.

Riordan diagnosed appellant as having bipolar disorder and noted a history of attention deficit hyperactivity disorder. XXIX 2091. He also found a personality disorder, "which is not that surprising to me that someone with so many problems over the years wouldn't have developed a disorder of personality trying to cope with a tumultuous life". XXIX 2092-93. He found a borderline personality disorder, which involves very unstable interpersonal family relationships and difficulty relating at an interpersonal level. XXIX 2093. There was a history of

turning to alcohol and marijuana over the years to medicate emotional pain. Id. He had these disorders at the time of the murder. XXIX 2094. He has an IQ of 97 with a weakness in reading. XXIX 2103.

There was a diagnosis of attention deficit disorder and borderline personality trait in 1992 and in 1993 there was a diagnosis of oppositional defiant disorder at Savannahs Hospital. XXIX 2104. At Savannahs, he had a history of acting out, acting aggressively towards peers and authority figures, acting argumentatively, projecting blame, holding a hostile view of others, having hostile impulses, often losing his temper, acting defiantly, acting in a instigative manner, relying on himself, rejecting direction from others, displacing anger, using abusive language towards others, refusing to cooperate, having a low frustration tolerance, acting belligerent, not learning from experience, running away, lying, using a weapon against others, breaking rules and threatening to bomb a school. XXIX 2104-05. He was diagnosed with a conduct disorder, which involved cruelty and using a weapon. XXIX 2106. In 1996, he was diagnosed with antisocial personality disorder with manipulativeness controlling aspects and propensity to act out for secondary gain, he reported thoughts about killing someone, and he threatened another inmate. XXIX 2106-07.

Dr. Gregory Landrum, a psychologist who testified for the

state, had evaluated appellant at the time of the 1996 attempted murder, and had not seen him since then. XXIX 2114, 2124-25. He agreed that appellant has bipolar disorder. XXIX 2114. He noted that his psychological problems are well documented as far back as elementary school. XXIX 2125. In 1996 he had been inconsistent in his compliance with medication, and did better in a controlled environment. XXIX 2118. A personality disorder interferes with one's ability to function with relationships, in school and occupationally. XXIX 2120. When Landrum saw him, he had features of antisocial personality disorder as well as bipolar disorder. XXIX 2121. Antisocial personality disorder involves violating the rights of others, difficulty with impulse control, acting before thinking, and typically involves manipulating for personal gain, stealing, aggression, and the like. Id. Before a diagnosis of antisocial personality disorder can be made, there must have been a childhood diagnosis of conduct disorder, which appellant had. XXIX 2121-22. If he "did not have what I view as an anti-social personality disorder and just had simply a Bipolar Disorder, you would not have any arrest history. Typically you would not have any problems with the law, any aggression." XXIX 2123-24.

The jury recommended a death sentence by a vote of 9-3. VIII 1296. The court found four aggravating circumstances, two of which it merged: prior conviction of a violent felony;

commission of the murder in the course of robbery or burglary; murder committed for pecuniary gain (merged with previous circumstance); and the murder was especially heinous, atrocious, or cruel. IX 1446-49. It found one statutory mitigator, that appellant was under an extreme mental or emotional disturbance at the time of the murder. IX 1450-52. It also found that he: had an unstable upbringing and family history; was sexually abused as a child; was a loving father, husband, son, and brother and his family loved him; had mental health problems for a long period and was committed to several mental health facilities; was gainfully employed; was committed to an adult prison as a juvenile; suffered from drug addiction for many years starting in adolescence; was a boy scout and received merit awards; received his GED diploma while in prison; that the jury did not conclude unanimously that he committed premeditated murder; that the cold, calculated and premeditated aggravating circumstance is missing; that he was cooperative with law enforcement; and he had a good attitude and conduct during trial. IX 1454-62. It also weighed in mitigation the impact of a death sentence on his family. IX 1462-63.

SUMMARY OF THE ARGUMENT

1. The court erred in refusing to remove a juror who revealed during trial that she knew, and had proposed business dealings with, an important state witness. This information was material in that it would have affected appellant's decision whether to challenge the her during voir dire, and it could not have been discovered through due diligence because the she failed to mention it when the jurors were asked if they knew any of the witnesses. The fact that the concealment of this fact may have been unintentional does not affect its prejudicial impact on appellant's jury selection decisions.

2. In interrogating appellant, the police mislead him as to his position, did not properly advise him of his rights, diluted his understanding of his rights, held him incommunicado, threatened him with the death penalty unless he made statements without the presence of an attorney, suggested that his life was in danger, and promised to protect his family if he co-operated, all as they interrogated him through the night and the next day. The court should have granted the motion to suppress because the statements resulted from misleading or confusing statements of his rights, were illegally obtained in that they were made without a knowing and voluntary waiver of his rights and without benefit of counsel, and he was under duress or coerced during the long interrogation.

3. The judge erred in overruling defense objections and denying motions for mistrial as to statements by the state and Det. Beath to the effect that appellant always or regularly carried a knife which he kept sharp. The statements were inaccurate as the evidence showed only that he had a knife which he carried at work and it was sharp only when he sharpened it. The claim that he stabbed Martin with such a knife was central to the state's case as to guilt and was independently prejudicial as to penalty.

4. The state charged appellant and Calvin Green with first degree murder. The jury found appellant guilty of felony murder, without an accompanying determination as to who actually killed Ms. Martin. At penalty, the jury did not make a unanimous determination that appellant was a major participant in the felony and acted with reckless disregard for human life. In a case such as the one at bar, a necessary predicate finding for a death sentence is that the defendant was the actual killer or was a major participant in the felony and acted with reckless disregard for human life. Under the state and federal constitutions, a jury must make this necessary predicate finding before a court may sentence a defendant to death. Hence, appellant's death sentence must be reversed.

5. This Court should reduce the death sentence to one of life imprisonment because the state failed to establish that

appellant personally killed Ms. Martin or that he was a major participant in the felony and acted with reckless disregard for human life.

6. The court erred in applying the heinousness circumstance to appellant where the record did not show that he was the actual killer or that he directed or knew how Martin would be killed.

7. The evidence did not support the heinousness circumstance because the state did not show the prolonged suffering and anticipation of death required by the circumstance.

8. The court erred in giving little weight to the statutory mental mitigating circumstance of extreme disturbance on the ground that there was not an additional statutory circumstance and that it viewed appellant's mental illness "one of the most dangerous types" in that, on top of a well-documented and serious bipolar disorder, he had pervasive personality disorders which led him to engage in criminal activity. The judge's decision did not comport with the law or with the evidence. Hence, he abused his discretion in giving little weight to this circumstance.

9. The court similarly erred in giving little weight to non-statutory mitigating circumstances.

10. The court erred in not properly considering the mitigating circumstance that appellant's ability to conform to

the requirements of law was impaired.

11. The court erred in not letting the defense present to the jury evidence that Ms. Martin and her family were opposed to the death penalty. The state presented extensive evidence about her character and it was error not to let the defense present this evidence which completed the picture of her personality.

12. Florida's death sentencing procedure does not comply with the Jury, Due Process, and Cruel and Unusual Punishment Clauses.

ARGUMENT

The following errors, separately or cumulatively, require reversal of the convictions and/or sentences at bar.

1. WHETHER THE COURT ERRED IN REFUSING TO REMOVE JUROR NICOSIA FROM THE JURY PANEL.

A verdict cannot stand if a member of the jury concealed, whether intentionally or not, material information which would have affected a party's decision to challenge the juror, unless the party could have discovered the concealment earlier through due diligence. This principle requires a new trial at bar.

This matter arose during the guilt phase at the end of the testimony of Rani Beasley. Both a deputy sheriff and a jeweler, Beasley testified for the state about her friendship and business dealings with Martin, and her discovery of Martin's jewelry at a pawn shop. At the end of her testimony, the defense moved for a mistrial because she was crying while on the stand and, on leaving the stand, "the first thing she does is start going over and hugging people in the audience and crying." XXI 1212. The state did not dispute these facts, and said, "We weren't aware that we can instruct them -- they're human beings, Judge, and they can respond like human beings." Id. The judge denied the motion.

While the judge and parties were discussing the motion for mistrial, juror Connie Nicosia, a painting contractor, sent a note saying: "I know the witness Ranie Beasley by giving a paint

bid and through friends. I didn't recognize the last name. Connie Nicosia." VI 1060; XXI 1215.[9] Out of the presence of the jurors, she said some of her friends were in a band with Beasley, she had made a bid to do a paint job for Beasley, and, though she had not accepted the bid, it was still "in mid-air right now" because Beasley had not had the money for the job. XXI 1218-22. In the preceding twenty months, she had seen Beasley twice in the band, and twice about the paint bid. XXI 1219. She said Beasley looked a little upset when she got off the stand, and did not notice anything after she went through the gate. XXI 1220. She had no concern about the verdict affecting the paint bid. XXI 1222.

The defense moved to discharge Nicosia, saying she had a financial interest with Beasley, whose emotional display compounded the problem. XXI 1223-24. The court said it would have granted a request for cause to avoid any risk had the matter come up during jury selection. XXI 1225. It voiced the possibility of switching Nicosia with an alternate, but took no action. XXI 1226-27.

The judge revisited the matter the next day, XXIII 1494-95, 1498-1506. Appellant asked that the juror be removed. XXIII 1498. The judge said he was satisfied that he did not have any

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[9] Nicosia had not responded when, during jury selection, the names of witnesses including Beasley were read and jurors were asked if they knew of them. XII 182-85.

legal authority to make her an alternate. XXIII 1499. He noted that, under Jennings v. State, 512 So.2d 169 (Fla.1987), a court may grant a new trial when a juror has concealed information which may have been material as to whether the juror might have been excused by a peremptory challenge or for cause. XXIII 1500. He did not believe that Nicosia had concealed anything intentionally, and did not think that there was anything in her answers on the subsequent colloquy which showed that she was particularly affected by her dealings with the witness. XXIII 1500-02. He said, "even though it is something that perhaps ... might have been a valid reason to excuse for cause of exercise a peremptory challenge", it was "not something she potentially concealed", so that "I don't find it necessary at this point to excuse her as a juror", although something might develop later in the trial to raise a doubt as to whether she could be fair and impartial. XXIII 1501-02. The judge said he would allow further questioning of the juror, but the defense declined because counsel did not think that any more information could be gotten and renewed the request that the juror be excused. XXIII 1503. The state reverted to the idea of making her an alternate (even though the judge had already said that he lacked legal authority to do so), and the defense replied that if something happened to another juror, she would be back on the jury, so

that she should simply be discharged.[10] XXIII 1505. The judge said there was no legally valid reason for discharge. XXIII 1506.

There was more discussion the next day. This passage is confusing in that it seemed at first that the state was calling for discharge of the juror and the defense was opposing her discharge. XXV 1740-41. It became clear, however, that the state was proposing that, since the judge had ruled that the juror was not disqualified, she should be converted into an alternate at the penalty phase. XXV 1741. The court took no action. XXV 1741-43. The next day, it denied the defense to discharge (XXVI 1821):

> One of the matters that we discussed yesterday afternoon and I was going to reserve ruling on it overnight is the situation concerning juror Connie Nicosia. I have again considered the situation. My decision remains the same. My ruling in conclusion is and my finding is I do not have a reasonable doubt as to whether or not she can be fair and impartial. She is going to remain as one of the primary jurors in this case and to the extent that the defense has previously asked to excuse her, again my ruling remains the same and that request is denied.

From the foregoing, the judge agreed that the undisclosed information would have lead to a cause or peremptory challenge if the matter had come out in voir dire, but denied the motion to remove her because he did not think she had intentionally

[10] If defense counsel had agreed to this plan, his agreement would be a waiver of his objection to service by Ms. Nicosia if she had later returned to the panel as an alternate if something happened to a member of the main panel.

concealed the information and he felt she could be fair and impartial. Appellant submits that the court erred.

Under De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995), there is a three-part test governing this issue (id. 241):

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So.2d 253 (Fla.1973). First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. Id. at 380. We agree with this general framework for analysis and note that the trial court expressly applied this test in its order granting a new trial.

The point is not the moral culpability of the juror, but the effect of the nondisclosure on counsel's ability to make decisions about jury selection. Chester v. State, 737 So.2d 557 (Fla. 3rd DCA 1999) summarizes the law in this regard, explaining that the question is not whether the juror has intentionally concealed the information, but whether the nondisclosure is material (id. 558):

> A juror's false response during voir dire, albeit unintentional, which results in the nondisclosure of material information relevant to jury service in that case justifies a new trial as a matter of law. See De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995) (recognizing that an unintentional false response by a juror during voir dire would be no less prejudicial to the defendant); Redondo v. Jessup, 426 So.2d 1146 (Fla. 3d DCA 1983) (holding that either actively concealed or unintentionally false material information taints the entire proceeding such that the parties are deprived

of a fair and impartial trial); Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972).

