IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-800

MICHAEL SIEBERT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." All other citations are as in the initial brief. Specific points raised in the initial brief but not addressed in the reply brief are not waived.

ARGUMENT

I

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE AND STATEMENTS, WHERE THE NON-CONSENSUAL, WARRANTLESS POLICE ENTRY INTO THE DEFENDANT'S HOME WAS NOT JUSTIFIED BY SUFFICIENT EXIGENT CIRCUMSTANCES KNOWN TO THE POLICE AND WHERE THE OFFICERS' SUBSEQUENT SEARCH OF THE DEFENDANT'S HOME WAS UNREASONABLY EXPANSIVE, IN VIOLATION OF ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION AND THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In our initial brief, we claimed that the facts and circumstances known to the police at the time of their forcible, non-consensual entry into the defendant's residence, including the information provided by Ace Green, did not support an objectively reasonable belief that a warrantless entry was necessary to tend to an emergency. (Initial Br., p. 56-62). In response, the State maintains that Green met the qualifications of an inherently reliable "citizen-informant" - a witness that may provide information that need not be corroborated. (Answer Br., p. 65). Under the facts of this case and prevailing

case law, Green did not qualify as a citizen-informant and the information he provided was not sufficient, failing corroboration by the police, to support entry into the defendant's home.

In deciding whether probable cause to support a search has been established, the courts have held that the relevant inquiry about an informant's veracity is satisfactorily answered by the mere showing that the informant is an ordinary citizen, an eyewitness, a disinterested bystander or a victim of the crime. *State v. Novak*, 502 So. 2d 990, 992 (Fla. 3rd DCA 1987). The presumption of trustworthiness accorded to a citizen-informant is based upon the absence of a prior relationship between the witness and the accused, making the motive to falsely accuse remote, or the concept that the public-spirited citizen gives his information out of his interest in law enforcement, not out of vindictiveness against the accused. *Novak, supra* at 992-993.

Applying these principles, the Court in *State v. Novak*, *supra*, held that although the informant's name was known to the police, his relationship with the defendant and his complicity in the defendant's acts compelled the Court to conclude that the informant was not entitled to the presumption of credibility afforded to a citizen-informant. As a consequence, the Court held that the police were required to establish the reliability of the informant and to corroborate the credibility of his information before probable cause for a search of the defendant's home could be established.

Similarly, in *Roper v. State*, 588 So.2d 330 (Fla. 5th DCA 1991), the defendant's

girlfriend appeared at the police station to file a complaint against the defendant for abuse. At that time, the girlfriend, Garrett, told the police that she had just ended her relationship with the defendant and that she knew that the defendant stored marijuana in several places in his home. Based upon the information provided by Garrett, the police obtained a search warrant, executed the warrant and found drugs in the defendant's home. The Fifth District concluded that Garrett did not qualify as a "citizen-informer." The Court noted that based upon the information provided by Garrett, the police should have concluded that Garrett was hardly disinterested in the matter. It was therefore incumbent upon the police to corroborate Garrett's reliability and the credibility of the information she provided. Their failure to do so meant that the police had failed to establish probable cause for the search. See also *Dial v. State*, 798 So. 2d 880 (Fla. 4th DCA 2001), where the Court held that the defendant's daughter did not qualify as a "citizen-informer" - the previously untested daughter's uncorroborated information was found to be insufficient to establish probable cause for the issuance of a search warrant for the defendant's home.

In this case, the record reveals that Green was the defendant's roommate, who, although on probation, made his living selling drugs. On the night of the alleged homicide, Green consumed cocaine and alcohol with the defendant. According to Green, at one point during the evening, the defendant asked Green to leave the apartment for a few minutes so that he could be alone with Adrianza. Green complied. As the period of his

forced absence grew longer, Green became upset and exasperated with the defendant. When the defendant repeatedly refused Green access to the apartment, he was forced to seek refuge in a nearby laundromat. Deprived of sleep and refused admittance to the apartment, Green called the police. (T. 2467-68, 2496-2504, 2506-08, 2528, 2597-2601).

