IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES
PAGE

OTHER AUTHORITY

ARGUMENT

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

The answer brief (AB) says appellant did not preserve this issue for appeal. In fact, he sought to remove Nicosia for not disclosing that she knew and had dealings with a witness, an important consideration in jury challenges (XXI 1223-24; e.s.):

> MR. HARLLEE: The defense is going to move to discharge her from the jury.
>
> It's not her fault. She didn't realize that Rani Beasley was the one that she has a potential, and it sounds like pretty much decided, business agreement with. She has a financial interest with this witness. And that's one of the key things we look for in jury selection. If we would have found that out during jury selection, we would have moved for cause on her.
>
> So at this time -- we still have twelve people left after her. We're going to move to discharge her from the jury.

The judge noted that it "might have been a valid reason to excuse for cause or exercise a peremptory challenge". XXIII 1502.

The judge was fully aware of the case law governing this situation, saying (XXIII 1500) (e.s.):

> THE COURT: It was Florida Supreme Court Jennings versus State, cited at 512 So. 2nd 169 where the Supreme Court points out that concealment by a juror on voir dire on information which may have been of materiality as to whether the juror may have been excused on preemptory challenge or for cause which having occurred is not revealed or discovered until later at the trial the Court is justified in granting a new trial.

The state agreed with this case law, but proposed making Ms. Beasley an alternate juror (XXIII 1504) (e.s.):

> We agree with the Court's ruling as far as she is disqualified or not but the language that you cited from the Jennings case, the Florida Supreme Court case, is sufficiently problematic at least from our perspective when it talks about material information, whether she concealed it intentionally or not.
>
> To be fair to the defense through no fault of the defense that they didn't know about it. She didn't intentionally conceal it so in an abundance of caution at that time we would agree to excuse her and substitute the alternate, but we would like to proceed along the lines we are proceeding now in case we lose a juror for another reason and to keep her on the jury and have her deliberate is probably the way we can have our cake and eat it, too, as the most cautious way of proceeding.

Appellant objected to making her an alternate, since it did not solve the problem (XXIII 1505) (e.s.):

> MR. MIRMAN [prosecutor]: We discussed an agreement or stipulation with respect to her being an alternate. I think that's the way around it, but we don't have an agreement. So that is not a possibility.
>
> MR. HARLLEE [defense counsel]: We are not going to stipulate to that.
>
> MR. AKINS [defense co-counsel]: It strikes me Mr. Mirman's proposal is in fact doing what the Court just determined you can't do because if she sits and we have to have an alternate at the end we then substitute her, aren't we, in fact, making her the alternate. That seems to be a back-handed way of saying the same thing.
>
> MR. HARLLEE: The Court already made the finding she doesn't qualify as a biased juror. I don't know of anything that is going to change.

The state later again proposed that the court "disqualify

her and go with the alternate", meaning that "if she were an alternate in a capital case if there was a problem later on we could bring her back for the penalty phase". XXV 1740-41 (e.s.). The defense objected as before: "Well, Judge, I think that is basically doing what the Court determined it could not do in its discretion and if the Court has made a finding that the State is agreeing with that finding that if there is no cause challenge then nothing should change." XXV 1741.

Nicosia's failure to disclose a matter material to the exercise of a defense challenge was squarely before the judge. The purposes of the contemporary objection rule under J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998) were met: the judge had a chance to respond to the objection, and counsel did not seek an advantage by letting an unknown error to go undetected. Counsel did not waive the issue by objecting to the plan of making Nicosia an alternate, since it did not solve the problem and, in any event, the judge ruled that he did not have the power to do so. Appellant sought the correct relief of removing her because her failure to disclose material information provided legal cause for her removal.

Contrary to the AB, Nicosia's information was material. Why else are jurors asked if they know the witnesses? The judge said it "might have been a valid reason to excuse for cause or exercise a peremptory challenge", XXIII 1501-02, and the state

proposed that she be disqualified or made an alternate. XXV 1740-41.

Leavitt v. Krogen, 752 So.2d 730 (Fla. 3rd DCA 2000) does not help appellee. In a malpractice case, jurors were asked if they had ever been parties to a law suit. A juror who had responded in the negative turned out to have been in a collection dispute involving a dance school twelve years earlier. Inquiry showed a complaint had been prepared but she did not know if it had been filed. The court held the collection matter immaterial under De La Rosa. The situation at bar is different. The juror knew, and had potential business dealings with, an important state witness, so that the undisclosed information was material under De La Rosa.

AB 21 says the question was susceptible of misinterpretation. In fact there was nothing ambiguous about it. Cf. Tripp v. State, 874 So.2d 732, 733 (Fla. 4th DCA 2004) ("Here, the trial judge asked all the jurors whether any of them knew defendant or his family. The question is not reasonably susceptible to mistake or misinterpretation."); Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984) (cited with favor in De La Rosa) (juror responded no when asked if family members or relatives worked at prison, but it was later learned that her nephew was a guard at prison and worked security during trial; on inquiry, she said she thought question referred to members of immediate

family; new trial ordered). The question at bar was much clearer than the one in Leavitt. Drew v. Couch, 519 So.2d 1023 (Fla. 1st DCA 1988) does appellee no good. The court wrote that under the "unique circumstances of this case", there was no abuse of discretion in finding the question ambiguous, but did not say what the exact question was or how it was ambiguous.

Footnote 10 of the AB is irrelevant. Regardless whether there were reasons to keep Nicosia on the jury, appellant was deprived of information relevant to the question of whether to strike her.

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

Appellant's motion presented the court with the question of whether the statements were made "without a knowing and voluntary waiver of his rights and without benefit of counsel" and whether they were "illegally obtained in that the Defendant was coerced/forced or under duress at the times of the statements". II 324. Nevertheless, the AB contends that appellant did not preserve for appeal his arguments that the statements were coerced and that there was no valid waiver of his right to counsel.

