IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1732
Lower Tribunal No.: 16-1999-CF-1156-AXXX

JAMES BELCHER,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-Appointed
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

STANDARD JURY INSTRUCTIONS

LEGAL TREATISES

ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN THE ANSWER BRIEF

Issue 1: The trial Court erred in not finding that the Defendant suffered

from ineffective assistance of trial counsel in connection with trial counsel's failure to object and request a curative instruction in response to the State's voir dire comments to jurors misstating the State's burden of proof and misstating the Defendant's presumption of innocence

Appellant respectfully disagrees with Appellee's description of the "deficient performance" aspect of the Strickland v. Washington, 466 U.S. 668 (2003) test of ineffective assistance of counsel. Appellee attempts to support its interpretation of Strickland v. Washington, 466 U.S. 668 (2003) by citing Ferrell v. State, 918 So.2d 163 (Fla. 2005) for the proposition that, to be deemed an "error" under the Strickland criteria, the mistake must be " . . .so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (Answer Brief, p. 15).

The expression "not functioning as counsel" was better used by the United States Supreme Court in U.S. v Chronic, 466 U.S. 648 (1984) to describe lawyer incompetence so severe that it amounted to an outright denial of the representation of counsel guaranteed by the Sixth Amendment to the United States Constitution.

The "errors of counsel" aspect of the Strickland test of ineffective assistance of counsel is actually less strict, and is much better explained later in the Strickland opinion as follows: "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range

of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional " Strickland, supra, p. 690.

The Strickland Court added, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. p. 688. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id., p. 688, citing Powell v. Alabama,, 287 U.S. 45 (1982), at 68-69.

In other words, the combined errors of the present Appellant's trial counsel may amount to ineffective representation even though the erring counsel was better than no counsel at all

In its Answer Brief, Appellee does not seem to grasp what Appellant is complaining about in this Issue. It is simply this: The prosecutor's unobjected-to comment that the Defendant maintains his presumption of innocence until the State presents evidence to the contrary (TR11, p. 81) effectively converted the presumption of innocence which exists throughout a criminal case into a weak,

"bursting bubble" presumption of innocence which ended the instant the State presented *any* evidence of guilt, however weak.

An example of such a weak, "bursting bubble" type of presumption exists in the automobile negligence cases. A driver who collides with the rear of another's car is presumed negligent until he or she produces evidence to the contrary. However, once *any* evidence to the contrary is produced, regardless of weak that evidence is, the presumption of negligence vanishes. Gulle v. Boggs, 174 So.2d 26, 27-29 (Fla. 1965). *See also* Eharhardt, Charles, Florida Evidence, 2004 Ed., West's, Section 303.1, with included discussion of Gulle at footnote 4.

This is why the prosecutor's presumption-changing *voir dire* comment in the present case was so damaging. It effectively converted the strong, criminal-case presumption of innocence into a weak, civil-lawsuit "bursting bubble" presumption of innocence that vanished the instant the State produced *any* evidence of guilt. So ended the present Appellant's presumption of innocence.

In its Answer Brief, Appellee also attempts to dismiss the prosecutor's mischaracterization of the presumption of innocence as inconsequential. Appellee argues that the trial court Judge told the prospective jurors that the Defendant was presumed innocent and under no duty to prove his innocence. (Answer Brief, p. 21). However, such Judge comments (TR 11, p. 36; TR 12, p. 412) were mere

bare-bones references to the presumption itself, not explanations of how is to be applied by the jury. Only the State provided such an explanation –an incorrect one– during *voir dire*.

Florida attorneys are free to *correctly* describe applicable law to prospective jurors:

> "A hypothetical question making a *correct* reference to the law of the case in determining the qualification or acceptability of a prospective juror may be permitted by the trial Judge in the exercise of sound judicial discretion.
>
> Pait v. State, 112 So.2d 380 (Fla. 1959), emphasis Appellant's

However, Florida attorneys cannot mislead jurors. As observed by the Court in Carlile v. State, 176 So. 862, 129 Fla. 860, (Fla. 1937):

> The rule in this State is that whether requested to or not, it is the duty of the trial judge to check improper remarks of counsel to the jury and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence. In such event, a new trial should be awarded regardless of the want of objection or exception.