Based upon the standards set forth in the *Novak*, *Roper* and *Dial* cases, Ace Green clearly could not be characterized as a credible, disinterested, citizen- informer. He was a probationer, who made his living selling drugs. At the time of his call to the police, he was extremely upset with the defendant because the defendant had excluded him from the apartment following a night of drug and alcohol use. Although Green had told the police that the defendant would not let him into the apartment, they did not inquire further as to the circumstances of the defendant's refusal. (T. 1096). Under the circumstances, Green was not an inherently reliable informant whose information could be relied upon without corroboration.

It was therefore incumbent upon the police to corroborate Green's information or his reliability before acting upon it. Instead, just moments after encountering Green, the police forcibly entered the defendant's apartment. Nevertheless, the State claims that their non-consensual entry was justified by the need to investigate an emergency. (Answer Br., p. 66).

"Probable cause for a forced entry in response to exigent circumstances requires

finding a probability that a person is in danger." *Kerman v. City of New York*, 261 F. 3rd 229, 236 (2nd Cir. 2001), citing *Tierney v. Davidson*, 133 F. 3rd 189, (2nd Cir. 1998). In *Kerman*, Kerman's girlfriend called the police and informed them that the defendant was mentally ill, off of his medication and was possibly armed with a gun. The girlfriend did not provide her name to the police and did not describe her relationship to Kerman. With paramedics, the police responded to the defendant's home and pounded on his door for several minutes. After completing his shower, the defendant responded to the front door and opened it a crack. The officers then forcibly pushed the door open, restrained Kerman and took him to a mental hospital. The *Kerman* court found that the officers' entry was unlawful. Noting that the girlfriend had not identified herself during the 911 call, the court refused to sanction such an intrusive, warrantless entry based upon information of questionable reliability.

The *Kerman* court's decision was, in part, based upon the recognition that the sanctity of a private dwelling is ordinarily afforded the most stringent Fourth Amendment protection. "The sanctity of a man's house and the privacies of life still remain protected from the uninvited intrusion....A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty–worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some

inviolate place–which is a man's castle." *United States v. On Lee*, 193 F. 2d 306, 315-16 (2nd Cir. 1952), cert. granted, 72 S. Ct. 560 (1952) (Frank, J. dissenting).

As stated earlier, the police were met at the defendant's apartment by Ace Green, an informant with no previous track record for reliability with the police. The fact that Green identified himself did not clothe the information he provided the police with the cloak of trustworthiness. *State v. Novak, supra*. Although having no basis to trust the information provided by Green, the police approached the defendant's apartment and knocked on his door. The defendant responded and conversed with the officers through his closed door. In doing so, the defendant endeavored to secure his privacy as guaranteed to him by the Fourth Amendment. When the officers insisted that his efforts would not suffice, the defendant partially opened the door and again spoke with the officers. During that conversation, the defendant gave the officers no reason to believe that he was in any distress. He informed the officers that he was OK and that they could go because there was no problem. The officers saw nothing that would indicate that the defendant was in distress. The defendant then shut the door. (T. 1082-83). Despite the defendant's clear assurances, which belied the questionably reliable information provided by Ace Green, the officers insisted that only their entry into the apartment would resolve their "concerns."[1] (T. 1083, 1098-99). Moments later, the police accomplished their

[1] The officers never offered the defendant the option of stepping outside his apartment.

objective by forcibly entering the defendant's apartment.

Based upon the foregoing, the officers clearly did not possess sufficient facts that supported an objectively reasonable probability that the defendant was in danger.

