IN THE SUPREME COURT OF FLORIDA

JOHN TROY, :

Appellant/Cross-Appellee, :

vs. : Case No. SC04-332

STATE OF FLORIDA, :

Appellee/Cross-Appellant. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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PRELIMINARY STATEMENT

The reply section of this brief is directed to Issues One through Five of the direct appeal. As to Issues Six and Seven, appellant will reply on his initial brief.

In both the reply and the cross-appeal answer sections, the state's brief will be referred to by use of the symbol "SB".

SUMMARY OF ARGUMENT [Cross-Appeal Issues]

[Issue I]. The state in its brief obfuscates the procedural developments relating to this point on cross-appeal, in order to make it seem as if there is a justiciable issue in there somewhere (SB82-84). What actually transpired is this: The prosecutor moved to compel discovery pursuant to the general criminal discovery rule, 3.220. The only relief she asked for was a list of the names and addresses of defense penalty phase witnesses. In the hearing, the prosecutor acknowledged that the state had failed to give the timely written notice of its intent to seek the death penalty necessary to invoke Rule 3.202 (governing discovery re mental mitigation experts). As far as Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002), the prosecutor said, "the State's position is that case controls expert testimony of mental

mitigation, and I am seeking other types of witnesses with regard to mitigation witnesses" (10/1675, emphasis supplied). The judge subsequently entered a written order granting the prosecutor precisely the relief she requested.

It was only during the Spencer hearing that the prosecutor began complaining about the Gonzalez decision, and even then she didn't ask the trial judge to do anything or rule on anything; only to place on the record her objection to the Gonzalez case (10/1684).

Contemporaneous objection and procedural default rules apply to the state as well as the defense (otherwise, to use the state's phrase, there would be no "level playing field"[1]), and the state is not entitled to an advisory opinion from this Court that it need not comply with the requirements for invoking Rule 3.202 in order to obtain the benefits of that rule.

In any event, the Gonzalez holding is plainly correct, since it is based on this Court's express recognition that the temporary Dillbeck[2] procedures (upon which the state seeks to rely as a fallback) were replaced by the January 1, 1996 adoption of a permanent rule, 3.202.

[Issue II]. Florida's capital sentencing statute prohibits the introduction in a penalty proceeding of unconstitutionally obtained evidence. The Harris v. New York, 401 U.S. 222 (1971) exception does not apply, nor did defense

[1] See SB85, 86, 89, 91.

counsel's very limited direct examination of Detective Grodoski "open the door." This

(..continued)
[2] Dillbeck v. State, 643 So. 2d 1027, 1031 (Fla. 1994).

issue on cross-appeal relating to the Spencer hearing is a small-scale mirror image of Issue III-C in appellant's initial brief, and it demonstrates the Hobson's choice with which appellant was confronted in the penalty phase, where he was coerced to forfeit one constitutional right (his right to be heard by the sentencing jury and to express his remorse) in order to preserve another constituional right (his right not to be sentenced to death based in part on statements obtained in violation of his Fifth Amendment right to counsel).

ARGUMENT

ISSUE I

SECTION 775.051, FLORIDA STATUTES, WHICH PROVIDES THAT (WITH THE EXCEPTION OF DRUGS USED PURSUANT TO A LAWFULLY ISSUED PRESCRIPTION) VOLUNTARY INTOXICATION CAUSED BY ALCOHOL OR CONTROLLED SUBSTANCES AS DESCRIBED IN CHAPTER 893 IS NOT A DEFENSE TO ANY CRIMINAL OFFENSE, AND THAT EVIDENCE OF A DEFENDANT'S VOLUNTARY INTOXICATION IS INADMISSIBLE TO SHOW LACK OF SPECIFIC INTENT OR INSANITY, VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The state's entire argument on the due process issue is premised on its mistaken insistence that the Montana statute and the Florida statute are "very similar" (SB25). The state, incorrectly, asserts that both statutes provide that voluntary intoxication is not a defense to any criminal action, and that both provide an exception for involuntary intoxication (SB 25-26). That would be an almost accurate summary of the Montana

statute which was before the U.S. Supreme Court in Egelhoff[3]; it eliminates intoxication as a defense but creates an exception for involuntary intoxication (i.e., "unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, injected or otherwise ingested the substance causing the condition." Mont. Code. Ann. §45-2-203. Therefore, the Montana statute is framed entirely in terms of the defendant's mens re, and it eliminates voluntary intoxication as a defense across the board. The applicability of the Montana statute does not depend in any way on the type of intoxicating substance consumed, nor does it depend on factors extraneous to the defendant's mens re (such as whether a prescription which he believed was lawfully issued was actually lawfully issued, or the licensure or good faith of the issuing physician or practitioner). Since the Montana statute removes the entire subject of voluntary intoxication from the mens re inquiry, it does not violate due process, for the reasons explained in Justice Ginsburg's swing-vote concurring opinion in Egelhoff.

Where the state goes wrong is in assuming that the Florida statute does the same thing (SB 25-26). To the contrary, the Florida provision, §755.051, could serve as a textbook example of how not to remove the entire subject of voluntary intoxication from the mens re inquiry. Under the plain language of the Florida provision (which unlike its

[3] Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996).