De La Rosa cited with favor Bernal v. Lipp, 580 So.2d 315 (Fla. 3d DCA 1991), a case in which a juror had not intentionally withheld the relevant information. De La Rosa at 241. It further quoted with favor Judge Baskin's opinion in the lower court stating that, under Bernal, regardless whether the juror had any intent to mislead, the important question is whether the nondisclosure was material in that it "prevented counsel from making an informed judgment - which would in all likelihood have resulted in a peremptory challenge". De La Rosa at 241-42 (quoting Judge Baskin's quotation of Bernal) (e.s.).[11]

Thus, De La Rosa's three-part test asks: (1) Was the information material and relevant in that it would have affected counsel's ability to make an informed judgement which would likely have resulted in a challenge to the juror? (2) Did the juror fail to disclose it, regardless of whether the nondisclosure was intentional? (3) Is the nondisclosure attributable to a lack of diligence by the complaining party?

The scope of review is essentially de novo in that a trial

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[11] De La Rosa also cited Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984) with favor. Mitchell was charged with crimes occurring at a prison. Jurors responded negatively when asked if they had family members or relatives working at the prison, but it was later learned that one of the jurors was the aunt of a guard at the prison who assisted with security during the trial. Upon inquiry, she said that she thought the question referred to members of her immediate family. The appellate court ordered a new trial.

court has no discretion in whether to grant a new trial when the three-part test is met. Bernal states at page 316 (e.s.):

> The applicable test is:
>
> > A case will be reversed because of a juror's nondisclosure of information when the following three-part test is met: '(1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party.'
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> Indus. Fire & Casualty Ins. Co. v. Wilson, 537 So.2d 1100, 1103 (Fla. 3d DCA 1989) (citation omitted).

Accord James v. State, 717 So.2d 1086 (Fla. 5th DCA 1998) ("If the test is met, the trial court must grant the appellant a new trial."). Cf. Loftin v. Wilson, 67 So.2d 185, 192 (Fla. 1953) (juror's nondisclosure of material fact "'is prejudicial to the party, for it impairs his right to challenge'") (quoting Pearcy v. Michigan, Mut. Life Ins. Co., 12 N. E. 98, 99 (Ind. 1887) and other authorities).

Turning to the case at bar, appellant notes the following:

First, the information was material and relevant to jury service. There can be no question that the juror's potential business dealings with a state witness was material and relevant to counsel's decision-making during jury selection. In fact the judge himself said that he would have granted a request for cause just to avoid any risk had the matter come up during jury selection. XXI 1225. Counsel was prevented from making an

informed judgment that would have resulted in a challenge to the juror.

Second, the juror did not disclose the information, although she explained that she had not recognized the last name. The inquiry is not into the juror's moral culpability. The important question is whether the defendant lost his right to make an informed jury selection because of the juror's failure, for whatever reason, to provide accurate information.

Third, the failure to obtain the information cannot be attributed to any lack of diligence on appellant's part. Counsel sought to strike the juror as soon as the information was discovered, and the state never claimed that appellant should have known of the nondisclosure at an earlier time.

From the foregoing, appellant would have been entitled to a new trial if he had learned of the nondisclosure after the verdict. Hence, it hardly makes sense that he should not receive a new trial here where he moved to strike the juror during the trial and the judge denied the request and kept the juror on the panel which decided appellant's guilt and rendered a sentencing verdict. Under these circumstances, this Court should order a new trial.

Jennings, the case the judge cited,[12] does not support his

[12] The judge also mentioned Chavers v. State, 827 So.2d 279 (Fla. 4th DCA 2002). XXIII 1499-1500 ("Schaffer versus State, cited at 827 So. 2nd 279, Fourth DCA opinion"). In Chavers, the court found no error when the trial judge replaced a juror who

action at bar. There, a juror revealed mid-trial that she had not been candid in voir dire about her opposition to the death penalty and said she could not recommend a death sentence. The state agreed to her remaining on the jury for the guilt phase, but said it would seek her discharge as to penalty proceedings. "Defense counsel did not object to her participation in the determination of guilt or innocence but declined to stipulate to her replacement for the penalty phase." Jennings, 512 So.2d at 173 (e.s.). She remained on the jury which found Jennings guilty, but was removed before the penalty phase. This Court found no error, noting that a judge has broad discretion in deciding whether a juror may sit and that there could be no prejudice to Jennings from having a juror who was "apprehensive about the death penalty" determine his guilt, and the juror "could not have had the same influence on the penalty phase as she would have had in the guilt phase." Id.

Obviously the aggrieved party in Jennings was the state: it was deprived of information which would have led it to challenge the juror. Nevertheless, the state agreed to her staying on the jury as to guilt, but was entirely within its rights in demanding her removal as to penalty. In fact, it would have been within its rights in demanding her removal during the guilt

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disclosed during the trial that he did not consider eyewitness testimony reliable. (There had been no questioning on voir dire on this subject.) It is not clear that Chavers bore any significant role in the judge's decision on the issue at bar.

phase.

Lebron v. State, 799 So.2d 997 (Fla. 2001) is instructive on this point. It cited Jennings and other cases for the following proposition, which is identical to the De La Rosa rule: "A juror's nondisclosure of information during voir dire warrants a new trial if it is established that the information is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence." Lebron at 1012-13.[13]

In Lebron, the trial judge learned more or less simultaneously that the jury was deadlocked and that one juror reported that another may have falsely said in voir dire that he had no bias against the police. Id. 1009-10. The judge declared a mistrial over defense objection. In determining that there was no double jeopardy bar to a new trial, this Court observed that the juror's nondisclosure alone would have warranted a mistrial:

> Additionally, where, as here, the trial court has initially been made aware of juror misconduct through a source other than the juror alleged to have caused the jury taint, such information, where corroborated,

[13] Another of the cases cited with approval for this point in Lebron was Blaylock v. State, 537 So.2d 1103, 1106-07 (Fla. 3d DCA 1988). Lebron summarized Blaylock's holding as follows: "reflecting that nondisclosure is considered material if it is substantial and important so that if the facts has been known, the complaining party might have been influenced to peremptorily exclude the juror from the jury." Lebron at 1014-15 (e.s.).

> has been deemed to require the declaration of a mistrial. See Lebron v. State, 724 So.2d 1208 (Fla. 5th DCA 1998) (holding that a juror's failure to timely disclose to the trial court his suspicion that the accused had murdered the juror's friend was juror misconduct, warranting a new trial). Here, juror Doe advised the judge of his belief that the foreman (contrary to the statement he had made during voir dire) was biased against police due to his interrogation when he was a juvenile charged with a criminal offense. The identified juror had expressed the view that all police are bad. However, when specifically asked during voir dire whether he had any bias as a result of his experiences with the juvenile justice system, this juror had indicated that he did not.

Id. 1013-14.[14] It was at this point in the opinion that this Court cited Jennings for the proposition quoted above, which mirrors the De La Rosa standard.

Accordingly, Jennings is entirely in keeping with cases like De La Rosa. In the case at bar, the judge erred in leaving Ms. Nicosia on the jury. This Court should order a new trial.

2. WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS.

Appellant filed a motion to suppress his statements, alleging that they were "illegally obtained in that the Defendant was coerced/forced or under duress at the times of the statements", and that he made the statements "without a knowing and voluntary waiver of his rights and without benefit of counsel." II 324. Although the motion referred to the August statements as well as those of September 5-6, counsel conceded

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[14] The discussion between Juror Doe and the court about the foreman is set out verbatim at footnote 9 of page 1009 of Lebron.

at the motion hearing that he did not have a strong argument as to the August statements. XI 95.

Det. Beath was the only witness on the motion to suppress, although the court also reviewed all of appellant's statements. Beath had appellant's wife Rebecca come to the police station on September 5, and later that night appellant came to the station concerned about his wife. X 24-26. He agreed to being interviewed while Rebecca was being polygraphed. X 26. Although Beath knew there was a warrant for appellant's arrest for the July burglary of Martin's house, he told appellant he was free to go and gave no Miranda warning before beginning to question him around 9:37 p.m. X 27, 56. At 10:07, the following occurred:

> BEATH: ... Now, I'm gonna Mirandize you, okay? 'Cuz I'm gonna tell you something that I believe, all right?
>
> PEREZ: You're gonna Mirandize me?
>
> BEATH: Yes.
>
> PEREZ: So, I'm under arrest?
>
> BEATH: No, you're not, okay? Not right now. You have the right to remain silent, anything you say can be used against you in court, you have the right to an attorney, if you can't afford an attorney, one will be appointed to you. You have the right to stop talking at any time. Okay? You understand that?
>
> PEREZ: Understood
>
> BEATH: All right. Do you want me to keep talking? Do you want to hear what I have to say?

PEREZ: Yes, I do.

XXII 1314-15; SR1 134 (transcripts of interrogation).[15] Beath then told appellant that he thought appellant stole the jewelry from Martin. Id. (Just before that, Beath had made a similar charge. XXII 1314.) At 10:52, the following occurred (SR 1 164-65):[16]

PEREZ: Can I see my wife?

BEATH: Nope

PEREZ: Hey, Mike, I have this question, am I under arrest right now?

BEATH: You are not free to go.

BEATH: 10:52, the tape is back on, same date. What's up, man?

PEREZ: So, are you telling me I'm not free to go because

BEATH: Look, Daniel, you told us about a crime, okay, with the ring, okay, we have probable cause to believe

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[15] Shortly before, Beath told appellant that there were two people who went into the house with socks on their hands and that they cut the phone lines. SR1 132.

[16] In the interim, Beath offered to help appellant, SR1 135-36, said appellant had lied, SR1 136, said the phone lines were cut, that socks were worn, but there was DNA evidence, SR1 139-40, and said nobody was going to have any pity "if it comes back to you". SR1 141. Det. Kelso told appellant that a death sentence was possible, and said: "Death, versus a long time in jail? What do you think looks better? Would you want to help yourself the most you can?" SR1 145-46. She said she did not think appellant was there by himself, SR1 162, and discussed a polygraph. SR1 163.

As noted in the Statement of the Case, the arrest of appellant at SR1 164-65 corresponds to a gap in the tape played for the jury at XXII 1328.

> that you stole the ring, all right, can't just let you go on that
>
> PEREZ: I understand that
>
> BEATH: Okay? You understand that, right
>
> PEREZ: I understand that
>
> BEATH: Cannot just let you go on that.
>
> PEREZ: Okay, so I'm under arrest for, for supposedly taking the ring?
>
> BEATH: You're not physically, if you want to call it that, then yes, you are under arrest, we cannot let you go, okay? 'Cuz you told us about a crime, and there's probable cause to believe that that crime was committed. Okay?
>
> PEREZ: Okay, so I can't see any of my family, I can't, I can't do any of that home, I can't go out and smoke a cigarette like we usually do when I'm in here, I can't do none of that
>
> BEATH: Not right now, okay? Not right now. All right?
>
> PEREZ: So, let me ask you this, should I be calling my, uh, attorney or something like that because I'm under arrest now?
>
> BEATH: It's up to you, if you want an attorney, then we stop
>
> PEREZ: Then I can't leave anyhow
>
> BEATH: Right
>
> PEREZ: So, when am I getting under arrest and put in jail because of a supposed ring, Mike?
>
> BEATH: You, technically, like you said, you are under arrest right now.

Appellant was not readvised of his Miranda rights at this time.

Beath said he could prove his story only by taking a polygraph,

which appellant then consented to take. SR1, 166-67. Beath testified that appellant agreed to take the polygraph about one and a half hours after being advised of his Miranda rights. X 28.

After the polygraph examination, officers questioned appellant from around 12:45 a.m. to 8 a.m. X 30-31.[17] After appellant had something to eat and a few hours of sleep, he went with the officers to locate evidence, and then was interrogated further. XI 32-35. During the course of this last interroga-

[17] During this time, appellant asked if he could call his wife, or if the officer would call her and ask if she would speak with him, but Beath replied: "Not tonight, it's 1:00 in the morning." SR2 178. Later, he asked if he could talk to his sister or somebody, and Beath said he would let appellant make a tape for his sister. SR2 204-205. Appellant wanted to talk to his wife or sister, and Beath replied that "the only person you can talk to right now is me". SR2 205. Appellant asked if he could talk to "my wife or my sister or somebody", and Beath said he did not know when they could let him make a phone call. Id. The officers told him that his story was not panning out and he bombed the polygraph, SR3 256, 274, and suggested that Calvin and Man-Man would be out on the street knowing that appellant had pointed the finger at him and would be upset with him. SR3 279-80. Kelso said there was a big difference between doing the stabbing and seeing it done. SR3 325-26. She said she did not want appellant to go down for something someone else did. SR3 339.