In its brief, the State cites a number of cases that it contends control this situation and are "similar." In fact, each is factually distinguishable. In *State v. Nemeth*, 23 P. 3rd 936 (N.M. 2001), the police received a 911call regarding a possible suicide attempt. The police responded to the defendant's home. After knocking on the door for a brief period, the defendant answered. The defendant was *crying* and very *distraught* and *emotional*. Although the defendant asked the officers to leave, the officers forcibly entered to assure the defendant's welfare. Clearly, the officers' concern for the defendant's well-being, which had its origin in the 911 call, was corroborated by the officers' observations. Based upon those observations, the Court found that the officers' entry was reasonable.

In *State v. Yoshida*, 986 P. 2d 216 (AZ. 1999), an off-duty officer observed the defendant walk in front of an oncoming car. The defendant then entered her home. The officer responded to the house and was given *consent to enter* by the defendant to discuss the matter with her boyfriend. Under the circumstances, the legality of the officer's entry into the home was not in issue, as it is here, because the officer was admitted with the consent of the defendant.

Similarly, in *United States v. Barone*, 330 F. 2d 543 (2nd Cir. 1964), the police were seemingly admitted with the *consent* of the occupants, when the officers responded

to an apartment after hearing screams inside. Once inside, the officers were aware that a man was inside of a closed bathroom. After waiting for the man to emerge in order to assure the officers of his safety, the officers saw counterfeit money in plain view being flushed down the toilet. Again, the legality of the officers' initial entry into the apartment was seemingly not in issue, since the officers were readily admitted by the occupants.[2]

Finally, in *In the Interest of J.B.*, 621 So. 2d 489 (Fla. 4th DCA 1993), the police responded to a home in connection to a 911 disconnect. Once there, the officer observed signs of a burglary. When the juvenile refused to cooperate with the officer, the officer informed the juvenile that he was under arrest for resisting an officer. The officer's subsequent efforts to arrest the juvenile resulted in an additional assault charge against the juvenile. Given the obvious signs of a crime scene, the Court found that the officers would have been remiss in their duty if they did not check to see if anyone needed aid.

In the case at bar, the defendant did not give consent to the officers to enter. In fact, he made it abundantly clear that he wished to maintain his privacy in his home by informing the officers that he did not wish them to enter. There was no indication that

[2] In dicta, the court hypothesized that had the officers been denied entry, they may well have had the right to forcibly enter. The court theorized that since the officers were aware that an unaccounted for male was still in the apartment, they had an obligation to be sure that the male was uninjured. In this case, the police had no information that anyone other than the defendant was in the apartment. Given the conversation with the defendant at the door, there was no reason for the officers to believe that anyone needed emergency attention.

the defendant was emotionally distraught or upset. There was no sign that any crime had occurred in the defendant's apartment. In fact, all that the defendant did was clearly inform the officers that he was not in distress and did not need their assistance. When verbal assurances were not sufficient, the defendant tried to maintain his privacy, yet give the officers visual proof of his well-being, by opening the door four to five inches and allowing the officers to see him. Unsatisfied, the officers insisted that nothing short of full entry into the defendant's apartment would do.[3] Under the circumstances, when they forcibly entered the defendant's apartment without the defendant's consent and without a warrant, they did so illegally.

The State also contends that once the officers gained entry into the defendant's apartment, they had the right to search the defendant's apartment to see if the defendant had any implements that he could use to harm himself. (Answer Br., p. 69). Taken to its

[3] Any insistence that an emergency still existed after the officers' contact with the defendant at his door is based upon nothing more than mere speculation. "Neither a lack of knowledge nor sheer speculation or guesswork about the situation at hand translates to exigent circumstances. Police must have a factual basis to forego a warrant and enter a constitutionally protected area; it is not enough that they are uninformed and subjectively afraid the situation *may* be worse than anticipated. *Lee v. State*, 856 So. 2d 1133, 1138 (Fla. 1st DCA 2003).

logical end, the State's argument would allow the police to search the defendant's entire home, including any closed containers, since any such item could potentially contain a harmful implement. No reasonable interpretation of the Fourth Amendment or the emergency exception to the warrant requirement would permit such an absurd result.