Montana counterpart refers to the inadmissibility of evidence for certain purposes), voluntary intoxication is eliminated as a defense only for those who became intoxicated through the use of alcohol or controlled substances as described in chapter 893. Therefore, the defense remains available to those who became intoxicated by huffing or otherwise ingesting chemical substances such as those set forth in Fla. Stat. §877.111. [This is not solely an equal protection problem (see SB 31). It is mainly a part of the overall due process deficiency of the Florida statute, in its failure to redefine mens re to make a defendant's voluntary intoxication irrelevant to the required mental state. See appellant's initial brief, p. 28-30.] If the availability of a voluntary intoxication defense depends on the substance consumed, rather than on the defendant's mens re, then the statute is an evidentiary proscription which violates due process. See Montana v. Egelhoff, supra, 518 U.S. at 58 (Ginsburg, J., concurring).

Moreover, unlike the Montana statute, the Florida statute does not create an exception for involuntary intoxication. Involuntary intoxication occurs when a person unknowingly ingests a substance which causes him to become intoxicated. See Carter v. State, 610 So. 2d 110 (Fla. 4th DCA 1998); Devers-Lopez v. State, 710 So. 2d 720. (Fla. 4th DCA 1998). It may occur as a result of side-effects of prescribed medication, see Brancaccio v. State, 698 So. 2d 597 (Fla. 4th

DCA 1997), but at least as typically it involves being "slipped a Mickey"; or accidentally taking the wrong pills; or consuming an innocent-appearing food or beverage. See Carter; Devers-Lopez; Jones v. State, 730 So. 2d 346 (Fla. 4th DCA 1999); see also People v. Velez, 175 Cal. App. 3d 785, 796-97, 221 Cal. Rptr. 631 (1985) (involuntary intoxication where unlawful drug was placed without defendant's knowledge in a lawful substance), citing e.g., People v. Scott, 146 Cal. App. 3d 823, 826-27, 194 Cal. Rptr 633 (1983) (PCP in punch); Commonwealth v. McAlister, 313 N.E. 2d 113 (Mass. 1974) (coffee spiked with drug that produced reaction consistent with LSD). Since §775.051 expressly deals with only voluntary intoxication, it is reasonable to assume that whatever was the status of involuntary intoxication under Florida law prior to the enactment of §775.051 (see Vaivada v. State, 870 So. 2d 197 (Fla. 1st DCA 2004), declining to decide that question), it remained unchanged thereafter. But the exception contained in §775.051 is clearly not an exception for involuntary intoxication, since (unlike the Montana statute) it says nothing about unknowing ingestion of an intoxicating substance. A defendant who was slipped a Mickey or ate Alice B. Toklas brownies is plainly not someone whose "use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to a defendant by a practitioner as defined in s.893.02." The exception is not directed, as Montana's is, to the defendant's mental state, but rather to

extraneous factors (which the defendant may not even be aware of) having more to do with the legitimacy of the doctor and his or her practice.

Florida's ill-conceived statute creates a hodgepodge of contingencies in which voluntary intoxication may or may not be a defense, and evidence of a defendant's intoxication may or may not be admissible. Such a scheme arbitrarily blocks some (but not all) defendants from presenting evidence pertaining to mens re, and violates due process and the Sixth Amendment. Unlike Montana's statute, Florida's statute does not redefine mens re or make a defendant's voluntary intoxication irrelevant across the board to the required mental state for criminal culpability. [That may be what the legislators wanted to do, but it isn't what they did. A constitutionally defective statute whose language is unambiguous cannot be cured by judicial rewriting. Lamont v. State, 610 So. 2d 435, 437 (Fla. 1992). The legislature, if it chooses, can adopt a statute which tracks Montana's or otherwise removes the entire subject of voluntary intoxication from the mens re inquiry, but it cannot apply a new statute retroactively to preclude a defense to any crime committed before its effective date].

ISSUE II

THE CIRCUMSTANTIAL EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THE CHARGE OF ATTEMPTED SEXUAL BATTERY; THE TRIAL COURT ERRED IN (1) DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THAT COUNT; (2) FINDING ATTEMPTED SEXUAL BATTERY AS AN AGGRAVATING FACTOR; AND (3) IN BOTH THE JOA

RULING AND THE SENTENCTING ORDER MISCHARACTERIZING THE ASSOCIATE MEDICAL EXAMINER'S TESTIMONY.

Appellant will rely on his initial brief as to the merits, but will reply to the state's argument concerning the applicable standard of review.

The state, relying on Fitzpatrick v. State, 900 So. 2d 495, 506 (Fla. 2005) and Orme v. State, 677 So. 2d 258, 262 (Fla. 1996), wrongly contends that this Court need not apply the circumstantial evidence standard of review because "direct evidence was introduced establishing Appellant's presence at the scene including his admissions to his mother, Debra Troy, technician Scogin's testimony of his fingerprint on a glass and the DNA and blood evidence introduced via stipulations" (SB 34)(emphasis supplied).