The AB takes a piecemeal approach to the voluntariness issue by structuring its brief topic by topic. The law does not take that approach but looks to the totality of the circumstances. Thus, appellee wrongly applies the law to the facts. Here, a

combination of circumstances rendered the statement involuntary, including: misleading appellant about his custodial status, raising the specter of the death penalty and leniency if he cooperated, exploiting fear that his family would be harmed, the length of interrogation and last but not least, inadequate warnings and waiver of constitutional right.

Appellee cannot deny that appellant made his statements without benefit of counsel. There was no lawyer present. Appellee also cannot make the defensive argument that there was a voluntary waiver for the obvious reason that Beath omitted the right to have counsel present when he advised appellant of his rights. SR1 134.[1]

The Supreme Court recently wrote in United States v. Patane, 124 S.Ct. 2620, 2627 (2004) (e.s.):

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[1] The AB ignores that the state constitution, see Traylor v. State, 596 So.2d 957, 966, n. 13 (Fla.1992), and the federal constitution, see Miranda v. Arizona, 384 U.S. 436, 471-72 (1966), require advising a suspect of the right to have a lawyer present at interrogation. Instead, it seems to suggest that the rule arose for the first time in recent rulings of the Fourth DCA. So far as AB 39 suggests that the later discussion of counsel, SR 1 165, cured the problem, its argument is ill-founded. The police may not conduct a custodial interrogation without full compliance with Traylor and Miranda, then advise the defendant of his rights, and then continue the interrogation. See Missouri v. Seibert, 124 S.Ct. 2601 (2004) (warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial); Ramirez v. State, 739 So.2d 568, 574-75 (Fla.1999) (same). There is no authority for piecemeal Traylor and Miranda warnings. Even at SR1 165, Beath did not specifically say appellant had the right to have counsel present during interrogation, and did not obtain a specific waiver.

> Similarly, in Miranda, the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated. See Dickerson, 530 U.S., at 434-435, 120 S.Ct. 2326; Miranda, 384 U.S., at 467, 86 S.Ct. 1602. To protect against this danger, the Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief.

"Failure to administer Miranda warnings creates a presumption of compulsion." Oregon v. Elstad, 470 U.S. 298, 307 (1985). This presumption is "irrebuttable for purposes of the prosecution's case in chief." Id.

At bar, there is no dispute about the fact that appellant was not given a specific warning of his right to have counsel with him during questioning. Hence, his custodial statements were coerced.

The AB does not dispute that appellant was in custody at least as of the time that Beath told him that he was not free to go. SR 164. His statements after that were unconstitutionally obtained.

Appellant was in custody still earlier under Ramirez. AB 25 responds that Ramirez was a juvenile, was not told he was free to leave, and had already turned over physical evidence. These grounds for distinguishing Ramirez are not effective.

First, this Court did not limit Ramirez to cases involving juveniles (739 So.2d at 574 (e.s.)):

> We conclude that not only a reasonable juvenile, but

> even a reasonable adult in Ramirez's position, would have believed that he was in custody at the time of the interrogation at the police station: he was questioned in a small room in the police station by two detectives, he was never told he was free to leave, and all of the questions indicated that the detectives considered him a suspect.

The fact that one is a juvenile or an adult is not a factor in determining custody for federal-law Miranda purposes. See Yarborough v. Alvarado, 124 S.Ct. 2140, 2151 (2004) ("Our opinions applying the Miranda custody test have not mentioned the suspect's age, much less mandated its consideration.").[2]

Second, although Beath originally (and falsely) lead appellant to believe that he was free to go as a way of establishing a rapport, the increasingly accusatory questioning and, most importantly, the abbreviated advice of rights lead him to ask if he was under arrest, so that necessarily he no longer thought he was free to leave. At this point, Beath did not tell him he was free to leave: he only told him not under arrest "right now". SR 134. Under Ramirez, telling someone he is not under arrest is not the same thing as telling him he is free to

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[2] Likewise, prior contacts with the police and interrogation history are irrelevant to the custody inquiry because they cut both ways. Id. 2152 ("[T]he relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. True, suspects with prior law enforcement experience may understand police procedures and reasonably feel free to leave unless told otherwise. On the other hand, they may view past as prologue and expect another in a string of arrests. We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their Miranda rights").

leave. When Ramirez asked if he was being placed under arrest, the officer replied: “No, no, I'm just reading your rights at this time.” 739 So.2d at 572.

Similarly, Raysor v. State, 795 So.2d 1071 (Fla. 4th DCA 2001) (en banc), held that “when the officer read appellant his Miranda rights during a consensual encounter, the encounter was no longer consensual.” It relied on and quoted U.S. v. Poitier, 818 F.2d 679, 683 (8th Cir.1987) (“we conclude that when the agents stated that they suspected Poitier of carrying drugs and read her Miranda rights, at that point a reasonable person would not have felt free to leave. The accusation, coupled with the Miranda warnings, created a sufficient show of authority to effectively restrain Poitier's freedom of movement.”).

Third, there is no significant difference between the facts that Ramirez gave the police physical evidence and that Beath told appellant, right before saying he was “gonna Mirandize” him, that he already had physical evidence (the ring; “a lot of stuff ... a lot of evidence”) belying his denial of the theft. SR 133-34. Immediately after, he showed appellant the evidence and said he had a statement from the pawnbroker, and there was “a lot of evidence in the murder of Sue Martin ... pointing in your direction”. SR1 135. He then said, “I have some things that I know that we can, we can work out”, and urged appellant to say the murder was an accident. SR 137-38. In these

circumstances, a reasonable person would not believe he was free to leave under Ramirez.

As in Ramirez, appellant was interviewed in a small room by two officers. As at bar, Ramirez knew the police had evidence that he was involved in the murder. Hence, as in Ramirez, appellant was in custody as of SR1 134-38. Since Beath did not then advise him of his right to have counsel present for the interrogation, he did not waive the right so that the resulting statements were obtained "without a knowing and voluntary waiver of his rights and without benefit of counsel." II 324.