After further interrogation, appellant asked Beath to promise that he would not let Man Man hurt his wife and children when he got out. SR3 402-403. Beath said, "Okay." SR3 403. Appellant again expressed fear that Man Man would hurt his family, id., and Beath told appellant: "No. Go ahead with your statement. Go ahead. I'm gonna do just like you said." SR3 404.

As appellant continued to plead for his family's safety, Beath said, "I'm going to do everything I possibly can to take care of that request that you just made. Okay? All right? I promise you that.", and told appellant to go ahead. Id.

tion, he was advised of his rights in the same manner as before, and agreed to keep talking. SR4 489-90.[18] He did not have his first appearance in court until two days later on September 8. I 5-6.

Counsel argued on the motion to suppress that appellant's statements were the product of misleading or confusing statements of appellant's rights by Beath and were obtained by coercive measures and duress during the long interrogation. XI 85.

The court denied the motion by written order. III 329-39. It wrote that once appellant was under arrest for theft of jewelry, it was obvious that the police wanted to talk to him about the murder and interrogation continued until he was booked into jail, and that under the totality of the circumstances the failure to give renewed warnings did not violate appellant's rights. III 336-37. It further found that failure to administer Miranda warnings before obtaining incriminating statements does not necessarily render a subsequent warned statement

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[18] Thereafter, Beath reminded appellant of his fear of Man Man and Beath's promise regarding his family: he urged appellant to be honest "because Man-Man's still out there", noting that appellant had said that "Man-Man's dangerous", and that appellant was "sitting here shaken up" and was "shaking" when he begged Beath to protect his family. SR4 493. He continued: "You were shaking in your pants. You were scared because you were scared for Rebecca and you were scared for Daniel [appellant's son]." SR 4 494. He told appellant that "Man-Man's still out there" and "Man-Man knows". Id. After these admonitions, appellant further diminished the role of Man-Man in his account of the crime. SR4 496-508.

inadmissible if there was subsequently a "careful and thorough administration" of Miranda warnings. III 337. It ruled that appellant was not in custody until 10:52 p.m. on September 5, that there was no bar to admission of statements made before that time, and that the 10:07 Miranda warnings were fully and properly administered so that appellant's subsequent statements were admissible. III 338. It wrote that appellant made his statements freely and voluntarily and that the police did not use improper tactics or make any promises of favorable treatment at any time during the interrogation period between 9:37 on September 5 and appellant's booking in the county jail. III 339.

"A trial court's ruling on a motion to suppress is clothed with a presumption of correctness with regard to the trial court's determination of historical facts. Appellate courts, however, independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendments." Davis v. State, 859 So.2d 465, 471 (Fla.2003).

At bar, contrary to the judge's findings, the warning of rights was not fully and properly administered and the police did use improper tactics and promises.

The state constitution requires that a suspect be advised of his right to have a lawyer present during interrogation. See

Traylor v. State, 596 So.2d 957, 966, n. 13 (Fla.1992). Likewise, Miranda v. Arizona, 384 U.S. 436, 471-72 (1966), states (e.s.):

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.

When Beath advised appellant of his rights, he did not advise him of his right to have an attorney present during interrogation:

> BEATH: No, you're not, okay? Not right now. You have the right to remain silent, anything you say can be used against you in court, you have the right to an attorney, if you can't afford an attorney, one will be appointed to you. You have the right to stop talking at any time. Okay? You understand that?

SR1 134 (first advice of rights). See also SR4 489-90 (second advice of rights using same terms). When appellant was placed under arrest, Beath compounded this error: Appellant asked if he should contact an attorney, and Beath told him that "if you want an attorney, then we stop", SR 1 165, which statement annulled appellant's right to have an attorney present during interrogation. The officers thereafter thwarted appellant's desire to speak with his family "or somebody", even denying him his right to make a phone call. SR2 178, 204-205.

Further, at the time of the first advisement of rights, Beath did not obtain a waiver either orally in writing. He merely asked appellant if he understood the rights read to him, and if appellant wanted to hear what Beath had to say. SR1 134. Appellant said he understood and wanted to hear what Beath had to say.

Further still, Beath mislead appellant as to his true position at the time that he made the inadequate advice of rights. He testified that when he began to interview appellant on September 5, he "went through the routine of letting him know he was there on a [voluntary] basis, and that appellant said he understood he was free to go. X 27. Later, when he gave the advice of rights, appellant asked if he was under arrest, and Beath artfully replied: "No, you're not, okay? Not right now.", SR1 134, and immediately went into the reading of the rights.

In fact, of course, appellant was not free to leave. Beath knew that an arrest warrant for felony charges had been obtained and stamped. X 56. Under Florida law, "officers are not only authorized, but it is their duty, to arrest and take into custody without a warrant any person who the officer has reasonable grounds to believe, and does believe, has committed any felony." Smith v. State, 363 So.2d 21, 22-23 (Fla. 3rd DCA 1978) (citing cases of this Court dating back to 1924). Hence, Beath had the duty to arrest appellant and could not let him

leave once he arrived at the station. Beath's going "through the routine of letting him know he was there on a [voluntary] basis", so that appellant felt he was free to go, was a charade which was intended to mislead appellant, and did mislead him, as to his true position.

At the time of this interrogation, it was well-settled that this sort of tactic is improper. In Ramirez v. State, 739 So.2d 568, 576-77 (Fla.1999), this Court wrote:

> Further, after being told he was to be read his rights, Ramirez responded by asking if he was under arrest. The detectives answered "no." However, by the time the warnings were given, Ramirez had already implicated himself in the crime and the detectives had independent corroboration of his involvement and ample probable cause to arrest him for murder. In fact, the detectives did arrest Ramirez upon completion of the interrogation. It is simply inappropriate for the police to make a representation intended to lull a young defendant into a false sense of security and calculated to delude him as to his true position at the very moment that the Miranda warnings are about to be administered. See Brewer, 386 So.2d at 237; Sawyer, 561 So.2d at 290-91; see also Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); Escobar v. State, 699 So.2d 984, 987 (Fla.1997), cert. denied, 523 U.S. 1088, 118 S.Ct. 1548, 140 L.Ed.2d 695 (1998).

Although appellant was not a juvenile, it can hardly be the case that this Court intended to allow such a tactic in the interrogation of an adult.

Thus, this is not a case in which the police could have been acting in a good faith attempt to comply with unclear legal principles. The rule was well-established that it was improper

to mislead appellant into thinking he was free to leave.

Waiver of the right to remain silent must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). See also Dooley v. State, 743 So.2d 65, 69 (Fla. 4th DCA 1999) ("Deception cannot be used to obtain a waiver of a defendant's Miranda rights."). Florida has so required since long before the Bill of Rights was applied to the states. Cf. Coffee v. State, 25 Fla. 501, 6 So. 493 (1889); Simon v. State, 5 Fla. 285 (1853).

Other actions of the officers further support suppression, including: Det. Kelso raised the specter of the death penalty, and said appellant's choice was between "Death versus a long time in jail." SR1 146. Immediately after, the officers said everything pointed to him, although he still had a chance, SR1 146-47, and "you really need to think about life." SR1 148. Just before the polygraph, appellant asked if he could go home, and Beath said: "Clear your name.", and then went to get appellant's wife for a brief conversation with appellant. SR2 170. After the polygraph, appellant was cold ("It's cold as hell in here, bro") and afraid (asked how the polygraph was,

appellant said it was "Scary"). SR2 174. Appellant was very cold during the ensuing interview. SR2 188 ("PEREZ: I'm fucking freezing, man BEATH: I know."), SR2 233 ("I'm freezing, man, I shoulda worn long sleeves"). Beath denied him his right to make a phone call, SR2 178, and said that "the only person you can talk to right now is me". SR2 205.

The officers consistently presented the process as one of a co-operative endeavor in which they were trying to help appellant. The following instances are from just the 45 minutes between the Miranda rights and the time that they told appellant he was not free to leave: SR1 135 ("All right, let me help you. You can get through this"), 136 ("Let me help you, ... for your kids, look at me."), 137 ("Im tellin' ya, don't do this to yourself.") ("Because I have some things that I know that we can, we can work out. Okay?"), 145 ("I would hate to see you take the whole rap for something that, where you just got in over your head.") (KELSO: ... . "You need to help yourself out at this point. BEATH: Don't go down KELSO: Don't go down by yourself BEATH: Listen to her, listen to her KELSO: Don't go down by yourself, man, it is not worth it."); 146 ("Death, versus a long time in jail? What do you think looks better? Would you want to help yourself the most you can?); 174 ("KELSO: You really need to think about your situation, remember what we talked about? You know, a long time in jail, you're still here

to see your kids grow up. BEATH: You still have a chance. KELSO: You still have a chance."); 148 ("What we're saying is, you need to really think about life"); 149 ("I'm just saying, I'm, I'm sitting here trying to search for, how can you help us believe in what you're saying?"); 150 ("What I'm saying, is help, help, help us understand. Try and prove to us that you're not lying about the rest of it, and that's ..."); 151 ("Help us, we've always said, our case is not to prove someone guilty but prove a lot of people innocent. And the last man standing is the guilty one, right?"); 156 ("You tell the truth here so we can prove you're telling the truth in the end."); 161 ("You understand that even though we're the cops ... We don't want to see anybody get more than they deserve ... ."); 163 ("'Cuz if I get the truth from someone else, I'm not a vindictive person but that person's gonna get my respect."). They used this tactic throughout the interrogation. The effect was to dilute the Miranda warning that appellant's statements would be used against him: the officers led him to believe his statements would be used on his behalf to rescue him from the death chamber. This tactic worked hand-in-hand with Beath's minimizing appellant's status as being "technically" under arrest and that he could not go home "right now."

The officers planted in appellant's mind the idea that Man-Man and Calvin would seek revenge against him. SR3 279-80. This

led to his begging Beath to promise that he would not let Man Man hurt his wife and children. SR3 402-403. Beath agreed to do so and told appellant to proceed with his statement. Id. Later, Beath reminded him of his fear of Man Man and Beath's promise about his family, urging him to be honest "because Man-Man's still out there". SR4 493. He said that when appellant was begging him to protect his family, he was "sitting here shaken up" and "shaking", "shaking in your pants. You were scared because you were scared for Rebecca and you were scared for Daniel". SR4 493-94. Beath said, "Man-Man's still out there" and "Man-Man knows". Id.

At bar, the police mislead appellant as to his position, did not properly advise him of his rights as required by the state and federal constitutions, diluted his understanding of his rights, held him incommunicado, threatened him with the death penalty unless he made statements without the presence of an attorney, suggested that his life was in danger, and promised to protect his family if he co-operated, all as they interrogated him throughout the night and the next day.[19] Under these

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[19] Overall, the questioning at bar is very similar to that condemned by this Court in Brewer v. State, 386 So.2d 232 (Fla. 1983), in which the officers raised likelihood that Brewer would receive a death sentence, said the evidence against him was overwhelming and the jury would convict him of first degree murder, pointing to shoeprint and other evidence, accused him of lying, said they would help him out and he would be convicted of second degree murder, and said they would help by telling parole and probation that he had cooperated with them.

circumstances, his statements were the product of misleading or confusing statements of his rights by Det. Beath, and were illegally obtained in that they were made without a knowing and voluntary waiver of his rights and without benefit of counsel, and he was under duress or coerced during the long interrogation. Use of the statements violated the Right to Remain Silent, Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should reverse and remand for a new trial.

3. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION AND MOTION FOR MISTRIAL AS TO STATEMENTS THAT APPELLANT ROUTINELY CARRIED A KNIFE.

In her opening statement to the jury, the prosecutor discussed the July theft from Ms. Martin's home, then said:

> One month later - we go to August 27, 2001. That was a Monday. That Monday night the defendant just after midnight which would be the morning of the 28th, drove up from Martin county where he lived and he went to Ms. Martin's house. He went there armed with a very small knife that he always carried and he went there, ladies and gentlemen, for two reasons.

XVIII 858. The defense objected to the remark as irrelevant and moved for a mistrial, and the state replied that appellant "acknowledged that he carried a knife all the time with a small blade in his statement" to the police, and the murder was committed with a small knife. XVIII 859. The court observed that a lot of males carry pocket knives in our culture, and overruled the objection and denied the motion for mistrial

(XVIII 860-61):

> THE COURT: I'm not necessarily going to say that it is common in our society, but I think most people generally understand that there are a lot of males in this society who do routinely and regularly carry pocket knives and that's not at all unusual in this society and to the extent that that's what you're alluding to, I don't think it's overly prejudicial and to the extent there is a relevance issue about whether a switchblade was used or some other type of knife would be consistent to the type of knife Mr. Perez was reputed to routinely carry. I'm overruling that objection at this point. To the extent that you moved for a mistrial, I'm denying that as well.