If appellant were challenging the sufficiency of the evidence of the murder conviction, or the sufficiency of the evidence to prove identity, the state might have a point. However, appellant conceded at trial that he was the person responsible for killing Bonnie Carroll. The issue here is not whether appellant committed the attempted sexual battery. The issue is whether the state proved beyond a reasonable doubt that an attempted sexual battery occurred at all; and the state's evidence on that point is entirely circumstantial and entirely insufficient. In sharp contrast to Orme, 677 So. 2d at 262, where "[t]he DNA and blood-stain evidence taken from

Orme and Redd's clothing obviously suggested that Orme had engaged in sexual relations with the victim [and] [l]ikewise the medical examination of the victim clearly showed she had been sexually assaulted around the time of death", the physical and forensic evidence in the instant case, while consistent with the possibility of an attempted sexual battery, was also consistent with a rage killing committed without an attempted sexual battery. While the absence of any semen at the scene or in any of the swabs taken from the victim's body may not conclusively prove that there was no attempted or completed sexual battery, this certainly is an aspect of the circumstantial evidence which is consistent with the reasonable hypothesis that the murder occurred without an attempt to commit a sexual battery.

ISSUE III

APPELLANT WAS DEPRIVED OF A FAIR PENALTY HEARING AND DUE PROCESS OF LAW WHEN THE TRIAL COURT (1) DENIED HIS REQUEST TO EXERCISE HIS RIGHT OF ALLOCUTION FOR THE PURPOSE OF EXPRESSING HIS REMORSE BEFORE THE CO-SENTENCING JURY; (2) IMPERMISSIBLY CHILLED APPELLANT'S RIGHT TO TESTIFY UNDER OATH CONCERNING HIS REMORSE (AND ALSO TO PRESENT OTHER EVIDENCE OF REMORSE) BY REFUSING TO RULE THAT THIS WOULD NOT "OPEN THE DOOR" FOR THE STATE TO INTRODUCE BEFORE THE JURY THE DETAILS OF THE CRIME (INCLUDING A NEW AGGRAVATOR OF WITNESS ELIMINATION) FROM AN UNCONSTITUTIONALLY OBTAINED CONFESSION; AND (3) ALLOWED THE STATE TO INTRODUCE THE SUPPRESSED CONFESSION IN THE SPENCER HEARING.

A. Allocution

Unless the state wishes to acknowledge that Florida's death penalty statute is an unconstitutional judicial sentencing procedure under Ring v. Arizona, 536 US 584 (2002), its reliance on Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992) is misplaced (SB 45). In that case:

> [Johnson] made a video tape expressing remorse for these killings and asked that it be shown to the jury. The trial court, however, agreed with the prosecutor that Johnson should not be allowed to escape cross-examination by not testifying in person. We agree. "All witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or interest." Jones v. State, 385 So. 2d 132, 133 (Fla. 4th DCA 1980). Johnson could have made this plea to the judge, the sentencer, and we find no error in refusing to let the jury hear his self-serving statement.

However, the rationale of Johnson cannot survive Ring. In the years since Johnson was decided it has become clear that under Florida's capital sentencing law the judge is not the sentencer. The jury and judge are co-sentencers[4], and in that situation - a "hybrid" sentencing scheme - the right of allocution (subject to strict limitations as to its scope) must include the right to address the jury; not just the judge. See Shelton v. State, 744 A. 2d 465, 492-94 (Del. Supr. 1999); Capano v. State, 781 A2d 556, 661 (Del. Supr. 2001) (Delaware having a hybrid sentencing scheme largely

[4] See, e.g., Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993); Jackson v. State, 648 So. 2d 85, 94 (Fla. 1994); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003).

modeled on Florida's). It is the jury whose role is to reflect the conscience of the community. It is the jury whose recommendation usually determines whether or not the death penalty is imposed (and often whether or not it legally can be imposed, see Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its progeny). If allocution in a capital trial is to be anything more than an empty form-over-substance exercise, it must apply to the jury. See United States v. Chong 104 F. Supp. 1232, 1234 (D. Hawaii 1999).

B. Opportunity to Testify Subject To Cross-Examination

Relying on Johnson and Chandler v. State, 702 So. 2d 186 (Fla. 1997), the state argues that in order for appellant to express his remorse to the jury he must take the stand and testify subject to cross-examination like any other witness. This echoes the trial prosecutor's argument on this point:

> We believe the law is clear in Florida that if he wants to allocute, he can allocute before Your Honor because the jury is only making a recommendation, and if he wants to testify before that jury, that he should be subject to cross-examination.

(19/1176).

Assuming arguendo that allocution before the jury could lawfully be denied, then appellant had a right to take the stand and testify subject to cross-examination like any other witness; this presupposes proper cross-examination. In this case, the prosecutor used the constant threat of improper

cross-examination to deter appellant from exercising the very constitutional right which (as she succeeded in persuading the trial judge) was the only way he could express his remorse to the jury. Although exclusionary rules of evidence are relaxed in the penalty phase, Florida's capital sentencing statute expressly states that "this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the [United States or Florida Constitutions]". Fla. Stat. §921.141(1); see Harich v. State, 437 So. 2d 1082, 1085-86 (Fla. 1983).

Appellant's in-custody statements to Detective Grodoski were suppressed by the trial court as having been obtained in violation of his Fifth Amendment right to counsel; this was done without a contested hearing but rather by stipulation between defense counsel and the prosecutor that the proposed factual findings were accurate and that the current state of the law required suppression (2/228-32). Yet this did not prevent the prosecutor from using the threat of cross-examination with the unconstitutionally obtained statements (which, among other things, would have injected a new aggravator into the mix, see Cross-Appeal Issue II) to deter appellant from exercising his right to testify. For the reasons discussed in appellant's initial brief (p. 75-79) such cross-examination would have been far beyond the scope of the proposed direct examination limited to remorse, and could not remotely be justified under either the "rule of completeness"

or the rationale of Harris v.New York, 401 U.S. 222 (1971).