Davis v. State, 698 So.2d 1182 (Fla.1997) does not help appellee. Davis says "the sole fact that the police had a warrant for Davis's arrest at the time he went to the station does not conclusively establish that he was in custody." Id. 1188 (e.s.). At bar there is much more than the "sole fact" that the police had a warrant. State v. Manning, 506 So.2d 1094, 1096 (Fla. 3rd DCA 1987) also does not help appellee. It states (e.s.):

> The Supreme Court explained further in Moran v. Burbine, 475 U.S. 412, ---, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410, 421 (1986), that two separate inquiries regarding the waiver must be made. The first is whether the waiver was a free choice on the part of the defendant and not the product of intimidation, coercion, or deception. The second is whether the waiver was made with a full awareness of the nature of the right being abandoned and the consequences of its abandonment. Both determinations are made by considering the totality of the circumstances. Fare v. Michael C., 442 U.S. 707, 724-26, 99 S.Ct. 2560, 2571-72, 61

L.Ed.2d 197, 212-13 (1979).

Manning does authorize misleading one as to one's true position.

A statement obtained by deception is as unconstitutional as one obtained by more direct coercion: "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda v. Arizona, 384 U.S. 436, 476 (1966).

AB 24-29 does not seem to deny that Beath had a duty to obey the warrant ordering appellant's arrest. Cf. McCray v. State, 496 So.2d 919 (Fla. 2d DCA 1986) ("The officers who learned of the outstanding capias had no discretion to do anything but arrest McCray."). Hence, Beath deceived appellant about his situation. Davis does not address this point. Davis merely contended that the existence of a warrant, without more, meant he was in custody. This Court was not called on to consider the effect of police deception in its analysis. Ramirez is the significant case on this point. State v. Manning did not involve deception, the police told Manning he was a suspect, he was aware of the import of the questioning, was fully and properly advised of his rights, and entered a written waiver of his rights.

AB 29-32 incorrectly suggests that appellant's argument is that the length of interrogation alone renders the statement

involuntary. The length of the interrogation "is a significant factor to consider". Chavez v. State, 832 So.2d 730, 748 (Fla. 2002). Under "the unique circumstances of this case", id. 749, this Court found the length of Chavez's confession was not coercive. Most importantly, Chavez involved a dispute about the facts surrounding the interrogation, in which the officers' testimony refuted, and the trial court rejected, Chavez's version of the facts. The case at bar does not involve such a factual dispute - the interrogation is all on tape. Chavez was repeatedly advised of his rights and repeatedly said he fully understood them. At bar, Beath made the confusing statement that appellant was not under arrest "right now" (implying that his status depended on his co-operation), then immediately gave a partial recitation of his rights, then, without ascertaining whether appellant specifically waived those rights, asked him if he wanted Beath to keep talking. XXII 1314-15. Conde v. State, 860 So.2d 930, 951 (Fla. 2003) is unhelpful for similar reasons. There was a break of over 11 hours, Conde was fully informed of his rights and executed a written waiver, and he specifically said he did not want to speak with any lawyers. The questioning in Walker v. State, 707 So.2d 300 (Fla. 1997), only lasted six hours, and there was full compliance with Miranda and a written waiver of rights. Roberts v. State, 164 So.2d 817 (Fla. 1964) did not involve lengthy interrogation through the night and the

only argument was that the length of the interrogation standing alone made the statement involuntary.

Appellee's try at distinguishing Brewer v. State, 386 So.2d 232 (Fla.1983) comes to naught. As in Brewer, the officers offered to help appellant and said he could get leniency. Just the few pages after the incomplete reading of rights[3] show: Beath said there was a lot of evidence pointing to appellant and, "Let me help you." SR1 136. Confronting him with the evidence, he said, "tell me the truth" about Aunt Sue "[b]ecause I have some things that I know that we can, we can work out." SR1 137 (e.s.). He indicated there was DNA evidence and that "if it comes back to you and you're still lying to me, ... nobody's gonna have any pity on you." SR1 141 (emphasis in original). Kelso said his choice was: "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 (e.s.). She said, "You really need to think about your situation, remember what we talked about? You know, a long time in jail, you're

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[3] The question of whether appellant was in custody at this point is irrelevant to the voluntariness inquiry. Cf. Beckwith v. U. S., 425 U.S. 341, 347-48 (1976) (when defendant claims that statement made in noncustodial interrogation was involuntary, court must examine entire record and make independent determination of ultimate issue of voluntariness); Hannon v. State, 84 P.3d 320, 339 (Wyo.2004). The custody issue goes to the timing of Miranda warnings, the theory being that custodial questioning is so inherently coercive that the suspect's decision to speak is presumed to result from compulsion or improper tactics.

still here to see your kids grow up?", and she and Beath told appellant he still had a chance. SR1 147. She said "you really need to think about life". SR1 148. Thus, as in Brewer, they presented the prospect that appellant could get leniency if he co-operated, and that, if he did not, the judge and jury ("they") would treat him without pity and he would face the death penalty.[4]

Appellant disagrees with the discussion of Maqueira v. State, 588 So.2d 221 (Fla. 1991). That case did not approve indicating to a suspect that he would benefit from cooperation. The judge disbelieved Maqueira's testimony that Gonzalez, an inmate who was not acting as a state agent, had promised that he could obtain benefits if he cooperated with the police, and believed Gonzalez's denial that he made such a statement. The judge "resolved this factual dispute in favor of the state." Id. 222-23. As for the AB's claim that a confession is not inadmissible just because the police say it would be easier on the accused if he told the truth, appellant notes that the

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[4] These offers of benefit continued during the interrogation. For instance at SR2 181, Beath said (e.s.):

> I really want to help you. We have come a long way. You and I have had hours of conversation, hours of talking. I've studied and watched everything about this case, and it's all coming down, man. They are going to be looking at every little detail that I've pulled together. And every little detail goes right towards Daniel Perez, man. I'm telling you, we need to discuss this for your benefit.

statements of the police at bar went far beyond such representations.[5] Maqueira did provide that a statement obtained by direct or implied promises is inadmissible.