Testifying for the state, Det. Beath summarized statements made during the taped interrogation. He said appellant "indicated to me that he did carry a knife on a regular basis. He kept his knife sharp and he had it -- it was a small locked blade style knife." XXII 1281. Appellant objected, moved to strike, and moved for a mistrial, saying it had not been established that appellant habitually carried a knife and the testimony was irrelevant. Id.

The state said the testimony served to highlight the matter for the jury, but conceded that Beath's summary was inaccurate:

> He is being asked about the highlighted portion of the jury to focus on. I don't believe that his testimony that he just gave is completely exactly what the defendant said. It's a little off but he mentioned a small knife blade he carries, I think he said was at work. I'm not going could to ask him to testify about something that's not on the tape so I don't think there is any problem.

XXII 1281-82. The judge overruled the relevancy objection, denied the motion for mistrial, and told the jury (XXII 1282):

> Members of the jury, the exhibit 52 admitted into evidence is the videotape of portions of the interview with Mr. Perez. It is the best evidence of what Mr. Perez said so you need to rely on your determinations about what is said off that videotape. Mr. Mirman, you may continue.

The actual discussion of appellant's knife on the tape was as follows (XXII 1309-10):

> BEATH: Do you normally carry a pocketknife or anything like that?
>
> PEREZ: When I'm at work
>
> BEATH: Okay. Any other times you normally carry knives or anything like that? Do you have collections of knives, or anything?
>
> PEREZ: I have one. Um, as far as carrying it all over the place all the time? No. There's occasions where I, I have it in my pocket, like after I get off of work or something, I'll have it in my pocket. But it's, it's a little, the one I have now? It's a, it's a little lock blade, it's like a, not even a, a 3" blade.
>
> BEATH: You have it on you?
>
> PEREZ: No
>
> BEATH: No?
>
> PEREZ: No
>
> BEATH: It's small?
>
> PEREZ: Yeah, it's small
>
> BEATH: You use it for work?
>
> PEREZ: Yeah, it's for cuttin' open wardrobe boxes
>
> BEATH: So, it's pretty sharp to, I mean, you could take it and (cutting motion through paper)?
>
> PEREZ: Yeah, when I sharpen it

BEATH: I mean, it's got to be sharp to cut tape and shit like that

PEREZ: Cut tape, yeah, yeah

BEATH: right?

PEREZ: Yeah

BEATH: Okay. So, do you keep it, I mean, is it a knife that you keep it, well maintained?

PEREZ: Yeah

BEATH: Okay. All right. Um, you take it to work with you?

PEREZ: Yeah

BEATH: You still do?

PEREZ: Yeah

In discussing an Enmund/Tyson issue after the guilt verdict, the state contended that the armed burglary verdict was sufficient to satisfy the requirements of those cases. XXVII 1900-01. The judge asked if "the pocket knife that the jury apparently concluded he regularly carried was of the type that could have been used to commit the murder. That's enough circumstantial evidence to show that he supplied the weapon?", and the state replied that it was. XXVII 1901 (e.s.). As the discussion went on, the state again said the jury found beyond a reasonable doubt that appellant "carried the knife", and argued that the murder weapon was "the knife that he described that he carried on his person." XXVII 1913-14.

Appellant makes these observations about the foregoing: First, appellant denied always carrying a knife, saying he had a work knife that was sharp when he sharpened it, and he kept it well-maintained. XXII 1309-10. Second, Beath's testimony that appellant had said that he carried a knife on a regular basis and kept it sharp was inaccurate. XVII 1281. Third, the prosecutor knew that Beath's statement was not "completely exactly" what appellant had said, and knew that he had actually said that he carried the knife at work. XXII 1281-82. Fourth, the prosecutor's remark in opening statement, that appellant "always carried" a small knife, was contrary to the evidence and (as just shown) contrary to his own knowledge of what appellant said on the tape. XVIII 858. Fifth, even though the judge had listened to the tape and had ruled on the defense objections, he himself was confused as to what appellant had said: he seemed to feel that the evidence had supported a conclusion that appellant "regularly carried" a knife and that he thought that the jury had so found. XXVII 1901.

Miller v. State, 782 So.2d 426 (Fla. 2nd DCA 2001) presented an analogous situation. The state charged Thomas Miller with manslaughter and theft. Its theory was that he and others had stolen a stop sign and a fatal car accident resulted. Miller contended that the city had replaced the stolen stop sign before the crash occurred, so that he did not cause the crash. An

officer testified about telling truth from falsehood by watching the speaker's eyes, although he was not presented as an expert in this regard. Id. 431. Another witness, Larry Jarrard, testified that he "believe[d]" that the defendants told him the day after the accident that the signs had been taken "the day before". Id. 430. Without defense objection, the prosecutor contended in final argument that the jury should rely on the officer's expertise in watching videotaped interviews of the suspects, and that Jarard had been "relatively certain" that the signs were taken the night before the crash. Id. 431-32.

The Second District found that these arguments misrepresented the actual testimony as to important contested issues in the case, and amounted to fundamental error. It noted that the state's case rested on circumstantial evidence, and wrote at pages 432-33:

> To return a verdict of guilty on the manslaughter charges, the jury must have accepted Jarrard's testimony on the timing issue and rejected the other witnesses' testimony. Had the jurors discarded Jarrard's testimony as inconclusive, the only remaining evidence of timing was the co-defendants' testimony that the signs were taken on a Friday night, days before the accident, testimony that was corroborated by the State's own witness. Accordingly, the misquoting of Jarrard's testimony became significant. Additionally, and perhaps more importantly, the prosecutor's suggestion that the deputy's body language testimony was an expert standard that the jurors should apply when they viewed the video tapes of the defendants most certainly tainted the jury's evaluation of Miller's credibility.
>
> We therefore conclude that the cumulative impact of

> these errors was fundamental. In her closing argument, the prosecutor impermissibly boosted the strength and credibility of Jarrard's testimony, while, at the same time, impermissibly and severely damaging the credibility of Miller. Without accepting this one piece of evidence, the jury could not have returned a verdict of guilty. To conclude that the other signs were taken on one night and the subject stop sign was taken on a separate occasion is speculation and not a reasonable inference that can be drawn from the evidence presented given the fact that there was no evidence that the signs were taken on two separate occasions or that any other signs were taken. Miller is entitled to have a jury weigh this conflicting evidence without the taint of the prosecutor's erroneous argument.
>
> As was the case in Cochran [v. State, 711 So.2d 1159 (Fla. 4th DCA 1998)], "[t]aken individually, in a different case, the prosecutor's comments may not have been so egregious as to warrant reversal." 711 So.2d at 1163. However, when the comments are viewed cumulatively, in the context of this extremely close case, we conclude that the errors did go "to the foundation of the case" and thus amounted to fundamental error, requiring us to reverse the manslaughter convictions for a new trial.

At bar, of course, the defense did object to the prosecutor's opening statement, and the objection was overruled. Likewise, the judge overruled the defense objection to the officer's testimony, although he did tell the jury to rely on its own determination of what was said on the videotape. Hence, appellant need not show fundamental error.

Appellant argued that the state's remark and the detective's testimony were irrelevant, pointing out that it was not established that he habitually carried a knife. "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla.Stat. Factually inaccurate statements cannot be

probative of any fact, and therefore are irrelevant. Cf. State v. Cavallo, 443 A.2d 1020, 1023 (N.J. 1982) ("Obviously, inaccurate testimony, lay or expert, has no tendency to prove any material fact."). Hence, the inaccurate statements that appellant always carried the knife or carried it on a regular basis were irrelevant. The prosecutor indicated she was highlighting the testimony about the knife for the jury to focus on it. XXII 1281-82. If the officer had accurately reported the statement, there would have been nothing to highlight, since appellant did not say he regularly carried the knife when not at work. This statement was probative to the state's case only so far as it was transformed into an untrue statement that he said he regularly or always carried the knife.

In Gore v. State, 719 So.2d 1197, 1200 (Fla. 1998), this Court established the following standard of review regarding rulings on objections to jury arguments:

> 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 argument.

Likewise, the following standard governs review of rulings on evidence:

> A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. See Carpenter v. State, 785 So.2d 1182 (Fla.2001) (citing Blanco v. State, 452 So.2d 520, 523 (Fla.1984)). The trial court's discretion is limited by the rules of evidence. See Nardone v. State, 798 So.2d 870, 874 (Fla. 4th DCA 2001).

Johnston v. State, 863 So.2d 271, 278 (Fla.2003).

These standards are consistent with the rule that a court does not have discretion to make a ruling contrary to existing law.

"In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law."). Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla.1980). "We find abuse of discretion when a court 'improperly applies the law or uses an erroneous legal standard.'" U.S. v. Taplin, 954 F.2d 1256, 1258 (6th Cir.1992) (citing cases). "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)." Schlup v. Delo, 513 U.S. 298, 333 (1995) (O'Connor, J., concurring). Cooter says at the cited page: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

This Court also wrote at page 1203 of Canakaris that prior

case law governs a judge's discretion:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic or reasonableness.

Accord Farrior v. Farrior, 736 So.2d 1177, 1179 (Fla.1999) (Pariente, J., concurring in opinion joined by Lewis, J.); Kennedy v. Kennedy, 622 So.2d 1033, 1035 (Fla. 5th DCA 1993) (en banc).

At bar, it was error to let the state put before the jury inaccurate claims that appellant always or regularly carried a knife. The claims were prejudicial because the question of whether appellant personally carried a knife at the time of the crime was a major issue as to both guilt and penalty. The state's claims seemed to have mislead even the judge who thought the evidence had shown to the jury that appellant regularly carried a knife.

It is true that the judge told the jury that the best evidence was what was on the tape, but this mild instruction was not likely to clear away the confusion caused by the prosecutor's remark in opening statement and the detective's sworn testimony. It left to the jury the task of locating a brief passage in a three hour tape and comparing it with the state-

ments of two persons in authority who spoke directly to them. Under these circumstances, the judge's instruction did not remove the prejudice to the defense.

The error was also prejudicial as to penalty, as the judge and jury had to determine appellant's level of culpability. The judge and prosecutor clearly viewed the jury as having found that appellant personally carried a knife during the crime, and the judge noted that such a finding could be based on his view that the evidence showed that appellant "regularly carried" a knife, and that such a finding was crucial as to penalty.

The convictions and sentences are unconstitutional in violation of the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

4. WHETHER THE COURT ERRED IN SENTENCING APPELLANT TO DEATH WHERE THE STATE FAILED TO OBTAIN THE NECESSARY PREDICATE JURY FINDING THAT APPELLANT WAS THE KILLER OR THAT HE WAS A MAJOR PARTICIPANT IN THE FELONY AND ACTED WITH RECKLESS DISREGARD FOR HUMAN LIFE.

The state charged appellant and Green with murder, burglary and robbery. There was substantial evidence, in the form of appellant's statement to the police, that appellant entered the house and found Green repeatedly stabbing Ms. Martin, who was already unconscious and rapidly dying. The jury found appellant guilty of felony murder, but did not find him guilty of premedi-

tated murder.[20] At penalty, the judge instructed: "In order for you to recommend a sentence of death in this case you must find Daniel Perez was a major participant in the crime of robbery or burglary and that Daniel Perez' state of mind at that time amounted to a reckless indifference to human life." XXX 2181. He rejected defense argument that the penalty verdict had to be unanimous and objections based on Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). XXVII 1931-33.

In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court overturned Earl Enmund's death sentence. He had sat in a car while two associates killed an elderly couple in a farmhouse, and was convicted of felony murder as a principal. The Court wrote: "Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." Id. 801. It concluded that the death sentence was improper "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken". Id.

In Tison v. Arizona, 481 U.S. 137 (1987), the Court

[20] It is noteworthy that a juror wrote to defense counsel after the trial: "None of the jurors were able to place the weapon in Mr. Perez's hands, nor did we believe that he was the actual murderer." IX 1442.

revisited Enmund. Gary Tison's adult sons broke Gary, who was serving a life term for murder of a guard during a prior escape attempt, out of prison by smuggling guns into the prison. The group kidnapped a family, and the sons stood by while Gary and another escapee murdered the family members with the guns they had supplied, and later took part in a deadly shoot out. The Supreme Court affirmed the sons' death sentences, writing: "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Id. 158.