The importance of describing the law during *voir dire* has been recognized by one notable legal scholar as follows:

> . . .what are your specific aims during the voir dire examination of prospective jurors? There are three:
>
> 1. Learn about the jurors' backgrounds and attitudes, so that you can exercise your challenges intelligently.
>
> 2. Present yourself and your client in a favorable way to the jury.
>
> 3. **Familiarize the jury with certain legal and factual concepts, if permitted by the court.**
>
> (Mauet, Thomas, fundamentals of Trial Techniques . Little, Brown and Co., 1980; emphasis Appellant's)

In the present case, trial counsel's failure to object to the State's incorrect description of the presumption of innocence was of much consequence. It was a very significant oversight casting doubt on the reliability of Appellant's trial. For this reason, Appellant's judgment and sentence should be reverse and the case reversed for a new trial.

Issue 2: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with allowing comments denigrating the role of the jury

In its Answer Brief, the Appellee discusses the case of Caldwell v.

Mississippi, 472 U.S. 333 (1985). The Appellee also discusses challenges made to jury instructions by Appellee's trial counsel. (Answer Brief, p. 24). Finally, the Appellee discusses the jury instructions that were given by the trial Court (Answer Brief, p. 27). However, what concerns the present Appellant most were the *prosecutor* comments which diminished the jurors' sense of their sentencing responsibility.

As noted by the Court in Caldwell:

> In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.
>
> * * *
>
> Even when a sentencing jury is unconvinced death is the appropriate punishment, it might nevertheless wish to "send a message" or express disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely err because the error may be corrected on appeal. (Citation to Justice Stevens' Concurrence in Magio v. Williams 464 U.S. 46 (1983).
>
> * * *
>
> The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death – a determination which would be made by others and for which the jury was not responsible. Creating this image

> in the minds of the capital sentencer is not a valid state goal.

The prosecutorial comments complained of in the subject appeal were particularly damaging because of the frequency with which they were uttered. As indicated in Appellant's Initial Brief (p. 13-14) the prosecutor told the jury *three* times that, although their recommendation carried "great weight," it was the Judge that actually imposed the sentence.

The Court in Mann v. Dugger, 817 F.2d 1471, 1487 (11th Cir 1987) was particularly troubled by *repeated*, improper prosecutor comments:

> Here the prosecutor's and the court's comments misled the jury as to their critical role. The prosecutor told the venire panel at least five times that their sentence recommendation was "advisory" and that imposing the death penalty was "not on your shoulders."

Repetition is a very effective technique of trial advocacy. As noted by John Sonsteng and Roger Hazdock in Trial Book 2d Ed. (West Publishing Co., 1995):

> The more time individuals perceive something, the more likely they will remember and believe it. Evidence may be repeated a reasonable number of times to increase the chances of recall and belief. . .
>
> (Trial Book, Id., Chapter 1, § 1, Advocating a case, ¶ 1.06)

As the present Appellee points out, both the trial Court Judge and

Defendant's trial counsel correctly revealed to the jury that their life-death recommendation was entitled to "great weight." (Appellee's Answer Brief, p. 26-28). However, such comments pale in comparison to the prosecutor's repeated reminders that the *Court* that is the ultimate sentencer. By harping on the judge's role in making the final life-death decision, the prosecution diminished the jurors' sense of their sentencing responsibility and violated Caldwell, supra.

In Mann v. Dugger, 844 F.2d 1446, C.A. 11 (Fla.) 1988, the Court was critical of a trial Court Judge who failed to correct a prosecutor's statements that the jury's job was to render an advisory recommendation and that imposition of the death penalty was not on their shoulders . The Mann Court explained that, by failing to correct such misleading prosecutorial comments, the trial court effectively placed the government's imprimatur upon the improper comments, giving them the same impact they would have if given by the Court itself.

In the present case, the State repeatedly made comments that wrongfully diminished the jurors' sense of their sentencing responsibility. This was contrary to the principles enunciated in Caldwell v. Mississippi, 472 U.S. 333 (1985). The trial Court erred in failing to find ineffectiveness of counsel for failing to object to and correct such misleading comments.

Issue 3: The trial Court erred in not finding ineffective assistance of counsel in connection with trial counsel's failure to object and request a curative instruction for the State's voir dire comment which failed to distinguish the defense's lesser burden of proof to establish mitigating circumstances

In its Answer Brief, Appellee argues, "Belcher contends his trial counsels were ineffective for failing to object to the prosecutor not explaining the lower burden of proof regarding mitigators during jury selection. IB at 16. Counsel's performance was not deficient. There was no basis for an objection. While defense counsel may discuss the lower burden if he wishes, he cannot force the prosecutor to do so. Defense counsel does not have this type of control over the prosecutor's remarks." Answer Brief, p. 31.