This case does not involve "[m]erely informing a suspect of realistic penalties and encouraging him to tell the truth". AB 34.[6] The officers offered to help appellant, saying they could "work out" his predicament, no one would have pity on him and he faced a death sentence unless he helped himself by co-operating. Appellant had to talk "soon" to avoid the death penalty, because once the DNA came back they would no longer help him (SR1 147-48):

KELSO: ... What could you do for us

PEREZ: Um,

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[5] While Florida cases have held that a statement, that it would be easier on the accused if he told the truth, will not void a confession standing alone, the Mississippi Supreme Court has reached the opposite result. Cf. Layne v. State, 542 So.2d 237, 239-40 (Miss. 1989) (discussing cases). Regardless, voluntariness is determined on the totality of the circumstances. Beath told appellant that he wanted to "help you," that "I have some things that I know that we can, we can work out," that nobody would have any pity on him, and Kelso said his choice was between death and a long time in jail so that he needed "help yourself the most" so that he would "still [be] here to see your kids grow up", that he still had a chance, and really needed "to think about life". These and other inducements made the statement inadmissible.

[6] The cases at AB 34-35 do not apply because of the additional misconduct of the police at bar. Also, appellee's discussion of Nelson v. State, 688 So.2d 971 (Fla. 4th DCA 1997) relies on Nelson's trial testimony raising matters not raised on the motion to suppress. Regardless, Nelson cannot be squared with Brewer and involves numerous factual distinctions from the case at bar, so it does not apply here.

KELSO: soon?

PEREZ: I don't know what to tell you cuz I don't know. I don't know what happened, I don't know, for real, seriously I don't know.

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 have a chance.

PEREZ: So, you're telling me that I'm going to jail?

KELSO: DNA comes back, everything points to you, we lock you up, we don't ask you any more stories. We want to hear the whole truth. We don't want someone that went there with somebody else to take the whole rap themselves. ... .

Thus, so far as appellant was "willing to cooperate with the officers to show that he was not the actual killer", AB 35, it was precisely because they told him that he was facing the death penalty unless he did so and did it "soon".

Further, they suggested that he would not receive a fair trial unless he changed his story: "But, I'm telling you, [the DNA evidence is] there, and if it comes back to you and you're still sitting here and keep lying to me, it's gonna, they're, nobody's gonna have any pity on you." SR1 141. Shortly after, Kelso said that "6 people plunked off the street" were not going to believe appellant. SR1 158. See also SR3 341 (referring to need to make a statement that "six people sitting over there" would believe).

AB 36 is incorrect in saying that the officers did not promise protection in return for a confession:

> A Hey, make me a promise, man, please.
>
> Q What's that?
>
> A Make sure my - my wife and my kids don't get hurt by this asshole when he gets out.
>
> Q When he gets out?
>
> A Yeah, Man Man.
>
> Q Okay.
>
> ... .
>
> A Okay? What happened was - and I'm ready to make a statement whenever you want it.
>
> Q Okay.
>
> A Okay? And no bullshit. All the bullshit aside. Okay? Straight up. What happened was -
>
> Q (Unintelligible) - all right. Go ahead. Go ahead.
>
> A Tell me. Tell me.
>
> Q No. Go ahead with your statement. Go ahead. I'm gonna' do - I'm gonna' do just like you said.
>
> A But please tell me.
>
> Q I'm telling you. Okay? I'm going to do everything I possibly can to take care of that request you just made. Okay? All right? I promise you that.

SR 3 402-404 (e.s.). See also SR3 493-94.

Contrary to AB 36, appellant did not say he was "ready to make the statement" before "the officers even acknowledged his fears". AB 36 also incorrectly says it was appellant who raised

the specter of Reed hurting his family. Beath would not let appellant contact his wife, and said, "the only person you can talk to right now is me", SR2 178, 204-205, and said Calvin and Man-Man would be out on the street knowing that appellant had pointed the finger at them and would be upset with him. SR3 280.[7] Hence, he successfully put in appellant's head that these dangerous men would take vengeance while outside of jail, and made it impossible for appellant to make any effort to protect his family except by talking to them. This case does not involve a delusion or confusion arising from appellant's mind without outside influences under Thomas v. State, 456 So.2d 454 (Fla.1984). Stokes v. State, 403 So.2d 377 (Fla.1981) and Coleman v. State, 245 So.2d 642 (Fla. 1st DCA 1971) are irrelevant: they did not involve promises to protect the suspect's family.

Appellant's (incorrect) statement that he had "a very high IQ", SR1 148, was sandwiched by the officers' statements that his "chance" for avoiding a death sentence lay in talking to them right then, that he needed "to really think about life", SR1 147-48, and does not refute the coercive nature of the interrogation.

Contrary to AB 37-38, Beath did not fully and properly

[7] The tenor of these remarks was that Calvin and Man Man would know appellant had fingered them, and the officers could not arrest them unless appellant co-operated by giving them evidence linking them to the murder.

advise appellant of his rights and did not get a valid waiver. He omitted the right to have counsel present during interrogation at 10:07 p.m. and again at SR4 490; in between, he said "the only person you can talk to right now is me". SR2 205. At 10:07 p.m., he asked if appellant "understood" the partial reading of rights, but did not obtain a waiver, asking only if he wanted to hear what Beath had to say. The later partial advice and waiver of rights at SR4 490 does not help appellee under Missouri v. Seibert and Ramirez.