As set forth in *Mincey v. Arizona*, 98 S. Ct. 2408, 2413 (1978), any warrantless search done pursuant to an emergency situation must be "strictly circumscribed by the exigencies which justify its initiation." In this case, the officers' avowed purpose for entering the defendant's apartment was to satisfy themselves that the defendant was not hurt. After their forcible entry into the defendant's apartment, that purpose was accomplished. At the officers' direction, the defendant was seated on the bed, which was located in the lower left corner of the apartment, near the apartment front door. (T. 3021-3023, State's Exhibit 48). Both Bales and Zeifman admitted that they were clearly able to see that the defendant was uninjured, composed and unarmed as they viewed him in the apartment. (T. 1100, 2672-73, 2697). Yet, despite possessing no information about anyone else being present in the apartment and the apparent complete abatement of any alleged "emergency," the officers embarked upon a cursory protective search of the defendant's apartment. As Zeifman searched the defendant's kitchen, Bales walked toward the bathroom, which was located in the upper right hand corner of the apartment. (T. 1098, 2415-16, State's Exhibit 48). As Bales looked around, he discovered the foot

of Adrianza in the bathroom.[4]

Under the circumstances, the officers' search was patently unreasonable - it exceeded the scope of the predicate emergency that they claimed justified their entry into the apartment. The precedent cited in the defendant's Initial Brief together with *United States v. Presler*, 610 F. 2d 1306 (4th Cir. 1979) and *Root v. Gauper*, 438 F. 2d 361 (8th Cir. 1971), stand for the clear proposition that once the emergency that justified the officers' entry into the home has been alleviated, a further search of the home is constitutionally unreasonable. The evidence seized or obtained as a consequence of Zeifman and Bales' exploratory, protective search must be suppressed.

II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL THAT WERE PREMISED UPON THE STATE'S EFFORT TO ELICIT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN COLLATERAL CRIMINAL ACTIVITY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED

[4] Bales' search was clearly more extensive than just merely turning around. Since Bales claimed that he saw the severed foot in the bathroom from a distance of six feet, he had to have walked across the apartment while conducting his protective sweep. (T. 1087-91, 1102-03, State's Exhibit 48).

STATES CONSTITUTION.

In response to the defendant's claim that the State had improperly elicited irrelevant evidence of the defendant's collateral criminal activity, namely that the defendant had intercourse with the victim after she was dead, the State primarily raises two arguments: 1) the defendant's claim was not properly preserved, and 2) the challenged evidence was relevant and properly admitted. (Answer Br., p. 71-79). Neither State contention is supported by the record.

As set forth in the defendant's Initial Brief, the State twice elicited evidence that the defendant may have had intercourse with the victim after she had expired. The first instance occurred during the examination of DNA analyst Jennifer McCue. After the defendant established on cross examination that scientifically, McCue could only say that the defendant and Adrianza had engaged in sex, the State responded on re-direct examination by asking McCue:

> Q.: Miss McCue, for all we know, she could have been dead at the time the defendant had sex with her; isn't that correct?
>
> A.: Yes, it is.

(T. 3320). Six questions later, the defendant objected to the prosecutor's question and the reference to sex with a dead body. The defendant also moved for a mistrial. (T. 3323-25). The court denied the mistrial motion. (T. 3325).

Later, during the State's direct examination of the medical examiner, Emma Lew,

the State again introduced the concept that the defendant had sexual relations with a dead body:

> Q: Now, in terms of the tests that you performed and the evidence which you recovered from her vagina and cervix that came back as the defendant's semen, *do you know whether she was dead when she had sexual activity?*
>
> A: *I cannot tell you that.*
>
> Q: *So, you don't know whether she was dead or alive for that ?*
>
> A: *That is correct.*

(T. 3606). At the conclusion of Dr. Lew's examination, the defendant again specifically objected to the questioning regarding the defendant's alleged sexual relations with a dead body and moved for a mistrial on that basis. Defense counsel indicated that he had waited until the conclusion of the doctor's examination because he did not want to interrupt the testimony. (T. 3656). The court again denied the defendant's motion. (T. 3656).