By refusing to rule that appellant's penalty phase testimony limited to remorse would not open the door to cross-examination by the prosecutor with the statements obtained in violation of his right to counsel – and by strongly indicating his predisposition to rule that the door would be opened and that the defense proceeded at its own risk – the trial judge denied appellant his right to be heard, and deprived him of a fair penalty proceeding. A defendant, and especially one on trial for his life, should not be forced to sacrifice one constitutional right in order to preserve another.

ISSUE IV

THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF MICHAEL GALEMORE VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR AND RELIABLE PENALTY HEARING AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Appellant will rely on his initial brief as to the merits of this issue, and will reply to the state's contentions concerning the proffer.

In a blatant "gotcha! maneuver",[5] the state complains that defense counsel's proffer of Galemore's testimony was insufficient to preserve this issue for review (SB 19, 64-65). The state's sandbagging is exposed by the trial transcript. Defense counsel explained his two reasons for presenting Galemore's testimony, one of which is the basis of appellant's argument on appeal:

[5] See State v. Anders, 388 So. 2d 308, 309 n.4 (Fla. 3d DCA 1980)("gotcha!"

> ...the prosecution has continuously suggested that, hey, if he goes back to prison, he can just go back to using drugs there at prison, and Mr. Galemore was gonna address that. He's a warden at Polk City. He was going to say, Listen, we take very strong measures to keep drugs out of the prison. Yes, small amounts get in from time to time. So those were my two comments.
>
> THE COURT: And I think those arguments were previously made for the record.

(30/2766).

The judge stated that he understood defense counsel's position, and granted the prosecutor's motion to exclude Galemore's testimony (30/2766). Defense counsel then stated:

> And would the record reflect I had Mr. Galemore in the courtroom and that he would have – would the Court accept that he would have testified along the lines that counsel indicated?
>
> THE COURT: Does the state have any objection to the proffer?
>
> MR. SCHAEFFER: No, sir.
>
> THE COURT: All right. We'll accept the proffer as being a substantial recitation of what the witness would have testified to had he been permitted to do so.

(30/2766-67)(emphasis supplied).

Obviously, if either the judge or the trial prosecutor had had any problem with the sufficiency of the proffer, defense counsel could have put Galemore on the stand and done a Q. and A. proffer in the absence of the jury. By expressly

(..continued)
doctrine applies to state as well as defense).

stating that he had no objection to the proffer, the prosecutor effectively assured defense counsel that there was no need to do that. For the state on appeal to now contend that this issue has been waived due to defense counsel's failure to make a sufficient proffer is unpalatable.

Ironically, the state's next argument is to claim that undersigned counsel is taking a position different from that asserted by trial counsel (SB 65-66). Specifically, the state contends that the undersigned is "changing the basis of [his] objection for the first time on appeal" (SB 66), by asserting that the exclusion of Galemore's testimony violated appellant's rights protected by the Eighth Amendment to present relevant mitigating evidence, and to introduce evidence to rebut evidence, inferences, or arguments put forward by the state.

First of all, it was the state's objection, and it was erroneously sustained. The exclusion in a capital penalty trial of evidence pertaining to a mitigating factor is by its nature an Eighth Amendment issue. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). The state complains, "The only case law he [appellant] relied on below was Ford [v. State, 802 So. 2d 1121 (Fla. 2001)], which described the resolution of a state law question" (SB 66). To the contrary, even a cursory reading of Ford shows that a constitutional question is involved. 802 So. 2d at 1136 n.36;

see also Walker v. State, 707 So. 2d 300, 315 (Fla. 1997) (quoted in Ford)("We conclude that Walker was afforded what Florida and U.S. Supreme Court caselaw deem sufficient . . .").

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE OF AGE, WHERE THE REQUESTED INSTRUCTION WAS SUPPORTED BY EXPERT TESTIMONY THAT APPELLANT IS PSYCHOLOGICALLY AND EMOTIONALLY A TEENAGER.

The state misunderstands the issue. Every one of the six cases relied on by the state (SB71) deals with a claim of judicial error in the sentencing order, in declining to find or accord

significant weight to the age mitigator.[6] That determination, as the state correctly points out, is largely within the trial court's discretion. What is not a matter of judicial discretion,

[6] Shellito v. State, 701 So. 2d 837, 843 (Fla. 1997); Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000); Blackwood v. State, 777 So. 2d 399, 410 (Fla. 2000); Nelson v. State, 850 So. 2d 514, 528-29 (Fla. 2003); Caballero v. State, 851 So. 2d 655, 661-62 (Fla. 2003). The sixth case, Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) involves a cross-appeal by the state unsuccessfully challenging a trial judge's decision to find the age mitigator.

however, is to limit the jury's ability to find and weigh a mitigating factor in deliberating its penalty verdict. The trial court is required by law to instruct the jury on all mitigating circumstances for which evidence has been presented and a request is made. Stewart v. State, 558 So. 2d 416, 420-21 (Fla. 1990); Campbell v. State, 679 So. 2d 720, 726 (Fla. 1996). As long as there is some evidentiary basis for the requested mitigator, the judge may not inject into the jury's deliberations his own view of whether the mitigator should be found:

> If the [jury's] advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Stewart v. State, supra, 558 So. 2d at 421, quoting Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986) (emphasis in Floyd opinion), and Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). In the instant case, defense counsel requested that the jury be instructed on the age mitigator (34/3324-25) [contrast Blackwood v. State, supra, 777 So. 2d at 410, where no such request was made], based on the following evidence which was presented in the penalty phase: The psychiatrist, Dr. Maher, testified that, as a result in part of appellant having been molested by an adult during his early teens and then being doubly traumatized by the humiliation of having to

testify about this experience, appellant became chronically depressed and his psychological and emotional development was arrested (32/2993-3005, 3019-20). According to Dr. Maher, appellant has throughout his life functioned on an adolescent level (32/3005). Dr. Maher further opined that the reason appellant's psychiatric hospitalization and substance abuse treatments have been unsuccessful is because of his lack of mature psychological development; "we're still dealing with an individual who is psychological and emotionally a teenager" (32/3019).

When a defendant's age – "whether youthful, middle-aged, or aged" [Blackwood v. State, 777 So. 2d 399, 410 (Fla. 2000)] – is linked with some other characteristic such as mental or emotionally immaturity, a jury instruction on the statutory age mitigator should be given if requested. Campbell v. State, 679 So. 2d 720, 726 (Fla. 1996).

Instead, the state makes the bizarre argument that "at the subsequent Spencer hearing held on November 21, 2003, while the defense presented additional testimony from witnesses, Tony Cummins, Gregory Grodoski as well as a statement from Mr. Troy, the defense did not seek to present evidence or argument pertaining to age as a mitigator [record citations omitted]. Appellee would submit that Appellant's failure to avail himself of the opportunity at that point to argue the presence of the age mitigator constitutes a

procedural default and waiver precluding a subsequent challenge now to the failure to give an age mitigator instruction." (SB 70).

What?!! Appellant had already presented the psychiatric evidence of his arrested emotional development at the level of a teenager in the penalty phase before the jury, and requested a jury instruction on the mitigator, which was erroneously denied. The error which is the subject of this Point on Appeal impacted the jury's penalty deliberations, by eliminating from their consideration a statutory mitigating factor which had evidentiary support. By the time of the Spencer hearing, the jury was long gone, and there was nothing defense counsel or the trial judge could do at that point to cure the error. The state may prefer, instead, for this issue to be about the judge's sentencing order findings, but it isn't.

CROSS APPEAL ISSUE I

(1) NO ISSUE IS PRESERVED FOR APPEAL; (2) THE TRIAL JUDGE'S RULING BELOW GAVE THE STATE PRECISELY WHAT IT ASKED FOR; AND (3) THE STATE IS NOT ENTITLED TO AN ADVISORY OPINION FROM THIS COURT THAT IT NEED NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS FOR INVOKING FLA. R.CRIM.P.3.202 IN ORDER TO OBTAIN THE BENEFITS OF THAT RULE.

"Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The state

complains on appeal that "the lower court erred in its mechanistic application of the Gonzalez[7] ruling" (SB 84-85) and that "the lower court should have allowed [a mental health] examination by the state's experts" (SB 91). However, not only did the state fail to comply with the procedural requirements necessary to invoke the rule which authorizes such examinations, the state never asked the judge to allow a mental health examination prior to the penalty phase. In ruling on the state's motion to compel discovery, the trial judge ruled favorably to the prosecution, and gave it precisely the relief it asked for. Even in her belated complaint about the Gonzalez decision during the Spencer hearing, the prosecutor did not ask the judge to order an examination at that stage of the proceedings, on to do anything else. Rather, the state is simply seeking an advisory opinion from this Court that in the future it need not comply with Rule 3.202.

Fla. R. Crim. P. 3.202 – which as the state correctly notes became effective January 1, 1996 (SB 86) – expressly states that:

> The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

Rule 3.202 (a).

[7] Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002).

One of the provisions of this rule is set forth in subsection (d):

> After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

As the state conceded at trial (10/1674), it did not give written notice of its intent to seek the death penalty within 45 days of arraignment.[8]

On June 13, 2003, the prosecution filed a written motion to compel discovery; specifically asking the judge "to enter an Order to compel the defendant to provide a list of names and addresses of all witnesses he expects to call during the penalty phase of the trial" (3/398). The state asserted that it was entitled to reciprocal discovery "regarding the penalty phase witnesses since the defendant has elected to participate in discovery", and cited four cases[9] which hold that the general criminal discovery rule [Fla.R.Cr.P. 3.220] obligating

[8] Appellant was arraigned on the murder charge on November 16, 2001 (see 1/27, 52). The letter from Assistant State Attorney Roberts to defense counsel Tebrugge (submitted by the prosecutor in the Spencer hearing), advising that "as things stand right now" the state intended to seek the death penalty is dated May 15, 2002 (8/1395; 10/1684).

[9] State v. Clark, 644 So. 2d 556 (Fla. 2d DCA 1994); Elledge v. State, 613 So. 2d 434 (Fla. 1993); Booker v. State 634 So. 2d 179 (Fla. 5th DCA 1994); and Sexton v. State, 643 So. 2d 53 (Fla. 2nd DCA, 1994).

a defendant who has invoked the rule to reciprocally furnish the prosecutor with a written list of names and addresses of all witnesses whom defendant expects to call "at the trial or hearing" applies to the penalty phase of a capital case.