Admittedly, the prosecutor did not literally say, "Mitigating circumstances must be proven beyond a reasonable doubt" during jury selection. However, the prosecutor *strongly indicated* that the same burden of proof –beyond a reasonable doubt– applies equally to the proof of mitigating circumstances as follows:

> Mr. De La Rionda (prosecutor): Thank you, sir. I's important for all of you to understand that in this type of trial there are two parts to the trial. What I mean by that is you have the first part where you determine whether the State has proven beyond a reasonable doubt of this defendant whether he's guilty or not guilty, and if he is found guilty of murder in the first degree, you move to the second part and in that part it's what is called a penalty phase. You get to hear some evidence. So do all of you understand that, that first part, you determine whether he did it or not? Do all of you understand that?
>
> (Affirmative response from prospective jurors)
>
> Mr. De La Rionda: The second part you're allowed to

> hear some evidence and some law in terms of what that penalty phase is like and it's what's called aggravating circumstances and mitigating circumstances, and then you get to vote as to whether to recommend to Judge Dearing that he impose the death penalty or not and that recommendation does carry great weight. Do you understand that?
>
> (Affirmative response from prospective jurors)
>
> (TR11, p. 144-145)

In other words, the State lumped all parts of the trial together and indicated that the burden of proof applies to all of them: proof beyond a reasonable doubt.

The Appellant disagrees with Appellee's assertion "Defense counsel cannot make the prosecutor discuss matters that the prosecutor does not want to discuss. Defense counsel have no such control over the content of the prosecutor's remarks." Answer Brief p. 33. Actually, defense counsel *can and must* object and seek correction of false and misleading statements of the law or below to preserve the right to seek correction on appeal. Absent an objection at trial, a misstatement of the law may be raised on appeal only if fundamental error has occurred. *See* Sochor v. State, 619 So.2d 285 (Fla. 1993), cert. denied, 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993) and White v. State, 446 So.2d 1031 (Fla. 1984) and Cardenas v. State, 816 So.2d 724 (Fla.App. 1 Dist. 2002). *See also* Jiminez v. State, 928 So.2d 508 (Fla. 3d DCA 2006) and Mizell v. State, 716 So.2d

829, 830 (Fla. 3d DCA 1988) and Davis v. State, 928 So.2d 1089 (Fla. 2005) regarding the duty of trial counsel to object in order to preserve for appellate review any issues concerning improper jury instructions and regarding how the Courts rarely find erroneous jury instructions to constitute "fundamental error."

Defendant's trial counsel was ineffective in failing to object to the prosecutor's misleading statements about the burden of proof. The lower Court erred in not finding ineffectiveness on this ground.

Issue 4: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with trial counsel's failure to object and request a curative instruction for the State's voir dire comment indicating that the Defendant has the burden of proving mitigating circumstances must outweigh the aggravating circumstances, rather than vice versa

Both the trial Court and the Appellee side-stepped this issue. The gist of Appellant's complaint here is not so much the wording of the Florida "weighing" jury instruction [Fla. Stand Jury Instr. (Crim.) 7.11]; Rather, Appellant complains that his trial counsel was ineffective during *voir dire* by doing nothing when the prosecutor and prospective juror Oldring indicated the jury would jump directly from finding aggravating circumstances to weighing such aggravating circumstances against mitigating circumstances.

Such unopposed comments directed the jury to skip the interim step of

determining *whether the aggravating circumstances, by themselves, are of sufficient magnitude to justify imposition of the death penalty.* This omission was not corrected until after all the guilt-phase evidence had already been presented and heard by the jury. This omission was corrected much later, when the trial Court Judge gave the standard pre-penalty phase jury instruction directing the jurors to determine whether the aggravating circumstances alone warrant the death penalty before proceeding to the next step of determine whether any mitigating circumstances exist and, finally, to weighing the mitigating circumstances against the aggravating circumstances. TR22, p. 1828-1829.