It is important to note that at the time the defendant objected and moved for a mistrial in each instance, neither the State nor the Court gave any indication that the defendant's objections were not timely or properly made. Instead, in each instance, the court considered the defendant's objections and motions and determined that a mistrial was not necessary. (T. 3325, 3656).

The purpose of the contemporaneous objection rule is to give trial judges an opportunity to address objections made by counsel at trial and to correct errors. *State v.*

Rhoden, 448 So. 2d 1013 (Fla. 1984); *Simpson v. State*, 418 So. 2d 984 (Fla. 1982). The rule prohibits defense counsel from deliberately allowing known errors to go uncorrected, in hopes of gaining a possible second trial if the first should end unfavorably, and ensures that objections are made when the recollections of witnesses are freshest. *State v. Rhoden*, *supra* at 1016.

Based upon the foregoing interpretation of the contemporaneous objection rule, this Court as well as other courts in this State have held that objections need not necessarily be made at the moment of the impropriety, in order to be considered timely. In *Johnston v. State*, 497 So. 2d 863 (Fla. 1986), this Court rejected the State's contention that the defendant had not properly preserved an improper comment, where the defendant's objection was not made until after four additional questions were asked and answered. In *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984), this Court likewise rejected a State claim of non-preservation, where the defendant's objection was not made at the moment of the impermissible inquiry. This Court stressed that the defendant's objection was sufficiently timely because the trial court would have been allowed to fashion a curative instruction or consider a mistrial motion had the court been disposed to sustain the objection. See also *Sharp v. State*, 605 So. 2d 146 (Fla. 1st DCA 1992), (defense objection, made at the conclusion of the State's direct examination and subsequent to defense voir dire inquiry of the witness, held timely) and *Roban v. State*, 384 So. 2d 683 (Fla. 4th DCA 1980), (objection made four questions after improper

remark held timely).

It is abundantly clear from this record that the trial court considered the defendant's objections to the testimony of McCue and Dr. Lew to be timely made. At no time did the trial court indicate that the court was not going to consider the defendant's objections on their merits because of untimeliness. Instead, the trial court did precisely what the contemporaneous objection rule was designed to foster: the court considered the defendant's objections and motions for mistrial and determined that a mistrial was not appropriate. Based upon the decisions in *Rhoden*, *Simpson*, *Johnston*, *Jackson*, *Sharp* and *Roban*, the defendant properly preserved the court's rulings on the challenged testimony for appellate review.

The State next contends that its questioning concerning the timing of the defendant's sexual intercourse with Karolay Adrianza was relevant because the defendant had placed the timing in issue during his examination of Analyst McCue. (Answer Br., p. 76, 79). The record plainly fails to support the State's claim.

The State called McCue to testify regarding the results of her testing of semen found in Karolay Adrianza's vagina. McCue identified the semen as belonging to the defendant and testified regarding the statistical likelihood that the semen belonged to someone else. (T. 3301, 3305-06). McCue also examined clippings from the defendant's nails, but found no evidence of blood on the clippings. (T. 3286, 3292-93).

On cross examination, the defense simply established that, scientifically, McCue

was only able to testify regarding the fact that the defendant had intercourse with Adrianza. (T. 3319). Scientifically, she was not able to draw any other conclusions. (T. 3319).

In that context, although the defendant was not charged with sexual battery upon Adrianza, an objection to the testimony regarding the presence of the defendant's semen in Adrianza's vagina would not have been appropriate because the semen was at least marginally relevant to prove the defendant's identity as a possible murder suspect. (Initial Br., p. 71). The defendant's cross examination simply brought to the jury's attention that McCue's testimony was limited to that point.