Contrary to AB 39, appellant explicitly argued that he made his statements "without a knowing and voluntary waiver of his rights and without benefit of counsel." II 324. There is no preservation problem. To repeat, the statements were made without benefit of counsel. To show a waiver of counsel, the state must show the police advised appellant of his right to have counsel present during questioning, and got a waiver of that right. It cannot do so for the obvious reason that the police did not do so. Further, by saying, in response to appellant's belated question about counsel, that the questioning would stop if he asked for counsel, Beath in effect told him that he could not talk to the police in the presence of counsel. Hence, the statements were made without a knowing and voluntary waiver of his rights and without benefit of counsel. The judge's finding of compliance with Miranda is manifestly

contrary to the evidence.

Dickerson v. United States, 530 U.S. 428 (2000) helps appellee not a bit. It ratified Miranda and did not in any way affect the statement in Miranda that the suspect "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. at 471-72 (e.s.). Regardless, it does not affect the state law right to advice of the right to have counsel present during interrogation under Traylor.

While police need not act as legal advisors, they must scrupulously comply with Traylor and Miranda. In Isom v. State, 819 So.2d 154 (Fla. 2nd DCA 2002), Almeida v. State, 737 So.2d 520 (Fla.1999), and State v. Glatzmayer, 789 So.2d 297 (Fla.2001), the police fully advised the suspect of his right to have counsel present during questioning, and the issue concerned the officer's responses to questions made by the accused after being so informed. At bar, Beath did not advise appellant of his right to have counsel present during questioning.

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

AB 42 says appellee's statement about the knife reflected what it believed the evidence would show. At trial, it told the jury that appellant "always carried" the knife. XVIII 858. Upon objection, it told the judge that appellant had said he

carried a knife "all the time … in his statement" to the police. XVIII 859. It cited no other evidence to justify its comment to the jury. In fact, as appellee later admitted to the judge during Beath's testimony, appellant's statement merely "mentioned a small knife blade he carries, I think he said was at work." XXII 1281-82. Thus, appellee's representation to the judge at XVIII 859 was incorrect. The AB offers no explanation for this discrepancy.

At XVIII 859, appellee did not refer to the expected testimony of Joseph Burns, who, in any event was not expected to testify that appellant "always carried" the knife mentioned in the opening statement. So far as appellee argues for the first time on appeal that it was secretly relying on the expected testimony of Burns, not only did Burns not give such testimony, appellee excused him as a witness in the middle of his testimony.[8]

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[8] Before withdrawing Burns as a witness, appellee had sought to have him testify that appellant had a "habit" of carrying a knife, based on the fact that Burns saw him about ten to twenty times over three years and that in the first half of those times he did not have a knife and the second half of those times he did. XXI 1258-61. He did not testify to this before the jury, so there is no point on appeal on the thorny question of habit evidence in Florida. Federal rule 406 allows it, but section 90.406, Florida Statutes, does not. Nevertheless, Professor Ehrhardt opines that such evidence is admissible, but he notes that "to establish that a habit existed, it is necessary that the conduct relate to a very specific factual situation. Evidence of general conduct by a person, e.g., 'she always drove fast,' is not habit and generally does not have sufficient probative value to be admitted." Ehrhardt, Florida Evidence § 406.1, p. 268 (2004 ed.). Thus, the evidence at bar

From the foregoing, error occurred under Jackson v. State, 818 So.2d 539 (Fla. 2nd DCA 2004) (reliance in opening statement on evidence never put before jury required mistrial), Mills v. State, 875 So.2d 823 (Fla. 2nd DCA 2004) (same), and Maddox v. State, 827 So.2d 380 (Fla. 3rd DCA 2002) (same). These cases refute the suggestion at AB 46 that a misstatement must be made in final argument to be prejudicial.

Contrary to the AB, appellee could not in good faith say that appellant told the police he always or all the time carried a knife. The cases mentioned in the middle of AB 44 are beside the point. Unlike the case at bar, they did not involve the state misstating the anticipated evidence to the jury in opening statement and to the judge upon defense objection.

Although the state's final argument did not repeat its claim that appellant "always" carried the knife, it also did not retract the claim. One cannot say that the unretracted statement was harmless beyond a reasonable doubt.

Contrary to AB 47-48, appellant's role in the crimes was hotly disputed below. The question of whether he took a knife into the house was a crucial issue as to both guilt and penalty.

Hartley v. State, 686 So.2d 1316 (Fla.1997) is beside the point. Whether Hartley was the "area tough guy" was a

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would be inadmissible even under Ehrhardt's theory. Regardless, the state did not seek to present testimony from Burns that appellant "always carried" the knife used in the burglary.

peripheral issue in his trial, the judge sustained the defense objection to the statement, and it was supported by the evidence.

It is a makeweight argument to say at AB 49 that the jury was generically told that the remarks of counsel were not evidence. One may assume that, just as the state's evidence is prejudicial to the accused,[9] so does its opening statement advance its case toward conviction and prejudice the defense. It is not too much to assume that the prosecutor made a calculated and expert decision that the assertion that appellant always carried a knife would help persuade jurors that he carried a knife into the house. The misstatement was prejudicial as to a crucial fact.

AB 49 incorrectly says an error is harmless under State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986) if there is overwhelming evidence of guilt. That case says at page 1139 (e.s.): "The test is not ... an overwhelming evidence test." Regardless, the evidence about appellant's role in the crimes and whether he carried or used a knife was not overwhelming.

AB 49 ignores the fact that appellee conceded below that Beath was incorrect in saying that appellant carried a knife on a regular basis and kept it sharp. XXII 1281-82. Further, it

[9] Amoros v. State, 531 So.2d 1256, 1260 (Fla.1988) ("almost all evidence to be introduced by the state in a criminal prosecution will be prejudicial to a defendant"); Rodriguez v. State, 753 So.2d 29, 42 (Fla. 2000) (same).

ignores that Beath's testimony compounded the effect of the opening statement and that appellee told the judge that it purposely highlighted the testimony so that the jury would focus on it. XXII 1281-82.