From the foregoing, it is a necessary predicate for a death sentence that the defendant was the killer or was a major participant in the felony acting with reckless disregard for human life.

In Tison, the Supreme Court wrote that the necessary findings could be made by the court on remand pursuant to Arizon'a non-jury capital sentencing scheme. Tison, 481 U.S. at 158.

Tison was decided long before Apprendi and Ring altered the constitutional landscape regarding fact-findings that have sentencing consequences.

In Apprendi, the defendant plead guilty to various offenses and received an enhanced sentence under a hate crime statute. The Court found a violation of the Due Process and Jury Clauses because the defendant did not plead to the predicate facts allowing the sentence enhancement, and a jury had not found them. It ruled that a defendant could not be exposed to a penalty which exceeded the maximum that he could receive "according to the facts reflected in the jury verdict alone." 530 U.S. at 482-83.

Ring applied Apprendi to capital cases. The Court concluded: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." 536 U.S. at 609.

Under Florida law, the jury is to make the initial determination of this issue. Cf. Jackson v. State, 502 So.2d 409, 412 (Fla. 1986) (jury must be instructed pursuant to Enmund).

This issue involves a pure question of law subject to de novo review.

The guilty verdict at bar did not encompass the necessary facts to justify a death sentence. It did not find that appellant was the stabber or that he was a major participant in the felony and acted with reckless disregard for human life. It

is true that the 9-3 death recommendation arguably indicates that nine jurors made the finding under Enmund and Tison at penalty. The penalty proceeding, however, did not comply with the constitutional and legal requirements for a jury determination of an element of guilt.

First, the penalty recommendation, and hence the jury's determination of the Enmund/Tison issue, was not unanimous: the jury was simply told to render a majority verdict, and its decision was made by a 9-3 vote. As appellant argued below, II 182-83, the Florida Constitution and Florida law require jury unanimity. The requirement arose in the state's earliest days. Cf. Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"); art. 1, § 6, Fla.Const. (1838) (right to trial by jury "shall for ever remain inviolate"; art. 1, § 22, Fla.Const. (1968 as amended) (same); § 775.01, Fla.Stat. (Florida law incorporates common law); L. Levy, Origins of the Bill of Rights 216 (1999) ("The rule itself derived from a case of 1367 in which a court ruled that a verdict agreed to by eleven of twelve jurors was unacceptable."). Jury unanimity is required in capital cases under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution.

Second, the jury was not instructed that the state had to prove the Enmund/Tison elements beyond a reasonable doubt. As

argued below, the reasonable doubt standard is a necessary part of due process. II 183-84. It arose in the early common law, and developed along with the unanimity requirement, Levy, at 216, and was an element of the jury trial by the end of the common law period, especially in capital cases, cf. State v. Wilson, 1 N.J.L. 439, 1793 WL 469, 4 (N.J. 1793), and has long applied in Florida. Cf. Holland v. State, 12 Fla. 117 (1867) ("On this point they were properly charged by the court as to the law, and we presume, from the facts of the case, they entertained no reasonable doubt of guilt."). It is required by the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

Third, over defense objection, II 152, SR5 71-72, XXVII 1931-32, the prosecutor and court told the jury repeatedly that its penalty verdict was "advisory". XXVIII 1950, XXIX 2148, 2172-83 (10 references in final instructions). The jury was told that the judge would give the recommendation great weight, XXIX 2173, but this instruction did not advise it that the judge could not impose a death sentence without the Enmund/Tison finding. Cf. Caldwell v. Mississippi, 472 U.S. 320 (1985) (court may not give instruction diminishing jury's sentencing role).

Fourth, under section 921.141(1), Florida Statutes, the rules of evidence do not apply to capital sentencing proceed-

ings. The lower court overruled appellant's argument that the statute unconstitutionally authorizes the use of hearsay. II 149-51, SR5 66-67. Further, over defense objection, II 200-212, the court allowed the state to present victim-impact evidence which is not admissible in a trial as to the elements of guilt.

In summary, the sentencing determination resulted from a proceeding lacking the necessary marks of a jury trial as to guilt in our jurisprudence: the jury reached a non-unanimous decision using an unconstitutional standard of proof, after being told that its decision was advisory only, on evidence not subjected to normal standards of competency. A constitutional error in the jury proceedings infects the judge's final sentencing determination. See Espinosa v. Florida, 505 U.S. 1079 (1992) (jury's consideration of invalid circumstance taints judge's sentencing order). This Court should reverse the death sentence.

5. WHETHER THE DEATH SENTENCE AT BAR IS IMPROPER BECAUSE THE STATE DID NOT ESTABLISH THAT APPELLANT KILLED MARTIN OR WAS A MAJOR PARTICIPANT IN THE FELONY AND ACTED WITH RECKLESS DISREGARD FOR HUMAN LIFE.

The jury did not determine that appellant committed premeditated murder, and did not determine who stabbed Ms. Martin. This case is like Jackson v. State, 575 So.2d 181 (Fla.1991) and Benedith v. State, 717 So.2d 472 (Fla.1998). Jackson held that one may not be sentenced to death for participating in a felony in which the victim was killed unless one he was a major participant in the felony and acted with reckless indifference to human life, and vacated Jackson's death sentence, stating at pages 190-91:

> Although the evidence against Jackson shows that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder. See Tison, 481 U.S. at 150-51, 107 S.Ct. at 1684-85. The entire case is based on circumstantial evidence. The totality of the record shows that Jackson previously indicated his intent to rob Phillibert's store; that Jackson was seen driving in the vicinity of the store shortly before and after the crime; that Jackson had been driving with his brother, whose fingerprints were found on the cash register; that Jackson said afterward "we had to do it because he had bucked the jack"; and that Jackson asked his mother to tell his brother to say "he hadn't been nowhere around the hardware store and get rid of the gun." A reasonable inference could be drawn from the evidence in this record that either of the two robbers fired the gun, contrary to the finding of the trial judge. There was no evidence presented in this trial to show that Jackson personally possessed or fired a weapon during the robbery, or that he harmed Phillibert. There was no evidence that Jackson carried a weapon or intended to harm anybody when he

> walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for Jackson to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized.

The evidence at bar also does not show beyond a reasonable doubt that appellant's state of mind was any more culpable than that of any other burglar. He said that Green said he had killed Martin because she "bucked" on him. The state did not establish that appellant personally possessed or used a weapon during the burglary, or intended to harm anyone when he entered the house, or that he expected violence to erupt. The fatal attack was very short and the state did not show that appellant could intervene before it was too late. No other innocent lives were jeopardized.

This Court followed Jackson in Benedith. Arturo Benedith and Thomas Taylor robbed John Shires of his car, and Shires died of three gun shot wounds. This Court wrote that the evidence did not prove that Benedith was the shooter, that he procured or possessed a firearm, that he and Taylor had ever used a firearm before in a robbery, or that he could have prevented the use of the firearm while the robbery was being committed. 717 So.2d 477. It noted that it could not be determined who shot Shires, and that there was testimony that Taylor seemed to be hiding something on his person the day before the murder. Id. This

Court vacated the death sentence and remanded for entry of a life sentence.

Again, the facts at bar are similar. The state did not not prove who killed Ms. Martin. While there was evidence that appellant had a work knife, there is no evidence that he had procured it for use in the burglary or he used it in the burglary. While he used a knife in the attempted murder case, that fact could not establish the degree of culpability needed for a death sentence under Jackson and Benedith, and the state did not so contend below: the Enmund/Tison analysis focuses on a defendant's participation in the murder, not his criminal history. The state did not show he could have prevented the use of the knife during the burglary.

The decision of the Arizona Supreme Court in State v. Lacy, 929 P.2d 1288, 1299-1301 (Az.1996) is similar. Clifford Lacy took part in a burglary in which two college co-eds were murdered, and his bloody shoeprint was found at the scene. He told the police he had gone with Bruce Stubblefield to get chemicals from one of the victims for use in manufacturing PCP, and Stubblefield killed the women in an argument. He took a microwave from the residence while Stubblefield was attacking the women, then re-entered and saw the him shoot one of the women. Stubblefield was acquitted, but, at a separate trial, Lacy was found guilty of two felony murder counts and sentenced

to death.

The trial court found Lacy "was more than a casual participant in these offenses under the felony murder rule, that he was a major actor," since he entered the house, and was present when a victim was bound and gagged[21] and when the other victim was shot the first time, and that either he or Stubblefield had a gun. Id. 1299. It did not find that Lacy killed, attempted to kill, or intended that a killing take place, and the supreme court found that the evidence would not support such a conclusion beyond a reasonable doubt. Id.

The supreme court reduced the death sentence to one of life imprisonment. It wrote that the judge did not explicitly find that Lacy acted with reckless indifference to human life, although it ruled that an explicit finding using those exact words is not necessary. It went on to find that, in any event, the evidence would not support such a finding. It noted that the main evidence of Lacy's involvement was his own account of the murders, and that, while the bloody shoeprint suggested that he "was not entirely truthful in his statement and may have been close enough to one of the bodies to have stepped in blood", it did not establish his mental state, or tell when he may have entered the bedroom. Id. 1300. It concluded at pages 1300-01

[21] The supreme court found that the evidence did not show that Lacy was present when one of the victims was being bound and gagged.

(emphasis in original):

> Utilizing what it calls the "only logical inference from the evidence," the state posits a highly inculpatory version of the events that night. However, it is just one, and not surprisingly the most abhorrent, of many viable scenarios. A mere possibility, or even the likelihood, that defendant exhibited reckless indifference is insufficient. Such a finding must be made beyond a reasonable doubt. Because the evidence does not permit that here, defendant's death sentences cannot be upheld under the strict requirements of Tison.

The Mississippi Supreme Court reached a similar conclusion in White v. State, 532 So.2d 1207 (Miss. 1988). A café owner was shot dead during a robbery committed by Willie White and two others. White was present at the time of the killing, and a witness saw him leave with a gun in his hand. The court wrote at page 1221:

> The evidence is more than sufficient to show beyond a reasonable doubt that White, his brother, L.V. White, and Willie Ruth (Bessie) Anderson robbed Poo-Nannie's Cafe, that its owner, Annie Dale Lewis, was killed in the course of the robbery, and that White was present when the killing occurred. But the evidence concerning the events before and after the robbery offers no indication which robber killed Lewis, or that any of the three contemplated in advance that lethal force would be employed.
>
> More specifically, there is no evidence that White made any attempt to kill Lewis, or that he contemplated that lethal force would be used. Circumstantial evidence places White in the store with his brother and Anderson at the time Lewis was killed. This is enough to undergird the jury verdict that White was guilty of capital murder. Because nothing in the record legitimately suggests that White killed or contemplated any physical harm to Lewis, the death verdict dies.

> To be sure, Sam Spearman testified that he saw Willie Lee White leaving the scene with a gun in his hand. There is nothing to show that this gun was the murder weapon, that White handled it before the shooting, or that it had even been fired, or that White knew of the presence of the gun until after the killing. Neither the murder weapon, nor any other gun, was received as evidence at trial. The evidence before the jury is wholly consistent with numerous other scenarios by which Willie White did not kill or anticipate a killing. Other reasonable hypotheses would suggest that L.V. White might have been the killer. Or Willie Ruth Anderson. What is important is that nothing in the record offers the jury a rational basis for selecting one hypothesis over the other. In sum, we have a pure absence of any proof on the elements contained in the sentencing statute.

In State v. Rodriguez, 656 A.2d 262 (Del. Super. 1994), a trial court addressed the following issue (656 A.2d at 263):

> This case raises an issue of first impression in Delaware: Whether a defendant who was convicted of felony murder under 11 Del.C. § 636(a)6 [FN omitted] may be sentenced to death when circumstantial evidence placed him at the scene of the murder with a gun in his hand, but no evidence existed which demonstrated beyond a reasonable doubt that he fired the fatal shots or expected that violence would erupt in the course of an attempted robbery during which a death occurred.

Rodriguez and two others robbed a liquor store, shooting the victim six times. All three men were armed with a gun. A witness saw Rodriquez wearing a Raiders jacket outside the store before the robbery, and another witness saw a man in a Raiders jacket flee the store after the robbery. When arrested, Rodriguez said was the wheel man in the robbery, and later denied any involvement. The state presented evidence of his part in other liquor store robberies, during one of which he

held a sawed-off shotgun to the victim's head said, "You're going to die." Id. He was convicted of felony murder, and the judge submitted to the jury at penalty a special Enmund-Tison verdict. The jury found in the state's favor by a 9-3 vote. Id. 268. Nevertheless, the court concluded that under the facts it could not legally impose a death sentence.