The State then gratuitously solicited from its DNA analyst that Adrianza may have been dead at the time that the defendant had sex with Adrianza. (T. 3320). Not only did the State's question call for McCue to give an opinion on a matter that was clearly outside her expertise, it also raised an uncharged allegation that was not relevant to any fact in issue and was highly disparaging and prejudicial to the defendant. Then, despite the absence of any evidence to support its irrelevant and highly damaging allegation, the State compounded the error by speculating with Dr. Lew as to whether the defendant had engaged in post-mortem sex with Adrianza. (T. 3606).

The defendant was charged by indictment with premeditated murder. He was not charged with committing felony murder involving sexual battery or any other sex act. Under the circumstances of this record, there is clearly an important distinction between

the fact that intercourse had occurred between the defendant and Adrianza, which was relevant to establishing a fact in issue relating to the charged murder, and the timing of the sex act, which was not. Since the State lacked any evidence to establish the circumstances of the sexual activity between the defendant and Adrianza, its repeated offering of its allegation regarding the defendant's engaging in sex with a dead body was patently designed to damage the defendant's standing before the jury. The prejudice resulting from those efforts mandate that the defendant be awarded a new trial.

III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL, WHICH WAS PREMISED UPON THE PREJUDICE SUFFERED BY THE DEFENDANT AS A CONSEQUENCE OF QUESTIONS ASKED BY THE PROSECUTOR OF DETECTIVE JACCARINO, WHICH IMPLIED THAT THE DETECTIVE WAS OF THE OPINION THAT THE KORKOURS HAD BEEN TRUTHFUL IN PROVIDING AN ALIBI FOR DANNY NAVARRES, THEREBY IMPROPERLY BOLSTERING THE CREDIBILITY OF THE KORKOURS ON THAT IMPORTANT ISSUE.

In this issue, we argued that the State had endeavored to improperly invade the province of the jury when it asked the lead detective questions which were designed to have the detective give his opinion about the credibility of two important State witnesses, the Korkours, who were the alibi witnesses for Danny Navarres. (Initial Br., p. 76-79). In response, the State essentially argued that the defense was not prejudiced by the

prosecution's efforts because the defense had already put the issue before the jury and the defense had abandoned their defense that Navarres had been the killer. (Answer Br., 80-82). The State's claims are not supported by the record.

During the defense cross examination of Detective Jaccarino, the defense established that the Korkours were the critical alibi witnesses for Danny Navarres. (T. 2945). The defendant then established that at the conclusion of the detective's investigation, the detective still had no idea about the location of Navarres' car between the hours of 4:00 AM and 8:00 AM on the morning that Adrianza's body was discovered. (T. 2948-49). Finally, the defendant elicited testimony from the detective that although the Korkours were cooperative, Navarres left the country a few days after Adrianza's death and never returned. (T. 2949).

As a consequence of the foregoing, the defense proved that the Korkours had a reason to be biased, by virtue of their relationship with Navarres, and that their alibi for Navarres was incomplete. The State chose to try to bolster this apparent weakness by asking Detective Jaccarino two questions which were designed to have the detective give his opinion concerning the credibility of the Korkours and their alibi for their nephew, Navarres. While it is not improper for the defense to question and challenge the thoroughness of the police investigation that led to his arrest, it is improper for the State to counter the defense challenge with police opinion testimony concerning the credibility of other State witnesses. See *Lee v. State*, 873 So. 2d 582 (Fla. 3rd DCA 2004), *Page v.*

State, 733 So. 2d 1079 (Fla. 4th DCA 1999), and *Olsen v. State*, 778 So. 2d 422 (Fla. 5th DCA 2001).

As noted earlier, the State claimed that the defendant was not prejudiced by the prosecutor's efforts because defense counsel admitted in closing argument that there was no evidence to support his theory that Navarres had killed Adrianza. (Answer Br., p. 82-83). In fact, defense counsel did no such thing. Instead, defense counsel informed the jury that Navarres had motive and opportunity to kill Adrianza. (T. 3724-26). Defense counsel also reminded the jury that Navarres had fled to Venezuela shortly after Adrianza's death, an indication that Navarres was responsible. (T. 3728). Ultimately, defense counsel admitted that he could not prove beyond a reasonable doubt that Navarres was the killer, but asked the jury to accept that scenario as the most reasonable one based upon the facts. (T. 3727-29).