The "curative instruction" given by the judge was even less effective than the one condemned in Barnes v. State, 743 So.2d 1105, 1107-08 (Fla. 4th DCA 1999). Appellee told the judge that Beath's testimony was inaccurate, but did not retract or correct that testimony for the jury. The judge did not tell the jury to disregard Beath's testimony on this point, and did not tell it that the state had conceded its inaccuracy. To follow the instruction, jurors would have to purposely remember Beath's testimony to compare it with the tape and then, while simultaneously continuing to listen to the tape, erase from their minds Beath's live testimony on this point.

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.

AB 52-54 suggests that in following the principal instruction and the independent act instruction, the jury necessarily found that appellant was the killer or a major participant in the felony who acted with reckless disregard for human life. The jury made no such finding, and a jury can convict someone of felony murder as an aider without making such

a finding. Further, the jury did not find that appellant personally committed an assault and battery and carried a deadly weapon. Under the principal instruction, the jury could have found appellant did these acts vicariously through Green.[10] See Lewis v. State, 625 So.2d 102 (Fla. 1st DCA 1993) (constructive or vicarious possession of firearm could sustain conviction for robbery with firearm; defendant could be convicted as principal for aggravated battery, even though accomplice, rather than defendant, carried firearm); Wilson v. State, 776 So.2d 347, 351 (Fla. 5th DCA 2001) (defendant guilty of armed burglary when either he or accomplice armed himself in structure; "Constructive or vicarious possession of a firearm is sufficient to support a conviction involving a firearm.").

Florida law on principals "eliminates the distinctions between those who are actually or constructively present at the commission of the offense." State v. Reid, 29 Fla. L. Weekly D 2438(Fla. 5th DCA Oct. 29, 2004). In fact, appellee extensively argued to the jury that even a lookout outside the building is guilty as a principal. XXVI 1766-69. Apparently jurors based the verdict on this argument, which the state made even before turning to the theory that appellant was the stabber at XXVI

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[10] The jury was instructed: "If the Defendant helped another person or persons commit or attempt to commit a crime, the Defendant is a principal and must be treated as if he had done all the things the other person or persons did ... ." VIII 1288 (e.s.).

1769. The record does not show that the jury unanimously found beyond a reasonable doubt that appellant was the killer or was a major participant in the felony and acted with reckless disregard for human life.

AB 55-56[11] contend that appellant waived this issue by agreeing that the jury be instructed on Enmund-Tison.[12] In fact, he did so only after the judge rejected argument that the jury verdict had to be unanimous and comply with Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). XXVII 1931-32.

As to AB 56-57, appellant first notes that Florida judges and juries share the responsibility of making Enmund-Tison findings, and there can be no dispute about the fact that this sharing of responsibilities requires that jury findings comport with the constitution. Cf. Espinosa v. Florida, 505 U.S. 1079 (1992). Further, appellee cannot deny that Enmund-Tison findings are a necessary predicate for a death sentence, and, under Apprendi and Ring, such a predicate finding must be made by the jury. The discussion of Ring in Brown v. State, 67 P.3rd 917 (Ok. Crim. App. 2003) is internally inconsistent. First, it says Ring "held that a capital jury must make any factual

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[11] AB 54-55 concern the next point on appeal, and appellant will discuss them there.

[12] Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987).

finding bearing on capital punishment beyond a reasonable doubt." Id. 918. It then says "The only thing that Ring requires is that, where the death penalty is sought for a murder defendant at a jury trial, the jury hearing the case must make the determination that certain 'aggravating circumstances' exist beyond a reasonable doubt to justify the penalty of death." Id. 918-19. It notes that, although Ring did not directly discuss the Enmund-Tison issue, it overruled Walton v. Arizona, 497 U.S. 639 (1990), which ruled that the jury need not find death eligibility because, under Cabana v. Bullock, 474 U.S. 376 (1986), the jury need not make the Enmund-Tison findings. Brown at 919-20. Thus, in overruling Walton, Ring rejected the logic that the jury need not make the necessary Enmund findings.[13] Nevertheless, Brown concluded that, although it was not "clearly enunciated" in Ring, Ring determined that the Enmund-Tison ruling is not necessary to make one eligible for the death penalty. Id. 920. Appellant certainly agrees with Brown that a capital jury must make any factual finding bearing on capital punishment beyond a reasonable doubt, but cannot agree with the backward logic which leads from that premise to the conclusion that the jury need not make the Enmund-Tison finding.

In Pearce v. State, 880 So.2d 561, 575 (Fla.2004), this

[13] In Cabana, the Court held that the eighth amendment does not require jury determination of the Enmund issue. Cabana does not survive the sixth amendment analysis of Apprendi and Ring.

Court specifically wrote that the constitution "does not permit imposition of the death penalty" without Enmund-Tison findings. Hence, absent such findings, one is not death-eligible, so that Ring requires that the jury make the necessary predicate finding. Pearce did not consider the application of Ring to this issue, and it does not support appellee's argument. Regardless, unlike at bar, Pearce's jury did not reject the state's theory of premeditated murder, and the trial court found and this Court agreed that the murder was cold, calculated and premeditated. In Diaz v. State, 513 So.2d 1045 (Fla.1987), the jury also apparently did not reject a theory of premeditated murder, and the evidence was that Diaz fired at the victim. Diaz was decided well before Ring and Apprendi, and therefore does not bear on the present issue. Van Poyck v. State, 564 So.2d 1066 (Fla.1990), did not directly address Van Poyck's claim that the jury had to make the predicate finding. Regardless, the jury was given a special verdict form with blanks for premeditated murder, felony murder and "both", and it "returned the verdict form with 'felony murder' and 'both' checked and 'premeditated murder' left blank." Id. 1068. Thus, it did find Van Poyck guilty of both premeditated and felony murder, which could satisfy Enmund-Tison, at least under the facts of Van Poyck.[14] Like Diaz, Van Poyck was decided long

[14] To be guilty of premeditated murder, one must either be the killer or know that a premeditated murder is going to occur

before Apprendi and Ring.