Appellant is not complaining that the standard "weighing" jury instruction is defective. On the contrary, Appellant complains here –as he complained in his post-conviction proceedings below– that the prosecutor and a prospective juror made comments about the "weighing" procedure which *left out* the critical part highlighted below:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard is presented in order that you might determine, **first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty** and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if

> any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.
>
> [Fla. Std. Jury Instr. (Crim) 7.11, emphasis Appellant's]

Appellee's reliance on Kansas v. Marsh, – U.S. – , 2006 WL 1725515 (June 26, 2006 is misplaced. The fact that the State of Kansas's death-sentencing scheme mandates imposition of the death penalty where aggravating and mitigating circumstances are equal has no bearing on a Florida cases like this one. Our law is different. Florida requires jurors to determine whether the aggravating circumstances, considered alone, warrant death.

In the present case, during *voir dire,* the prosecutor made a comment which directed the jury was to skip this vital step and proceed directly from finding aggravators to weighing them against mitigators. TR11, p. 149. This misconception of the law was reinforced when prospective juror Ms. Oldring affirmed that she would indeed consider both aggravating and mitigating circumstances adding, "If the defense can make the mitigating circumstances outweigh the aggravating circumstances, then I would have no problem recommending life." (TR 12, p. 299). At this point, defendant's trial counsel should have objected and had the judge inform that prospective jurors that there

would be an interim step of determining whether the aggravating circumstances, *considered alone,* were of sufficient magnitude to warrant the death penalty. By excluding this step from his description of the procedure, the prosecutor wrongfully decreased the State's burden of proving that death is an appropriate sentence.

Appellant is not complaining about the wording of the standard jury instruction. On the contrary, Appellant is complaining about *voir dire* comments relating to the "weighing" process which failed to comport with the standard jury instruction. The trial Court erred in failing to find that Appellant's trial counsel were ineffective in doing nothing when prospective jurors were given incorrect information about the operation of the life-death jury advisory procedure.

Issue 5: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with trial counsel's failure to object and request a curative instruction for the State's comments indicating that a killing done instantly after deciding to kill is premeditated, first degree murder

The three elements of "premeditation" are a conscious decision to kill, "reflection" upon that decision, and then the killing itself. *See, e.g.* Fla. Std. Jury Instr. (Crim) 7.2. In the present case, the incomplete definition of "premeditation which the prosecutor gave and which Appellant now complains of was given at the

beginning of Defendant's trial, *during voir dire.* TR11, p. 166-167. As indicated at page 42 of Appellee's Answer Brief, the jurors were not told about the "time for reflection" element of premeditation until the conclusion of the penalty phase, after all of the evidence had been presented and evaluated by the individual jurors.

Appellee's reliance on State v. Williams, 797 So.2d 1235 (Fla. 2001) is misplaced. In Williams, the State did mention all three elements of premeditation –albeit is a somewhat disjointed fashion– during the same portion of the trial: the State's guilt-phase closing argument. The present Appellant's jury, by comparison, had to sit through all of the guilt-phase evidence laboring under false impression that "premeditation" exists whenever someone consciously decides to kill, without regard to whether or not they reflect upon such decision to kill.

The jurors did not receive a complete, correct definition of premeditation – which included the critical "time to reflect" element– until after the evidence had been presented and after their minds were largely made up. The prosecutor's earlier, incomplete definition of premeditation was therefore very misleading and very prejudicial. The trial Court erred in failing to find ineffective assistance of counsel in trial counsel's failure to object or take other corrective action during trial.

Issue 6: The trial Court erred in not finding that the Defendant received

ineffective assistance of counsel in connection with the prosecutor's comments which suggested to the jury that the State need not prove intent for first degree murder

In its Answer Brief, the Appellee cites Bedoya v. State, 779 So.2d 574 (Fla. 5th DCA 2001) in support of its argument that there was no need for Defendant's trial counsel to object to the prosecutor's *voir dire* statements that the State need not prove motive for a premeditated, first degree murder conviction.

Bedoya does not deal with prosecutor *voir dire* comments. Rather, the question in Bedoya was whether the State had presented sufficient circumstantial evidence of premeditation to support the conviction of first degree, premeditated murder. The Bedoya court found that evidence of a violent and continuing attack upon the victim, in the form of multiple weapons, wounds, and bloodstains, constituted sufficient circumstantial evidence of premeditation.