This issue is subject to this Court's independent de novo review in its review of appellant's death sentence. Cf. Chamberlain v. State, No. SC02-1150, n. 12 (Fla. June 17, 2004). The death sentence cannot stand at bar. This Court should vacate the death sentence and remand with instructions to enter a life sentence for the murder.

6. WHETHER THE COURT ERRED IN FINDING THE HEINOUSNESS CIRCUMSTANCE BECAUSE IT DID NOT FIND THAT APPELLANT WAS THE ACTUAL KILLER OR THAT HE DIRECTED OR KNEW HOW MARTIN WOULD BE KILLED.

The "especially heinous, atrocious or cruel" circumstance does not apply vicariously to one who was not the actual killer unless the state can establish beyond a reasonable doubt that he directed or knew how the victim would be killed. In Williams v. State, 622 So.2d 456, 463-64 (Fla.1993), this Court wrote (e.s.):

> Williams' next argument is that the trial court erred in finding that the heinous, atrocious, and cruel aggravating factor applied to him. While the record reflects that the manner in which the victims were killed was heinous, atrocious, and cruel, the State in this instance failed to prove beyond a reasonable doubt that Williams knew or ordered the particular

> manner in which the victims were killed. We have expressly held that this aggravating factor cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed. Omelus v. State, 584 So.2d 563 (Fla.1991). Consequently, the trial court erred in applying this aggravating factor vicariously. We find that the remaining aggravating factors are fully supported by the evidence.

Archer v. State, 613 So.2d 446, 448 (Fla.1993), struck HAC where Archer "knew that [the co-defendant] would use a handgun to kill the victim; he did not know, however, that the victim would be shot four times or that he would die begging for his life."

At bar, the judge specifically did not find whether appellant himself killed Martin. XXXI 2298. Appellant's statement was that he did not know that Green was going to kill Martin, much less that he knew the manner that he would use. The judge erred in applying the circumstance to appellant.

In Archer, Williams, and Omelus the defendants were not present at the scene of the murder. Nevertheless, the logic of those cases is that the defendant in some way agreed that the murder would be committed in a torturous manner. At bar, the jury did not find premeditation, so that there is no basis for any determination that appellant had previously agreed that Green would kill Martin at all, much less in a torturous manner. By contrast, Archer, Omelus and Williams specifically ordered the killings.

The sufficiency of the evidence to support an aggravating circumstance is subject to de novo under this Court's independent appellate review: it is an appellate court's function "to determine sufficiency as a matter of law". Tibbs v. State, 397 So.2d 1120, 1123, n. 10 (Fla. 1981). At bar, the evidence did not support the circumstance, and its use was prejudicial in light of the strong case for life. Use of the circumstance violated the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should reverse for resentencing.

7. WHETHER THE EVIDENCE SUPPORTS THE HEINOUSNESS CIRCUMSTANCE.

Ms. Martin had a blunt force injury to the face, which apparently caused a concussion, although there was no visible damage to the brain itself and no skull fracture. XXIV 1632-33.[22] Eight stab wounds to the left side of the neck penetrated about an inch into the body; four of them struck the jugular vein and would have been fatal. XXIV 1641. There were scratches on the right base of the neck. Id. 24 stab wounds to the right torso included several that went into the liver and right lung causing a hemorrhage in the right lung cavity of

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[22] The state's theory was that the stab wounds were preceded by the blow to the head, which was delivered by the duck head cane: "Mr. Perez takes that duck head cane and hits her over the head on the forehead abruptly. He then takes out his knife and he starts attacking her with his small knife." XVIII 864 (state's opening statement as to guilt).

about 400 milliliters of blood, indicating that she was alive when stabbed on the right side. XXIV 1642-43. These injuries would also have been fatal. Id. There were many other stab wounds. XXIV 1645-47. The pathologist testified that blood on the right side and the neck was very consistent with those wounds occurring first and the others occurring afterward, but added: "Of course, often times things occur so quickly that you can get other wounds first, but looking at where the blood is one would say I favor the neck wounds and the ones on the right side as occurring first because of the absence of little blood in the other wounds." XXIV 1648.

The stab wounds to the neck would cause unconsciousness within seconds to a minute or two, and brain death would quickly follow. XXIV 1649. She would have died within ten or fifteen minutes from the wounds to the liver or lung. Id.

Appellant's police statement was consistent with the foregoing: he said that when Green was stabbing Martin, she "didn't move. She didn't do shit. She was just gone." XXII 1355. Green "had her on the ground and he was just jugging the shit out of her", and that "She wasn't moving. She was just gargling, like, like, there was a gargling sound." XXIII 1414. When appellant came in, she "was on the ground. She - as far as what I saw, she was not moving. She was not doing anything. I heard a (sound effect) and that was it." XXIII 1469. He heard

"no screaming or none of that shit. ... . It was more of - it was more of (sound effect) like, boom, boom, like - like if you were to get up and go like this on the wall." XXIII 1478. Green later said, "She bucked on me. She started screaming. She fucking bucked on me. She bucked on me. She didn't have to buck on me." XXIII 1470.

In Elam v. State, 636 So. 2d 1312 (Fla. 1994), David Elam knocked Carl Beard to the ground and then beat him to death with a brick. This Court struck the heinousness aggravator (id. 1314):

> Elam claims that the trial court erred in finding aggravating circumstances applicable here. We agree. We find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel inapplicable. Although the [victim] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the [victim] was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

Similar is Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Although it has been held that strangulation is "nearly per se heinous",[23] this Court struck HAC in a strangulation case (id. 1208):

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as

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[23] See Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990) (citing cases), vacated on other grounds, 505 U.S. 1215 (1992).

> "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

In Zakrzewski v. State, 717 So.2d 488 (Fla. 1998), the defendant was convicted of brutally murdering various members of his family. This Court struck the circumstance as to the murder of Sylvia Zakrzewski, who was beaten and strangled, writing: "Medical testimony was offered during the trial which established that Sylvia may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death. We have generally held awareness to be a component of the HAC aggravator." Id. 492-93 (e.s.).

At bar, the evidence did not show the prolonged suffering which the aggravator requires. The evidence was that Martin screamed when she encountered Green, Green immediately hit and stabbed her, and she was quickly unconscious. An initial blow from the cane itself may have rendered her unconscious or semi-conscious and, in any event, the stab wounds to the neck quickly

produced unconsciousness. The state presented evidence based on the examination of blood spatters that Ms. Martin did not have blood on the tops or bottoms of her shoes, indicating she was not standing erect when the blood was flowing, and was "either on her knees - she wasn't standing erect". XXI 1172-73. The blood patterns indicated that she did not stand back up. XXI 1190.

Hence, it is speculative to say that the murder involved prolonged torture or consciousness of impending death. An aggravating circumstance, however, may not rest on speculation. Hamilton v. State, 547 So.2d 630, 633-34 (Fla.1989), states:

> ... . Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Thus, in Bundy v. State, 471 So. 2d 9, 22 (Fla. 1985), this Court struck the circumstance where victim's body was found 45 miles from where she was abducted, and her torn, bloodied and semen-stained clothes were nearby: "There was no clear evidence offered to show that Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension, or was sexually

assaulted before her death. In the absence of these types of facts, we must conclude that this case does not fit in with our previous decisions in which we have found the manner of the killing to be the conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel." See also Diaz v. State, 860 So.2d 960, 966-67 (Fla. 2003) (error to base finding on speculation that murderer prolonged victim's suffering by slowly reloading revolver) (citing cases and discussing circumstance at length); Brown v. State, 644 So. 2d 52, 53-54 (Fla. 1994) (error to find circumstance where examination of badly decomposed body revealed three stab wounds, none of which would be immediately fatal). Put another way, speculation cannot substitute for the requirement of substantial, competent evidence. Cf. Smith v. Smith, 29 Fla. Law Weekly D 1079 (Fla. 1st DCA May 4, 2004) (abuse of discretion under Canakaris to impute income to husband based on speculative testimony without competent evidence to support finding that he was deliberately underemployed and able to earn more) (citing cases).

At bar, the court noted the medical examiner's testimony about the sequence of the stab wounds and the fact that the neck wounds could cause loss of consciousness in a few seconds. IX 1449. It then said that Martin "was alive and conscious during some of the multiple stab wounds and the State has proven beyond

a reasonable doubt that her murder was unnecessarily torturous, conscienceless and pitiless". Id. This conclusory statement did not satisfy the circumstance's requirements. Even assuming that Martin was conscious for some of the stab wounds, such a fact is indistinguishable from Elam where the victim may have been conscious for less than a minute while being beaten to death with a brick.

The cases cited by the trial court in this regard do not support the circumstance here. Davis v. State, 620 So.2d 152 (Fla.1993), recited facts from the original opinion (Davis v. State, 586 So.2d 1038 (Fla.1991), vacated Davis v. Florida, 505 U.S. 1216 (1992)), showing that Davis at one point halted the attack to use a different knife, and that he also choked the victim. Further, and most importantly, the victim "was alive and conscious when each injury was inflicted". In Pittman v. State, 646 So.2d 167 (Fla.1994), Pittman stabbed three family members to death during a prolonged ordeal. The first attack came on the daughter after she refused Pittman's sexual advances and was crying for help. The second was on her mother as she was in the hallway outside the daughter's room, and the third was on the husband, who was trying to use the phone. Further, Pittman had made several threats against the victims. Hence, the case showed the prolonged fear and suffering which the circumstance requires.

In Francis v. State, 808 So.2d 110 (Fla.2002), Francis stabbed 66-year old twin sisters in circumstances in which each was aware not only of her the attack on herself, but also of the attack on her sister. This Court wrote at pages 134-35 (e.s.):

> Francis also claims that the trial court erred in finding that the murders satisfied the elements to be classified as HAC. For HAC to apply, the crime must be conscienceless or pitiless and unnecessarily torturous to the victim. See, e.g., Nelson, 748 So.2d at 245; Hartley v. State, 686 So.2d 1316, 1323 (Fla.1996). The HAC aggravator has been consistently upheld where, as occurred in this case, the victims were repeatedly stabbed. See, e.g., Guzman v. State, 721 So.2d 1155, 1159 (Fla.1998); Brown v. State, 721 So.2d 274, 277 (Fla.1998); Atwater v. State, 626 So.2d 1325, 1329 (Fla.1993).
>
> In this case, the medical examiner testified that Mrs. Brunt was stabbed sixteen times and Mrs. Flegel was stabbed twenty-three times. Although Mrs. Flegel's lack of defensive wounds does not necessarily indicate that she was unconscious throughout her attack, Mrs. Brunt's defensive wound tends to indicate that she was conscious during at least some part of her attack. Additionally, Francis' contention that the victims "may have been instantaneously killed" is not supported by the record. The medical examiner's testimony in this respect was that the victims could have remained conscious for as little as a few seconds and for as long as a few minutes. It is important to note that we have upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds. See Rolling v. State, 695 So.2d 278, 296 (Fla.1997) (upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds after she was initially attacked); Peavy v. State, 442 So.2d 200, 202-03 (Fla.1983) (upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds).
>
> Moreover, as we have previously noted, "the fear and emotional strain preceding the death of the victim may

> be considered as contributing to the heinous nature of a capital felony." See Walker, 707 So.2d at 315; see also James v. State, 695 So.2d 1229, 1235 (Fla.1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."). In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate. We arrive at this logical inference based on the evidence, including photographs presented at the guilt phase, which clearly establishes that these two women were murdered in their home only a few feet apart from each other. As a result, we conclude that the trial court's HAC finding is further buttressed by the logical fear and emotional stress experienced by the two elderly sisters prior to their deaths as the events were unfolding in close proximity to one another. [FN16]
>
> FN16. There is no evidence in the record to suggest that the bodies of the victims had been moved after they were killed. As such, we note that one of the sisters was killed in an area designated the living room and the other was killed in the kitchen area. The evidence, however, shows that these rooms were joined and divided only by a single waist-high counter top. Thus, it would have been impossible for the victims not to have seen each other. Based on the record and close proximity within which the victims were murdered, no speculation is required to conclude that both victims were subjected to appalling amounts of fear and stress before their deaths.

Thus, Francis acknowledged the rule that speculation about the victim's fear and stress cannot support the aggravator. Further, the stabbing cases cited in Francis involved additional facts, not involved at bar, which supported the circumstance.