At the June 19, 2003 hearing on the motion to compel discovery, the prosecutor stated her request, and distinguished the Gonzalez case from what she was asking for:

> I have supplied the Court through the motion with the cases that indicate that discovery does apply to the penalty phase and that witnesses and any evidence that's going to be admitted should be given in reciprocal discovery. Specifically, I'm relying on the case of State v. Clark, 644 So. 2d 556. I am aware that the State did not initially give notice of the intent to seek the death penalty; therefore, I realize that there may be an issue with regard to expert witnesses being supplied on reciprocal discovery.
>
> I believe the defense has responded to my motion citing Gonzalez v. State; however, Judge, the State's position is that case controls expert testimony of mental mitigation, and I am seeking other types of witnesses with regard to mitigation witnesses.
>
> So I would ask that the Court compel the defense to supply the names, addresses, and any other exhibit lists of those witnesses.
>
> THE COURT: You think Gonzalez is limited to a mental health witness?
>
> MS. RIVA [prosecutor]: Yes, sir.

(10/1674-75)(emphasis supplied).

On June 24, 2003, the trial judge granted the state's motion to compel (3/447-49), over defense objection (3/410-12;

10/1675-78). The trial judge disagreed with the defense's contention that the adoption of Rule 3.202 coupled with the rejection of the proposed comprehensive amendments to Rule 3.220 meant that this Court intended for the general criminal discovery rules not to apply to a capital penalty phase (3/447-48); and concluded that State v. Clark, 644 So. 2d 556 (Fla. 2d DCA 1994) was still good law:

> It appears that Rule 3.202 modifies Clark's application in situations where the State anticipates the defendant calling a mental health expert to establish mental mitigation in the penalty phase. Under the rule, in that limited situation, when the State gives timely notice of its intent to seek the death penalty, the defendant must file notice of his or her intent to present mental mitigation evidence, identify the names and addresses of the experts, and file a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through such testimony.
>
> In Mr. Troy's case the State has failed to file its notice of intent to seek the death penalty as required by the rule. Therefore, while subsection (a) of the rule makes it clear the lack of notice does not preclude the State from obtaining the death penalty, nevertheless the State is barred from obtaining pre-guilt phase disclosure of the identity of any expert witness defendant intends to use to establish mental mitigation testimony. See Gonzalez v. State, 829 So. 2d 277 (Fla. 2d DCA 2002). The rule does not purport to restrict disclosure of additional information otherwise appropriate for disclosure under Rule 3.220.
>
> Rule 3.202 creates an exception to the broad penalty phase disclosure requirements sanctioned in Clark. Although the State missed its opportunity to discover the

> defendant's mental mitigation expert's identity, under Clark it remains entitled to disclosure of all other penalty phase witnesses, lay or expert. And as noted in Clark, its ruling applies to a procedural setting in which a defendant has not yet been convicted of first-degree murder. State v. Clark, 644 So. 2d 556, 557 (Fla. 2d DCA 1994).
>
> NOW THEREFORE, the State's Motion to Compel discovery of defendant's penalty phase witnesses is GRANTED as follows:
>
> A. Except for the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, defendant shall disclose to the State the names and addresses of the lay or expert witnesses defendant expects to call at the penalty phase of the trial, insofar as such witnesses are known to defendant. This disclosure shall occur on or before Friday, July 11, 2003.
>
> B. As required by Florida Rule of Criminal Procedure 3.220, both parties are under a continuing obligation to disclose the names and addresses of other witnesses they expect may be called at the trial or any hearing in the case.

(3/448-49).

So it is plain to see that prior to the trial and penalty phase the state (1) asked only for a witness list pursuant to the reciprocal discovery provisions of Rule 3.220; (2) got what it asked for; (3) acknowledged that it had not initially given notice of intent to seek the death penalty and thus might not be entitled to a list of defense mental health experts; (4) acknowledged that Gonzalez was controlling on the

issue of mental mitigation experts; and (5) never requested that any state expert be allowed to examine appellant.

Thus, while the state on appeal faults what it calls the judge's "mechanistic adoption" of the Gonzalez ruling (SB 85), the prosecutor below not only acquiesced [see Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979)], it was actually she who told him that it was the state's position that Gonzalez controls discovery regarding mental health experts, but she was seeking other types of witnesses.

The state reversed its field at the Spencer hearing, long after the penalty phase jurors had gone home (and considerably more than 48 hours after appellant's conviction. See Rule 3.202(d)). Only then did the prosecutor begin complaining about Gonzalez and the results of the state's failure to invoke the provisions of Rule 3.202:

> This is regarding the inability to have a State expert examine the defendant for a psychological evaluation. We had hired a doctor, Dr. Meyers, to review records that we had in our possession regarding the defendant. However, he was not able to actually perform an examination, and this Court's hands were tied because of the Second DCA case of State v. Gonzalez. I want to get a cite for that. Actually, it is Gonzalez v. State . . . . And the issue involved the state giving late notice of its intent to seek the death penalty, thereby, according to the rule and according to the case of Gonzalez, precluding the State from being able to have this examination done.
>
> What I wanted to do is just be sure that I placed on the record an objection to the Gonzalez case and that the State did seek to have this further evidence done.