Unfortunately, State-given descriptions of the law have the imprimatur of government authority. They have much the same force as judge-given instructions. Because of this, an earlier, different Bedoya case –Bedoya v. State, 634 So.2d 203 (Fla. 3d DCA 1994)– is more applicable. In this earlier Bedoya Opinion, the Court stated ". . . the court should not give instructions which are confusing, contradictory or misleading. Butler v. State, 493 So.2d 451 (Fla. 1986); Finch v. State, 116 Fla. 437, 156 So. 489 (1934)."

The case of Daniels v. State, 108 So.2d 755 (Fla. 1959) is cited at page 48 of Appellee's Answer Brief. Daniels does indeed contain the ruling that the State need not prove motive or purpose to establish first degree, premeditated murder. However, the Daniels Court also stressed the need for the State to prove intent and premeditation as follows:

> The element of premeditation, as well as all elements of the crime of murder, must of course be proven by the State. The accused's guilt must be established beyond a reasonable doubt. The ultimate question of whether there was premeditation is to be determined by the jury.

(Id., p. 759)

The case of Matthews v. State, 177 So. 321 (Fla. 1937), 130 Fla. 53 (1937), is cited at page 48 of Appellee's Answer Brief. It also contains language indicating that, while *motive* need not be proved, proof of *premeditation* is still needed for a conviction of first degree, premeditated murder:

> So far as we have been able to find the courts generally hold that there must be some sort of premeditation, that the fatal blow must not be the incident of mania or a sudden paroxysm of heat of passion such as suspends the cool, normal state of the mind, but as to whether there has been such premeditation is a question for the jury to be determined by them from a consideration of all the facts under the instructions given them by the court."

(Id., at p. 60-61, 130 Fla. 53 (1937)

In conclusion, Defendant's jurors probably regarded the terms "motive" and "premeditated intent to kill" as synonymous. The prosecutor made repeated *voir dire* comments about the State not having to prove motive. The jurors probably took such comments to mean that the State need not prove premeditation. The trial Court erred in not finding ineffective assistance of counsel in trial counsel's failure to object and seek correction of such misleading statements.

Issue 7: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with his trial lawyer's concession that the victim suffered a sexual battery, the predicate offense for the felony first-degree murder conviction in this case

The Defendant was tried and found guilty by the jury, of first degree murder (on both premeditated and felony-murder theories) and sexual battery with great force. TR3, p. 459-460. As noted by this Court in its direct appeal decision for this case, one of the three aggravating circumstances found by the Defendant's jury was the Fla. Stat. §921.141(5)(d) aggravating circumstance of the capital felony being committed while the Defendant was engaged in the commission of a sexual battery. By Defendant's trial attorney indicating to the jury that the only real question is "who did it," Defendant's trial counsel effectively admitted that the victim's last sex partner and killer were one and the same.

The complained-of comment by defense counsel does so as follows:

> Obviously, and quite tragically, Ms. Embry is dead. There's no dispute about that, and there's really no dispute about the things that the State went over in great detail with your about, such as she lived at home alone, that her brother found her when she didn't show up for school and work that day. Those kind of things. And so a lot of the evidence that you'll be hearing will be important for your consideration. But the evidence, that kind of evidence, will not show you what the ultimate question is. It won't answer the ultimate question for you, which is who did it. And that's what you need to be concerned with.

(TR13, p. 565-566, 567)

Given that no DNA testing was done on the semen found in the victim's body, and given the evidence of other prior, non-harmful contacts –sexual and otherwise– between the victim and other men including the Defendant (*see* Initial Brief, p. 39-40) the jurors had reason to doubt that the victim's last sexual intercourse was with the Defendant. Quite possibly, the jury would have harbored reasonable doubt about whether the Defendant was guilty of sexual battery. Quite possibly, the jury would *not* have found the Defendant guilty of sexual battery, even if they found him guilty of premeditated murder. Such a result would have eliminated one of three aggravating circumstances that led to the jury's 9-3 death recommendation.

Eliminating of the weighty aggravating circumstance of the capital felony being "committed while the Defendant was engaged in the commission of a sexual battery" may have spared the Defendant's life.

The Appellee's comments about Defendant's lawyers' intentions and strategy (Answer Brief, p. 52-53) miss the mark. Jurors cannot read lawyers' minds; They can only hear the spoken word. In the instant case, Defendant's trial lawyer indicated to the jurors that the only real question is the identity of the person who committed the crimes.