Based upon the record, it is apparent that the defendant never abandoned his defense theory that Navarres had been responsible for the death of Adrianza. As Detective Jaccarino conceded, the Korkours were the witnesses who were critical to establishing an alibi for Danny Navarres. Therefore, the State's attempt to bolster the credibility of the Korkours with the opinion testimony of Detective Jaccarino was highly prejudicial. It undermined the heart of the defendant's defense and served to deprive the defendant of a fair trial.

V

THE PROSECUTOR'S IMPROPER AND PREJUDICIAL REFERENCE TO IRRELEVANT CRIMINAL ACTIVITY CONSTITUTED AN EFFORT TO ELICIT EVIDENCE OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND SERVED TO DENY THE DEFENDANT AN OPPORTUNITY TO HAVE THE JURY FAIRLY CONSIDER ITS SENTENCING RECOMMENDATION.

In this issue, we argued that the State had improperly endeavored to elicit evidence of prior criminal activity that was unrelated to any statutory aggravating circumstance, when the prosecutor asked Ace Green during the penalty phase, "*And he [the defendant] would frequent or he would go to gay clubs and hustle money from gay guys.*" (T. 4220). In its brief, the State answered that if the evidence inherent in the prosecutor's question was not admissible in its case in chief, it would be admissible to rebut the defendant's evidence of mitigation. Specifically, the State maintained that the prosecutor's question was designed to elicit evidence to rebut Green's testimony that the defendant had been gainfully employed. (Answer Br., p. 97-98).

That exact argument was made by the prosecutor to the trial court when the defendant objected to the prosecutor's question and moved for a mistrial. The court expressly rejected the contention and found that the purpose of Green's testimony was

not to demonstrate that the defendant was a hard-working man.[5] (T. 4221). In fact, at no time did the defendant make such an argument to the jury. As a consequence, it was clear to the trial court that the prosecution was not endeavoring to rebut mitigation evidence.

Instead, the record reflects that the prosecutor was intent on prejudicing the defendant before the jury that would decide upon the defendant's life or death, while operating under the guise that the State was interested in having the jury "know everything" about the defendant. (T. 4222). Unfortunately, the prosecutor's design and methods are not consistent with Florida law.

It is clearly the established law in Florida that the State is generally limited to introduction of evidence that is relevant to the aggravating circumstances set forth in the statute. *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992); *Hitchcock v. State*, 673 So. 2d

[5] In fact, Green was called by the defense to testify about the defendant's deteriorating condition from the time that Green moved in with the defendant until the day of Adrianza's death. Green stated that the defendant smoked marijuana, drank alcohol and used cocaine excessively. (T. 4211-12). By the date of Adrianza's death, the defendant had become like "the living dead." (T. 4212). At that time, the defendant was only concerned with obtaining and using drugs. He cared little for personal hygiene, food or sleep. (T. 4212).

859 (Fla. 1996). Introduction of evidence of prior criminal activity that does not qualify under the statute, particularly involving inflammatory allegations of the type in this case, is not permitted because it exposes the defendant to the risk that the jury would give undue weight to the inadmissible information in their sentencing recommendation. Based upon the precedent cited in the defendant's Initial Brief, this Court should reverse the defendant's death sentence and remand this cause for a new sentencing proceeding.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence for first degree murder must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentence of death must be vacated and the case remanded for new sentencing proceeding before a jury.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to: Sandra Jaggard, Esq., Criminal Appeals Division, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131; and to the Clerk of the Court by Electronic Mail (e-mail) to: e-file@flcourts.org, this 31st day of March, 2005.

BY: _____
SCOTT W. SAKIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is composed in 14 point Times New Roman type.

BY: _____
SCOTT W. SAKIN