(10/1683-84).

Plainly, then, the state is not appealing any adverse ruling below; but rather it is simply trying for an advisory opinion on cross-appeal because it doesn't like Gonzalez and it isn't used to its own procedural defaults having consequences.

The state is equally wrong on the merits. Its basic contention is that when it fails to comply with the procedural requirements necessary to invoke Rule 3.202 (the controlling rule which authorizes a mental health examination of a capital defendant by a state expert), it should be able to obtain such an examination anyway. The theoretical underpinning for this argument is explained by the state as follows:

> The rule [3.202] by its terms does not impose any sanction; the failure of the state to give its notice merely means that the rule is inoperative. But the inapplicability of the provisions of the rule does not mean the State is sanctioned; rather, the case proceeds as before the rule was adopted – the trial court has discretion to permit an evaluation by the state's experts.

(SB 85).

The state's argument is wrong on so many different levels it's hard to know where to start. [First of all, how can the state criticize the trial judge's supposed failure to exercise discretion to consider appointing a state expert notwithstanding its failure to invokie Rule 3.202 when the

prosecutor never asked him to appoint an expert.] The state seems to think that whenever it fails to invoke Rule 3.202 it gets to fall back on the caselaw-created interim procedures set forth in Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) and Elledge v. State, 706 So. 2d 1340, 1345 (Fla. 1997)(SB 85-86). However, as the Dillbeck court expressly stated, it was adopting "as a temporary measure" a procedure to govern discovery regarding mental health experts in capital proceedings, until a permanent rule could be adopted. 643 So. 2d at 1027 (emphasis supplied). Subsequently, on November 2, 1995, the permanent rule was adopted by this Court:

> Accordingly, we adopt appended new rule 3.202. The new rule shall become effective January 1, 1996, at 12:01 a.m. Until that time, the interim procedure approved in Dillbeck v. State, 643 So. 2d 1027, 1031 (Fla. 1994), should be followed.

Amendments to Florida Rule of Criminal Procedure 3.220 – Discovery (3.202 – Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So. 2d 83, 84 (Fla. 1995) (emphasis supplied).

See Gonzalez v. State, supra, 829 So. 2d 277, 279-80 (Fla. 2d DCA 2002) ("Amendments established that the Dillbeck procedure no longer controlled after January 1, 1996. The state was on notice by the new rule that Gonzalez would not be subjected to the rule's requirements if the State's notice was untimely").

The state's attempt to resurrect Dillbeck for use as a

safety net should be unavailing. For all of the state's talk about level playing fields (see SB 85, 86, 89, 91), it raises a question about why the state – in virtually every criminal appeal – relies on procedural default arguments (sometime straightforward; other times hypertechnical, convoluted, or even sandbagging[10]), but thinks its own procedural defaults should be free of consequences.

CROSS APPEAL ISSUE II

FLORIDA'S CAPITAL SENTENCING STATUTE PROHIBITS THE USE IN A PENALTY PROCEEDING OF EVIDENCE SECURED IN VIOLATION OF THE UNITED STATES OR FLORIDA CONSTITUTIONS, AND NO EXCEPTION EXISTS TO JUSTIFY THE PROSECUTOR'S USE OF APPELLANT'S STATEMENTS TO DETECTIVE GRODOSKI.

The issue raised by the state on cross-appeal is a small-scale mirror image of the much more significant issue (at least from appellant's viewpoint) to the fairness of this penalty proceeding raised in Issue III-C of appellant's initial brief (p. 72-79). The state used the threat of cross-examination with the statements made to Detective Grodoski – suppressed due to violation of appellant's Fifth Amendment right to counsel – to deter appellant from taking the stand to express his remorse; after first successfully asserting the position that appellant could not allocute before the penalty jury, but was required instead to take the stand and testify subject to cross-examination.

[10] See Issue IV in this reply brief, for example.

What happened at the Spencer hearing demonstrates that defense counsel was not being overly cautious during the jury penalty phase; given the trial judge's repeated warnings that he was inclined to allow the cross-examination proposed by the state if appellant were to exercise his right to testify (even though his testimony would be limited to remorse and would not go into the facts of the crime), appellant was confronted with a constitutional Hobson's choice. Unless he sacrificed his right to be heard and to express his remorse to the sentencing jury, the unconstitutionally obtained statements concerning the details of the crime would be introduced before the jury and could be used by the state to establish an otherwise unproven aggravating factor.

The state's reliance on Rodriguez v. State, 753 So. 2d 29, 47 (Fla. 2000) – which it argues for the proposition that hearsay statements may be substantively admissible in a capital penalty phase to establish an aggravating factor (SB 96-97) – ignores one crucial difference; the out-of-court statement in Rodriguez was not unconstitutionally obtained. Florida's capital sentencing statute provides that in a penalty proceeding:

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5)and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules

> of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

Fla. Stat. 921.141(1) (emphasis supplied).