In Guzman, the victim "was conscious and suffering intense pain during the attack." 721 So.2d at 1159-60. In Brown, the victim was conscious and moved about the room while being attacked. 721 So.2d at 278. In Atwater, the victim was beaten before or during the stabbing and "the stab wounds were more likely inflicted in the order of increasing severity and that the fatal wounds to the heart were probably inflicted last." 626 So.2d at 1325. In Rolling, the defendant stabbed Sonya Larson in the chest, then taped her mouth shut, which in itself would cause panic and fear of harm or death. He then proceeded to stab her to death. 695 So.2d at 281-82, 296. The majority opinion in Peavy has no information or analysis about the circumstance. Justice McDonald wrote in a separate opinion that the evidence did not support the circumstance under the case law because the medical examiner testified that the victim would have felt some pain, but lost consciousness within seconds and bled to death within a minute, and there were no signs of a struggle. One cannot tell if the majority agreed or disagreed with Justice McDonald's assessment of the facts or whether other evidence supported the circumstance. Further, Peavy dates back to an era in which the circumstance applied to "execution-style" killings. Vaught v. State, 410 So.2d 147 (Fla.1982), rejected argument that the circumstance could not apply to a shooting that "was spontaneous and caused nearly instantaneous death", writing at

page 151 (citations omitted): "the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a 'cold and calculating' or 'execution-style' fashion." See also Jones v. State, 411 So.2d 165, 169 (Fla.1982) (store clerk shot during robbery; "The finding that the murder was especially heinous, atrocious, or cruel was supported by the evidence that appellant, ignoring the victim's plea to be spared, shot him to death point-blank, in the style of an execution."); Hargrave v. State, 366 So.2d 1, 5 (Fla.1979). It may be that the majority in Peavy applied the circumstance simply because it considered the murder to be an execution-style murder.[24]

To uphold the circumstance at bar would mean that it may

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[24] In general, that era rejected attempts to define or narrow the circumstance. Pope v. State, 441 So.2d 1073, 1078 (Fla.1984), formally abandoned any narrowing language:

> In 1981 the Supreme Court adopted a completely revised set of Standard Jury Instructions in Criminal Cases, "intended as a definitive statement of the law on which a trial jury is required to be instructed." Notes on the Scope, Organization and Use of These Instructions, Florida Standard Jury Instructions in Criminal Cases xxi (1981). The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered nor is the defendant's mindset ever at issue.

This Court wrote that its purpose was to eliminate the mental element. Id. The resulting jury instruction was found unconstitutional in Espinosa v. Florida, 505 U.S. 1079 (1992).

apply to any murder involving any awareness on the victim’s part. It would then apply to such a broad array of murders as to violate the constitutional requirement that aggravators genuinely narrow the class of persons eligible for the death penalty, which is reserved only for the most aggravated and least mitigated murders.

The viability of a death penalty statute depends on “the constitutionally necessary narrowing function of statutory aggravating circumstances.” Pulley v. Harris, 465 U.S. 37, 50 (1984). Aggravating circumstances provide a “meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not”. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. 238, 313(1972) (White, J., concurring)). “The use of ‘aggravating circumstances’ is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.” Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). “Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.” Maynard v. Cartwright, 486 U.S. 356, 362 (1988); accord Ring v. Arizona, 536 U.S. at 606.

Under its independent de novo review, this Court should find that the evidence does not support the circumstance. Its use was prejudicial especially in light of the strong mitigation. Application of the circumstance at bar violated the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions, and this Court should order resentencing.

8. WHETHER THE COURT MISAPPLIED THE LAW AND ERRED IN ITS ASSESSMENT OF THE STATUTORY MENTAL MITIGATING CIRCUMSTANCE OF EXTREME DISTURBANCE.

While the weight to assign a mitigating circumstance is in the judge's discretion, a court abuses its discretion when it bases its decision on a flawed view of the evidence or the law, or if its action is unreasonable.

It was undisputed below that the murder was committed while appellant was under the influence of extreme mental or emotional disturbance. In its penalty phase opening statement, the state told the jury: "I anticipate they will call witnesses in the penalty phase to establish that the Defendant has a history of psychological problems and he does. That he has a history of mood disorder of a serious nature and he does. We are not going to tell you that he doesn't. He does." XXVIII 1952-53 (e.s.). The state continued: "I also believe that their expert testimony will attempt to downplay another reality that we are going to submit to you in the evidence that he has a personality disorder which causes him to or that he has a pervasive pattern of

violating the rights of others and disregarding the rights of others." XXVIII 1953 (e.s.).

Dr. Michael Riordan testified for the defense that appellant exhibited severe mental illness from early childhood, including a series of suicide attempts beginning at age seven, sexual molestation, institutional confinement, medication, and classification as severely emotionally handicapped. Appellant's early childhood involved a ruptured and disordered family life and frequent moves which destroyed peer relationships. He spent birthdays and holidays in mental institutions. The elements of serious personality disorders began around age seven. Riordan said appellant's personality disorders would naturally arise from the hurdles he faced over the years: "[it is] not that surprising to me that someone with so many problems over the years wouldn't have developed a disorder of personality trying to cope with a tumultuous life". XXIX 2092-93.

Dr. Riordan concluded that appellant had a major mental illness, bipolar disorder, and various personality disorders including antisocial personality disorder and attention deficit disorder.

Dr. Gregory Landrum, testifying for the state, concurred in Riordan's diagnosis. He testified that, in addition to the bipolar disorder, appellant had personality disorders which interfered with his ability to function in relationships, in

school and occupationally and involved violating the rights to others, having difficulty with impulse control, acting before thinking, manipulating for personal gain, stealing, and aggression.

In final argument, the prosecutor again conceded the existence of the mental mitigating evidence (XXX 2153):

> The Defendant has a mental health history. There is no getting around that. That's a fact. You heard from Dr. Riordan yesterday. He's a forensic psychologist and he related to you the mental health history and according to him Daniel Perez was diagnosed with Bipolar Disorder, a mood disorder. Attention Deficit Disorder and Personality Disorder.

She also reviewed the extensive evidence of personality disorders affecting appellant's hostile views, impulses and actions and his homicidal acts and thoughts, and his pattern of violating the rights of others and impulsiveness. XXX 2153-54.

At the Spencer hearing, the prosecutor said: "We have urged the Court to consider that as mitigating. In fact, we conceded that it's a substantial mitigating factor." XXX 2215-16.

Notwithstanding the foregoing, the judge gave only "little weight" to the substantial and unrebutted evidence in finding the extreme disturbance mitigator. He wrote that "the mental or emotional disturbance Perez suffers from is one of the most dangerous types. The most significant and disturbing components of Perez's bipolar disorder [are] the antisocial and borderline personality features." R 1451. In part, he seemed to think

that there was a broad difference between the views of Drs. Landrum and Riordan, R 1451-52, although in fact they reached similar conclusions: appellant had bipolar disorder and various personality disorders arising from his troubled childhood. The only difference between them was that the state's questioning of Landrum focussed more on the personality disorders than Riordan's did, as the judge himself noted in the sentencing order. R 1451. The judge further based his decision on his view that there was "no evidence presented in this case that Daniel Perez is not able to conform his conduct to the requirements of law". R 1452. He concluded:

> Thus, while the State, while the Court finds that this mitigating circumstance of Daniel Perez participating in a murder while he was under extreme mental or emotional disturbance has been adequately proven, the Court gives little weight to this mitigating circumstance because there is no showing that Perez is unable to conform his behavior to the requirements of law and because the antisocial personality and borderline features of Perez' Bipolar Disorder makes him dangerous.

R 1452. The judge wrote in a footnote that there was little reassurance that medication would control appellant's homicidal impulses because "it was determined he no longer needed medication" when he was imprisoned before. Id., n. 3.

"[The] weight to be given a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard." Cole v. State, 701 So.2d 845, 852 (Fla.1997). See also Barnhill v.

State, 834 So.2d 836, 853 (Fla. 2002). An abuse of discretion occurred at bar.

Dr. Landrum, the state's expert, testified that appellant "certainly met the criteria in my view of Bipolar Disorder or Mood Disorder", XXIX 2117, and identified it as "Bipolar I", the more serious form of the illness. XXIX 2117-18. He said a personality disorder "is a disorder that is much more pervasive, much more enduring in a person and all of us have our own sort of unique personality certainly, but personality disorder is a personality that is really above that that tends to be atypical abnormal." XXIX 2120. A personality disorder is "present to such a degree that has interfered with the person's ability to function with relationships in school, occupationally, those sorts of things. It's a persistent enduring pattern of behavior. Rather inflexible. A person has a way of relating to people and they tend to persist with that over time regardless of the situation they find themselves in." Id. He testified (XXIX 2123-24 (e.s.)):

> The personality disorder tends to give you an idea of how those emotions [of mood disorder] are going to be expressed. If he did not have what I view as an anti-social personality disorder and just had simply a Bipolar Disorder, you would not have any arrest history. Typically you would not have any problems with the law, any aggression.

Dr. Landrum agreed with Dr. Riordan's assessment, which he noted was more recent than his own (XXIX 2124-25):

Q. Doctor, you had an opportunity to review Dr. Riordan's report?

A. Correct.

Q. Maybe I'm missing something. It sounds by and large that you both agree on most of these diagnoses; is that a fair statement?

A. Yes. As I reviewed his report, I certainly agree that there are indicators of the Bipolar Disorder as well as the borderline personality disorder. I would also add from my findings back in '96 which was the last time I had contact with him there are also features of the antisocial personality there as well.

Q. Based on your testimony I would assume that you would agree this is not a recent fabrication by Daniel Perez as far as these psychological problems?

A. No. I think they have certainly in reviewing the record have been persistent for quite some time and have been well documented I think as far back as elementary school age.

The judge's decision to accord little weight to the mitigator seems to have sprung also from his view that appellant's mental disorder "is one of the most dangerous types" based on the testimony regarding appellant's personality disorders. It is important to note that neither psychologist specifically testified that appellant's disorder is "one of the most dangerous types". Dr. Landrum did testify that, without the personality disorder, appellant would not have engaged in criminal activity: "If he did not have what I view as an anti-social personality disorder and just had simply a Bipolar Disorder, you would not have any arrest history. Typically you would not have any problems with the law, any aggression." XXIX

2123-24.

Thus, the judge’s view was that he would not give great weight to the mitigator because of the personality disorder which caused
appellant’s criminal behavior. That is, if he had not engaged in criminal behavior, the mitigator would have greater weight. In this view, however, this very important statutory mitigating circumstance could never receive great weight because there would be no murder and therefore no capital sentencing proceeding.

The judge’s other reason for giving little weight was his finding that there was “no evidence presented in this case that Daniel Perez is not able to conform his conduct to the requirements of law”. XXIII 1452. Again, if appellant had been completely unable to conform his conduct to the requirements of law, he would have been legally insane or incompetent and could not have been convicted of murder and there would be no capital sentencing.

The logic at bar was similar to the flawed logic condemned in Mines v. State, 390 So.2d 332, 337 (Fla.1980), where the judge had rejected mental mitigation because the defendant was not insane at the time of the crime. See also Morgan v. State, 639 So.2d 6, 13-14 (Fla.1994) (error to not find mental mitiga-

tion because jury had not found defendant insane).[25]

Anyway, there was evidence that appellant's mental disorders drastically affected his ability to conform his behavior to law, and the evidence was undisputed. The state's own expert said that appellant has a pervasive personality disorder which affects his functioning in life, that such a disorder is "atypical abnormal", that it produces a "rather inflexible" approach to situations, which is to say that appellant has a limited ability to conform his actions to situations in which he finds himself. Such persons "tend to persist with that over time regardless of the situation they find themselves in." Appellant's behavior arising from his personality disorders involves impulsiveness, aggression, and manipulative behavior. The state's expert concluded that appellant's criminality was directly related to his personality disorders. Thus, contrary to what the judge wrote, the evidence established that appellant had a psychological disability which substantially affected his ability to conform his behavior to law.

Finally, the cases cited by the judge do no support his conclusion. The judge noted that, under Rose v. State, 675 So.2d 567 (Fla.1996), Hildwin v. Dugger, 654 So.2d 107 (Fla.1995), and Santos v. State, 629 So.2d 838 (Fla.1994), the extreme disturbance circumstance is "a mitigating factor of the

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[25] Further, as discussed more extensively in the following point, dangerousness is not a proper sentencing consideration.

most weighty order", but distinguished those cases on the ground that they involved a finding that the defendant was unable to conform his conduct to the requirements of law. Again, the judge's reasoning was illogical and contrary to the record before him. It does not make sense to say that one mitigating circumstance should have more or less weight because of the presence or absence of another circumstance. Nothing in Rose, Hildwin, or Santos indicates that a court may give one statutory mitigator less weight simply because the other one has not been found. In fact, Rose teaches that both statutory mental mitigators are among "the weightiest mitigating factors". Rose, 629 So.2d at 840.