It has long been Florida law that:

> Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984). In keeping with these principles, determination of this issue should have been committed to the jury for decision by a unanimous verdict.

> 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 cases at AB 54 are unlike the case at bar. In Chamberlain v. State, 881 So.2d 1087 (Fla.2004), Chamberlain suggested that co-defendant Thibault use Chamberlain's father's gun; Chamberlain himself struck victim Harrison with an "asp"; after Thibault shot one victim, Chamberlain said "no more witnesses"; he urged Thibault to kill Harrison so they could avoid the electric chair; when he saw that Harrison still was not dead, he went to the car, got bullets, and reloaded the gun for Thibault. Id. 1092-94. Chamberlain understandably did not

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and purposely assist in its commission.

even raise an Enmund-Tison claim on appeal. Nevertheless, this Court sua sponte reviewed the evidence and found that he qualified for the death penalty.

In Van Poyck, the defendants went "armed to the teeth" to free a prison inmate from a van. Van Poyck pointed a gun at a guard's head and kicked him; it was not clear whether he or Valdez murdered the other guard; Van Poyck pointed his gun at a guard and pulled the trigger, but the gun did not fire; he shattered the windows of another car with the butt of a gun; he and Valdez fled in a high-speed chase in which many shots were fired.

The facts for Copeland v. Wainwright, 505 So.2d 425 (Fla.) vacated Copeland v. Dugger, 484 U.S. 807 (1987)[15] are set out in Copeland v. State, 457 So.2d 1012 (Fla. 1984). Copeland entered a store and robbed the victim; he and his cohorts kidnapped her to a motel where she was raped; they then took her to a secluded area where she was shot; shortly before the murder, Copeland possessed and test-fired the murder weapon; his fingerprint was at the scene of the rape, and there was evidence that he took part in it. In Jackson v. State, 502 So.2d 409, 410, 412 (Fla.1986), Jackson knew his brother was carrying a firearm when the two entered a hardware store to commit a robbery; their plan

[15] Copeland's death sentence was vacated for failure to consider mitigating evidence, and he was later sentenced to life.

was for one of them to hold a gun on the victim while the other stole from the cash register; the evidence showed that he "contemplated or intended that lethal force would be used should he and his brother encounter resistance from their prey". In Cave v. State, 476 So.2d 180, 187 (Fla.1985), "Cave was the gunman who admits to holding the gun on the clerk during the robbery and forcing her into the car; he was present in the car during the thirteen-mile ride and heard her plead for her life; and he was present when she was forcibly removed from the car in a rural area, stabbed, and shot in the back of the head. Under these circumstances, it cannot be reasonably said that appellant did not contemplate the use of lethal force or participate in or facilitate the murder." In State v. White, 470 So.2d 1377 (Fla. 1981), White and others armed themselves, put on masks, and proceeded to rob and murder six people and attempted to murder two others; although White himself did not do any of the shooting he fully participated in subduing and intimidating the victims. The facts in Bush v. State, 461 So.2d 936 (Fla.1984) are unclear, but the evidence most favorable to Bush was that he and his cohorts abducted a store clerk and Bush drove them to a remote location where he stabbed her before another man shot her. In James v. State, 453 So.2d 786 (Fla.1984), James and Clark went to a store where Clark shot and robbed a man. Ignoring the man's pleas not to harm his disabled wife, James

then entered the office/residential portion of the premises with Clark and Clark shot the wife.

In this regard, AB 54 exaggerates the evidence. The record shows that appellant was trembling with fear of Man Man, who had planned and orchestrated the crime, and the evidence most favorable to the state was that he did not know lethal force would be used, and that when he entered the house Green had already stabbed Martin and told him he killed her because she "bucked" on him. The evidence did not show appellant supplied the murder weapon, and the judge did not so find.[16]

The record does not show that appellant acted with reckless disregard for human life, and this Court should reduce the sentence to one of life imprisonment.

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.

Contrary to the AB, Enmund and Tison do not bear on this issue, and the judge's finding of the felony murder circumstance is irrelevant. The question is whether appellant was the actual killer or whether he directed or knew how Martin would be killed. The incidental fact that the defendants in the cases cited at AB 59 were not present at the murder is also irrelevant. In each of those cases, the defendant actually

[16] The judge's Enmund-Tison findings are in his discussion of the felony murder circumstance. IX 1446-48.

ordered the killing, so that there was a strong reason to apply HAC vicariously. At bar, there is no such strong reason for applying the circumstance vicariously. Appellant did not order the murder, and the jury did not find him guilty of premeditated murder. The evidence most favorable to the state is that Green was finishing the stabbing when appellant came into the house. This fact is not sufficient to apply the circumstance to appellant. Cave (applying HAC because Cave "personally removed the victim from the convenience store at gun point, placed her in the back seat of the car in which he and a co-defendant were seated, heard her pleas for her life during a fifteen to eighteen minute ride to an isolated area, removed her from the car and turned her over to Bush and Parker who stabbed and then shot her. At some point her panties were wet with urine.") and Copeland (applying HAC because of "victim's hours-long ordeal from the time she initially encountered appellant to the time of her eventual execution") do not help appellee in this regard. Cave and Copeland actively took part in prolonged abductions of the victims, giving rise to application of HAC.

7. WHETHER THE EVIDENCE SUPPORTS THE HEINOUSNESS CIRCUMSTANCE.

The AB points to the BellSouth conversation as showing fear of impending death. At most, it shows worry about the telephone problems and that Martin said she had to get off the phone. The concerns expressed in this conversation were much less than

those in James, where the wheelchair-bound victim heard her husband being shot and then heard him begging that she not be harmed. See the discussion of the facts in the dissent at 453 So.2d at 793 (Boyd, J., dissenting):

> The murder of the elderly victim was preceded by the infliction of severe mental anguish as she heard the intruders shoot her husband and then come looking for her. Moreover, the evidence showed that the wheelchair-bound woman, powerless to escape or resist, did not die instantly but moaned in pain as her life was gradually extinguished. These circumstances clearly set the crime apart from the simple norm of an intentional murder.