In Harich v. State, 437 So. 2d 1082, 1085-86 (Fla. 1983), this Court said:

> It is clear that whenever evidence is suppressed because it was secured in violation of the fourth or fifth amendment, this statute prohibits its introduction during the penalty phase unless there is an appropriate exception as in Harris v. New York,401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

In its brief in the instant case, the state, citing Harris v. New York, 401 U.S. 222 (1971), argues "the Supreme Court has held that a defendant may be impeached with his prior inconsistent statements – even if obtained in violation of the requirements of [Miranda] – since there is no constitutional right to give false evidence to the jury." (SB 96). The state's argument based on Harris fails because of the absence of a "prior inconsistent statement."[11]

In Harris, the U.S. Supreme Court held that a defendant's statement which has been suppressed due to Miranda or other constitutional violations (as opposed to being an involuntary confession) may nevertheless be admissible for impeachment

[11] The legal arguments which follow are also contained in appellant's initial brief [Issue III, p. 75-79]; because they pertain as well to the state's cross-appeal they are repeated here.

purposes as a prior inconsistent statement. The basis of the exception is that the right of a defendant to testify in his own behalf cannot be construed to include a right to commit perjury. 401 U.S. at 255. Therefore:

> The shield provided Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Harris v. New York, 401 U.S. at 226, quoted in Nowlin v. State, 346 So. 2d 1020, 1023 (Fla. 1977).

See also Rogers v. State, 844 So. 2d 728, 732 (Fla. 5th DCA 2003) (purpose of Harris exception is to prevent perjury; therefore, statement procured in violation of Miranda may "be used to impeach a testifying defendant in the same manner as any other prior inconsistent statement").

The most basic and obvious requirement of a prior inconsistent statement is that it be inconsistent. See e.g., State v. Smith, 573 So. 2d 306, 312-13 (Fla. 1990); Hill v. State, 428 So. 2d 318 (Fla. 1st DCA 1983); Alexander v. Bird Road Ranch and Stables, Inc., 599 So. 2d 229 (Fla. 3d DCA 1992); and see Ehrhardt, Florida Evidence (2004 ed.) §608.4, p. 489 ("A prior statement of a witness is admissible to impeach credibility only if it is in fact inconsistent with the trial testimony"). Thus, as the Third DCA held

(..continued)

in reversing for a new trial in Wright v. State, 427 So. 2d 326 (Fla. 3d DCA 1983), the state cannot use a suppressed confession to impeach a testifying defendant when the statements in the confession are not inconsistent with the defendant's testimony.

In the instant case, the details of the murder, or the fact that witness elimination may have been a contributing motive, are not necessarily inconsistent with genuine remorse. [That is particularly true in light of the fact that appellant, whose prior criminal history never involved any comparable explosion of violence, was substantially impaired by the combined effect of alcohol, marijuana, and especially cocaine at the time of the crime[12]. Certainly it isn't implausible or "inconsistent" that he may have felt extremely remorseful when the effects of these substances wore off and he fully comprehended the horror of what he'd done]. Absent "prior inconsistent statements" (and without appellant testifying in the Spencer hearing), the Harris v. New

[12] See the trial court's sentencing order finding the impaired capacity mitigator and giving it great weight (10/1639, see 10/1646; 36/3564 regarding weight).

York exception is inapplicable.

As far as the "rule of completeness", the purpose of that doctrine is "to avoid the potential for creating misleading impressions by taking statements out of context." Larzelere v. State, 676 So. 2d 394, 401 (Fla. 1996); see Mendoza v. State, 700 So. 2d 670, 673 (Fla. 1997); Evans v. State, 808 So. 2d 92, 103 (Fla. 2001). The "rule of completeness", which is codified in Fla. Stat. § 90.108, only applies to written or recorded statements (including tape recordings), and does not apply to conversations and unrecorded interviews. See Christopher v. State, 583 So. 2d 642, 645-46 (Fla. 1991); Hoffman v. State, 708 So. 2d 962, 966 (Fla. 5th DCA, 1998); Ehrhardt, Florida Evidence, §90.108, p. 48-50. There is a related concept, referred to as the "doctrine of curative admissibility", which (in circumstances very different from the instant case) may apply to unrecorded conversations or interviews; however:

> The doctrine of curative admissibility "rests upon the necessity of removing prejudice in the interest of fairness . . . and [I]ntroduction of otherwise inadmissible evidence under the shield of this doctrine is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." United States v. Winston, 447 F. 2d 1236, 1240(D.C.Cir. 1971)[other citations omitted].

Guerrero v. State, 532 So. 2d 75, 77 (Fla. 3d DCA 1988) (emphasis supplied).

See Ehrhardt, Florida Evidence (2004 ed.), §108.1, p. 51, Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992).

Defense counsel's very limited questioning of Detective Grodoski in the Spencer hearing (10/1694-99) did not remotely "open the door" wide enough for the state to truck in the details of an unconstitutionally obtained confession or establish an otherwise unproven aggravating factor. See Ramirez v. State, 739 So. 2d 568, 579-81 (Fla. 1999); Pacheco v. State, 698 So. 2d 593, 595 (Fla. 2d DCA 1997); Barone v. State, 841 So. 2d 653, 655 (Fla. 2d DCA 2003).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests this Court to grant the following relief:

Reverse the convictions of first degree murder, robbery, and burglary (in the Carroll case), and remand for a new trial [Issue I].

Reverse the conviction of attempted sexual battery and remand for discharge (Issue II].

Reverse the death sentence and remand for a new penalty proceeding before a newly empanelled jury (Issues III, IV, V, and VII].

Reverse the death sentence and remand for resentencing [Issue VI].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2005.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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