The abuse of discretion standard requires that judges "dealing with cases essentially alike should reach the same result." Canakaris, 382 So.2d at 1203. This rule is part of the rule governing review of death sentences which this Court established in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).[26]

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[26] This Court wrote at page 10 of State v. Dixon:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on

Hence, in general judges should follow Rose and give great weight to a statutory mitigating factor absent some unusual circumstance. Cf. Bell v. State, 841 So.2d 329, 335-36 (Fla.2002) (giving little weight to age mitigator improper for 17 year old absent unusual maturity).

Further, the fact that prison medical staff erroneously told appellant that he no longer needed medication is no reason to reduce the circumstance's weight. It makes no sense that state agents could diminish the mitigating effect of appellant's disease by giving him erroneous advice which worsened his mental condition.

From the foregoing, the judge abused his discretion in giving diminished weight to the statutory mental mitigating circumstance for reasons which are not supported by the record and are contrary to law, logic and precedent. This Court should order resentencing.

9. WHETHER THE COURT ERRED IN ITS ASSESSMENT OF NONSTATUTORY MITIGATING CIRCUMSTANCES.

The judge found that appellant's having suffered sexual abuse and his unstable upbringing and family history were the

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> the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, 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.

most significant factors contributing to "the antisocial and borderline personality features of his bipolar disorder." IX 1454-55. Nevertheless, he gave these circumstances little weight because they "contributed to a combination of antisocial personality features and borderline personality features which have coalesced over time into a conduct disorder that now makes Daniel Perez a dangerous person". Id.

The judge found that appellant suffered from mental health problems for a long period, was committed to several mental health facilities, and his family had a history of mental health problems, yet gave this circumstance only little weight for similar reasons. IX 1456-58. He found it "significant" that Dr. Riordan had not said that the murder would not have occurred if appellant had been on medication and undergoing mental treatment, and wrote that he placed "no confidence in the suggestion" that he would take medication and follow mental health treatment while in prison for life. IX 1458. The judge noted that while in prison appellant had described part of himself as evil and wanting to stage a spectacular end, once expressed thoughts about killing someone, and did well on medication while in prison. IX 1456-57.

It is important to note that these findings did not involve resolution of disputed testimony, the area in which lower court judgments receive greatest deference. There was no dispute

about appellant's personality disorders, nor about the fact that they produced his criminal behavior. As Dr. Landrum testified for the state: "If he did not have what I view as an anti-social personality disorder and just had simply a Bipolar Disorder, you would not have any arrest history. Typically you would not have any problems with the law, any aggression." XXIX 2123-24. There was no dispute about appellant's profoundly troubled childhood and his sexual abuse as a child.

Underlying the judge's thinking was the view that appellant's mental health problems and troubled childhood had little weight because they led to criminal activity and produced a dangerous person beset by thoughts of violence and murder.

In fact, an antisocial personality disorder is mitigation. See Morton v. State, 789 So.2d 324, 331 (Fla.2001) (error not to consider antisocial personality disorder in mitigation). At bar, the judge erred by using appellant's personality disorder not as mitigation but as anti-mitigation: he used it to diminish the important and unrefuted defense evidence of mitigation.

This Court disapproved of similar reasoning in Miller v. State, 373 So.2d 882 (Fla. 1979). In sentencing Miller to death, the judge found several aggravating and mitigating circumstances, then wrote that, under the sentencing statute as it then existed, Miller would be eligible for parole consideration in 25 years, so that he might some day be released. He

wrote further: "the testimony overwhelmingly establishes that the mental sickness or illness that he suffers from is such that he will never recover from it, it will only be repressed by the use of drugs." Id. 885. He concluded that, since Miller might one day be released, "the only certain punishment and the only assurance society can receive that this man never again commits to another human being what he did to that lady, is that the ultimate sentence of death be imposed." Id.

This Court wrote at page 886 of Miller (e.s.):

> ... . The trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute. The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.

This Court then concluded on the same page:

> In light of the trial court's findings that the defendant was suffering from mental illness at the time he committed this crime, the motivating role the defendant's mental illness played in this crime, and the apparent causal relationship between the aggravating circumstances and his mental illness, it was reversible error for the trial court to consider as an additional aggravating circumstance, not enumerated by the statute, the possibility that Miller might commit similar acts of violence if he were ever to be released on parole. Whether a defendant who is convicted of a capital crime and receives a life sentence should

be allowed a chance of parole after 25 years is a policy determination for the legislature or the parole authorities rather than for the courts. Therefore, the sentence of death is vacated and the cause remanded to the trial court for resentencing in a manner not inconsistent with this opinion.

Walker v. State, 707 So.2d 300, 314 (Fla. 1997) followed Miller. This Court disapproved the prosecutor's asking the defense mental health expert whether he thought that Walker might kill again and wrote:

> This Court has explained that "the probability of recurring violent acts by the defendant if he is released on parole in the distant future" is not a proper aggravating circumstance in Florida. Miller v. State, 373 So.2d 882, 886 (Fla.1979); White v. State, 403 So.2d 331, 337 (Fla.1981). Moreover, the State may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty--like, as in this case, the defendant's mental impairment. Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983).
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> We agree with Walker that the prosecutor's question was wholly improper and in no way related to probing Dr. Eisenstein's opinion that Walker's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. ... .

At bar, the judge made an error like those of the judge in Miller and the prosecutor in Walker. He wrote that appellant is dangerous because of his major mental illness and personality disorders. He used this finding on the scales against appellant, using it to subtract weight from the powerful mitigation at bar. While he did not employ the precise term "aggravating circumstance" in this regard, neither did the judge in Miller or

the prosecutor in Walker. Hence, it was error to use it for the state's benefit in the scales of life and death under those cases.

Thus, the lower court made a ruling contrary to existing precedent in reducing the weight of the strong nonstatutory mitigation because of future dangerousness. Hence, an abuse of discretion occurred. The standard of review is abuse of discretion, as discussed in the previous point on appeal. This Court should order resentencing.

10. WHETHER THE COURT ERRED IN NOT FINDING IN MITIGATION THAT APPELLANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS IMPAIRED BECAUSE THE DEFENSE EXPERT DID NOT EXPRESSLY TESTIFY THAT IT EXISTED.

The judge wrote in the sentencing order (IX 1453):

> Dr. Riordan opined that Daniel Perez was acting under extreme mental and emotional disturbance at the time of Susan Martin's death, however, he offered no evidence that the capacity of Daniel Perez to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There is no evidence of such impairment in the record, and the Court does not find that this mitigating circumstance applies in this case.

Contrary to the judge's ruling, the fact that Dr. Riordan did not directly testify to the existence of this circumstance is not dispositive of the question of whether it should apply in the case.

In Stewart v. State, 558 So.2d 416 (Fla. 1990), a state witness testified that Stewart was "drunk most of the time" in

the period after the shooting, and Dr. Merin, a psychologist, testified that the defendant was "impaired but not substantially so" at the time of the offense. The judge refused to instruct the jury on the "substantially impaired" mitigating circumstance. This Court found error, writing at pages 420-21:

> The trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's additional testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. Cf. Cooper v. State, 492 So.2d 1059 (Fla.1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987) (no instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.
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>> "The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be pre-conditioned by the judge's view of what they were allowed to know."

> Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986) (quoting Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976) (emphasis added), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977)). We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury's recommended sentence. See State v. DiGuilio, 492 So.2d 1129 (Fla. 1986). This error mandates a new sentencing proceeding.

The same logic should apply at bar. As in Stewart, there was evidence from which one could conclude that there was a substantial impairment to appellant's ability to conform his conduct to the requirements of law. It was undisputed that appellant has a chronic severe mental illness which is aggravated by personality disorders which limit his ability to adapt his behavior. The judge erred in not evaluating this evidence in determining whether to apply the statutory mitigating circumstance of substantial impairment and the non-statutory circumstance of less-than-substantial impairment of appellant's ability to conform his conduct to the requirements of law.

The judge's decision was based on its erroneous view of the law that there must be specific expert testimony setting out the mitigating circumstance using the statutory language. Hence, it was based on an error of law in that the judge failed to follow the law as articulated in Stewart. As a matter of law, a judge must consider all proposed mitigation. The judge's failure to consider this mitigating circumstance constituted an error of law subject to de novo review under Canakaris.

The failure to properly consider the mitigating circumstance violated the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and was prejudicial considering the closeness of the case for death and the substantial mitigating circumstances. This Court should vacate the death sentence and order resentencing.

11. WHETHER THE COURT ERRED IN REFUSING THE LET THE DEFENSE PRESENT EVIDENCE OF MS. MARTIN'S AND HER FAMILY'S OPPOSITION TO THE DEATH PENALTY.

During jury penalty proceedings, the defense sought to introduce evidence through Susan Martin's sister, Jane, as to Susan's and the family's views about the death penalty. XXVIII 2404-06. Jane had written to the judge before the trial saying she wanted a life sentence for the murderer. VIII 1407. She wrote that "my sweet sister and deceased parents would have strongly opposed a sentence of death", and that the family "has never felt that a life should be discarded, regardless of the circumstances." Id. The state objected, and the defense replied that it constituted "reverse victim impact evidence as to how the family feels not only in this situation, but in punishment at large. We do feel it's relevant." XXVIII 2005-06. The judge ruled it was "inappropriate evidence for the jury to consider in a penalty phase the wishes of the victim's family concerning a life sentence or death sentence." XXVIII 2006. At the Spencer hearing, the state called Jane as a witness and she

read the letter in open court, XXX 2197-99, but it argued that the court should not consider it in mitigation. XXX 2218-19. The sentencing order sai that such evidence was not a mitigating circumstance. IX 18.

The state presented extensive evidence to the jury about Susan Martin's character. Hence, it opened the door to the defense's presentation of additional evidence about her character. Cf. Lusk v. State, 531 So.2d 1377, 1382 (Fla. 2nd DCA 1988) (state opened door to evidence about victim's character by putting his character in issue); Butler v. State, 842 So.2d 817, 827 (Fla.2003) (citing Lusk with approval); Carter v. State, 687 So.2d 327 (Fla. 1st DCA 1997) (although state may not normally present evidence of defendant's character, it may do so once defense puts character in issue); Gore v. State, 784 So.2d 418, 433 (Fla.2001) (same). The standard of review is whether the court abused its discretion as limited by the evidence code and decisional law. The judge abused his discretion by making a ruling contrary to law.

This Court should order new sentencing proceedings. If the state elects to present character evidence about the victim at sentencing, the defense should be allowed to present evidence regarding her character.

12. WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313(1972).

Section 775.082(1), Florida Statutes, provides that one convicted of a capital felony shall be punished by death "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death", and that otherwise there shall be a life sentence. Under section 921.141, the jury is to determine whether "sufficient aggravating circumstances exist" and whether there are "sufficient mitigating circumstances exist which outweigh the aggravating circumstances", and the court must find that "sufficient aggravating circumstances exist" to support a death sentence, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hence, to obtain a death sentence, the state must establish "sufficient aggravating circumstances" and that there are insufficient mitigating circumstances to outweigh them. Under the statutory and constitutional rule of strict construction of criminal statutes,[27] a defendant is not eligible for a death sentence unless there are "sufficient aggravating circumstances" and insufficient mitigation to overcome them.

Under Ring v. Arizona, 536 U.S. 584 (2002), the question of

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[27] See § 775.021(1), Fla.Stat.; Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (rule applies to capital sentencing statute); Borjas v. State, 790 So.2d 1114, 1115 (Fla. 4th DCA 2001) (rule derives from due process and applies to sentencing statutes); Dunn v. United States, 442 U.S. 100, 112 (1979) (rule is rooted in due process).

death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

Appellant recognizes that this Court has rejected similar arguments in, e.g., Bottoson v. Moore, 833 So.2d 693 (2002). He respectfully submits, however, that such decisions did not consider the rule that the statute must be strictly construed in favor of the defense so that one is death eligible only on a finding of sufficient aggravating circumstances and insufficient mitigation.

Further, so far as Bottoson stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313(1972), there must be a narrowing of the category of death eligible persons. Cf.

Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered"); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under death-eligibility requirement that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person": "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers").

Appellant notes that, although the jury did unanimously find appellant guilty of felony murder, that circumstance alone (merged with the pecuniary gain circumstance) could not make him death eligible under Enmund and Tison. Further, the heinousness circumstance does not apply at bar, and the jury made no unanimous determination that it did apply. Finally, there was no determination that appellant's prior conviction of attempted murder standing alone satisfied the requirement of "sufficient aggravating circumstances." This issue presents a pure question of law subject to de novo review. This Court should reverse appellant's death sentence and remand for imposition of a life sentence.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 by U.S. Mail 22 June 2004.

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Of Counsel

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with 12-point Courier New type, a font that is not spaced proportionately.

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Of Counsel