Appellant agrees that the question of when Martin was struck with the cane is speculative: the record shows only that it happened while she was alive, and appellant indicated Green hit her with it after she was unconscious. XXII 1348. That she gargled on her blood is equally consistent with unconsciousness.

As discussed in the initial brief, the judge's findings set out at AB 61-62 do not support HAC. Elam v. State, 636 So.2d 1312, 1314 (Fla.1994) states:

> 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 defendant 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 defendant was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

Compare Whitton v. State, 649 So.2d 861, 867 (Fla.1994) (attack

lasted 30 minutes and evidence showed that there was not rapid loss of consciousness). The fact that there was a lot of blood is a simple fortuity, and does not support the aggravator.

AB 64-65 place great reliance on appellant's statement at SR4 469-70 that Martin was fighting Green. Two pages later, the officers clarified that this was based on what Green had said rather than appellant's own observation:

> Q. What was he saying while he was on top of Aunt Sue?
>
> A. He said that she was bucking. She kept on bucking.
>
> Q. What does bucking mean?
>
> A. That means fighting.
>
> Q. So she was putting up a fight.
>
> A. Yes. That's what he was saying.

SR4 472. Under this evidence it makes no sense to apply HAC vicariously to appellant. When he came in, Martin was already unconscious and dying, and he intervened by grabbing Green. SR 4 470. Appellant's comparison of the blood to Lake-okee-fucking-chobee was an expression of shock rather than a callous remark and in any case does not prove HAC.

Green's statement that Martin fought him does not refute the likelihood that she quickly lost consciousness so that HAC was improper under Elam.

The cases at AB 66-67 have more egregious facts than at bar.

In Guzman v. State, 721 So.2d 1155 (Fla.1998) there was testimony that the victim was in intense pain during the attack, and this Court found that HAC was justified under Whitton. As already noted, Whitton involved an attack over 30 minutes, unlike Elam and the case at bar. Owen v. State, 862 So.2d 687 (Fla.2003) involved the deliberate infliction of torture for Owen's sexual pleasure. In Duest v. State, 855 So.2d 33 (Fla.2003), the victim was conscious for 15 to 20 minutes and stumbled from the bed to the bathroom in intense pain before dying. Likewise, the victim in Brown v. State, 721 So.2d 274 (Fla.1998) was conscious during the attack and left a trail of blood spatters showing that he had moved during the attack. In Finney v. State, 660 So.2d 674 (Fla.1995), the victim was bound and gagged, which would cause extreme fear and anticipation of harm, and was conscious while she was stabbed to death. Pittman v. State, 646 So.2d 167 (Fla.1994),[17] Atwater v. State, 626 So.2d 1325 (Fla.1993) and Davis v. State, 620 So.2d 152 (Fla.1993) are distinguishable as set out in the initial brief. Derrick v. State, 641 So.2d 378 (Fla.1994) is similar to Brown.

AB 67-68 present inference and speculation, which cannot support HAC. As already noted, appellant agrees that no one knows when the blow with the cane occurred or whether it stunned

[17] AB 67 says that Pittman testified he was not the stabber. In fact, he said that he had nothing to do with the crime; the jury disbelieved his testimony and accepted testimony that he had confessed to all three murders.

or knocked Martin out. At most, we have some evidence that Green hit her with the cane after she was unconscious and that she was still alive when it hit her.

In Floyd v. State, 569 So.2d 1225 (Fla.1990) the evidence did not show that the first stab wounds may have caused unconsciousness in a minute or less. The facts at bar are like those in Elam, and this Court should strike the circumstance and vacate the sentence. Ferrell v. State, 680 So.2d 390 (Fla.1996) and Hunter v. State, 660 So.2d 244 (Fla.1995) involved much less mitigation than at bar, and do not mandate affirmance.

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

Appellant notes that page 73 of the AB does not dispute that the weighing of circumstances is subject to review under the abuse of discretion standard. An abuse of discretion occurs when a decision is contrary to reason, the law or the facts. This issue does not involve a judge's accepting or rejecting testimony, so that Roberts v. State, 510 So.2d 885 (Fla.1987) does not apply. The judge gave the circumstance little weight because appellant had a "most dangerous" type of mental disorder. Such, however, made the evidence more mitigating rather than less. It makes no sense to give more weight to a non-dangerous mental illness. Further, there was no testimony that appellant's mental illness was of the "most dangerous"

type.

As to argument at AB 77-78, appellant's ability to conform to the requirements of law cannot logically have any bearing on the weight to give the extreme duress mitigator, and the judge erred in writing that there was no evidence on this point, when there was. See the discussion at pages 84-85 of the initial brief. Cole v. State, 701 So.2d 845, 852 (Fla.1997) has no bearing on this issue.

Regardless whether a healthy mind could cope with 40 hours of sleeplessness and the stresses discussed at AB 78-79, appellant did not have a healthy mind: he had a serious mental illness, whose effects were compounded by pervasive personality disorders. The argument is like saying a fall is no big deal without noting that the person involved has severe osteoporosis.

Haliburton v. Singletary, 691 So.2d 466 (Fla.1997), which involves a strategic decision not to present certain evidence which would open the door to other evidence is irrelevant.

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 AB mistakes the nature of the error. The judge made the error of thinking there was "no evidence" of an impaired capacity. IX 1453. Regardless of whether there was evidence refuting this circumstance, the judge erred because he did not

consider the evidence supporting it. While a court may reject evidence of a mitigator for various reasons, error necessarily occurs when the judge is unaware of the evidence, and therefore, because of this error, cannot and does not consider the evidence.

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 Mitchell Egber, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401, by courier 7 December 2004.

_____
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.

_____
Of Counsel