Trial counsel effectively conceded that the victim had been raped. Trial counsel also effectively conceded that the rape and the murder were committed by the same individual. The trial Court erred in not finding ineffective assistance of counsel in conceding such important parts of the State's case.

Issue 8: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with impermissible appeals to the jurors' emotions and sympathy

Both the trial Court and the Appellee seem to have side-stepped the most troubling prosecutor comment of all:

> "in the last minutes of Jennifer Embry's life she was staring at her killer. She was looking right at him. That's the man she was staring at."

(TR18, p. 1318)

Evidence of the victim's virtues was presented at trial (Answer Brief p. 54). This made the prosecutor's subsequent comment about the victim staring up at her killer all the more inflammatory and prejudicial.

In Watts v. State, 593 So.2d 198 (Fla. 1992), this Florida Supreme Court discussed the following closing argument: " Ladies and gentlemen, we are here today because Simon Jurado is dead. We are here because he died an evil and tragic death. We are here today because the last thing that Simon Jurado saw before he died was his wife Glenda as she laid on this bed in the guest room with a gun in his face as the defendant sexually assaulted and violated her and raped her. *We are also here today because Glenda Jurado's life will never be the same."* (Emphasis added by Court.)

Defense counsel objected to the last comment and requested a mistrial. Defense counsel argued that the comment was irrelevant and intended to evoke the jury's sympathy for the victim. Although this Court found that remark to be harmless error in that particular case, this Court stated that " . . . this comment was improper because it was not relevant to a determination of Watts' guilt . . . and only served to improperly inflame the jury's emotions. . ." In other words, this Florida Supreme Court has made it clear that prosecutors are not to make emotion-

evoking comments about what victims see or feel in the last moments before their deaths.

With regard to the State's closing argument about the subject victim staring at her killer, the Appellee quotes from the trial Court's subject denial order:

> The third instance of appealing to the emotions and sympathy of the jurors Defendant cites to is the State's guilt phase closing argument. . . . The standard for review of prosecutorial misconduct is whether "the error committed was so prejudicial as to vitiate the entire trial." (citations) The comments by the prosecutor, of which Defendant complains, did not rise to the level of vitiating the entire trial. (references to record). Moreover, the comments by the prosecutor did not " 'inflame the minds and passions of the jurors so that their verdict reflect[ed] an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.' " (citations)
>
> (Subject denial order, [R2, p. 258-259] quoted in Appellee's Answer Brief, p. 57)

Actually, the Courts use a "harmless error" test in determining whether inflammatory prosecutor remarks require a new trial. Rhodes v. State, 547 So.2d 1201 (Fla. 1989). The "harmless error" test is well-described in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) as follows:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that

> there is no reasonable possibility that the error contributed to the conviction. See Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

The record in the present case indicates that the evidence that this Defendant committed a sexual battery was weak. Although some semen had been found in the victim's vagina, it was never DNA tested or linked to this Defendant. TR16, p. 971-974. Only the semen found on the victim's slipper (near the bathtub where her body was found) was DNA-tested and matched to this Defendant. TR16, p. 977-979. Semen with intact sperm was found on the victim's slipper (DNA-tested and matched to Defendant) as well as on her bed (never DNA-tested). TR 16, p. 1009-110. All of this suggests that the victim had recent, consensual, bedroom sex with some unidentified person prior to her murder. Indeed, the Victim's job supervisor, Ms. Pamela Lyle, testified that the victim dated other men. TR15, p. 752-754.

The sexual battery case against the Defendant was not a sure-fire winner; It was a "close" case. The inflammatory remarks that the Defendant complains of may well have tipped the scales and caused him to be wrongfully convicted of sexual battery. The error was harmful.

The trial Court erred in not finding ineffective assistance of counsel in trial counsel's failure to object and take action to correct the inflammatory comments made by the prosecutor.

Issue 9: The trial Court erred in not finding ineffective assistance of counsel in connection with not using a defense gynecologist to counter the State's expert's opinions that the physical evidence indicated that the Defendant committed forcible, sexual battery

Defendant will rely solely on the argument he submitted in his Initial Brief for this Issue. Should any new case law or legislation arise which Defendant deems beneficial on this Issue, he will notify the Court and counsel in the form of a Notice of Supplemental Authority.

Issue 10: The trial Court erred in not finding that Defendant's trial counsel was ineffective in failing to object to the nonstatutory aggravating circumstances of the nutritious food, diversions, risk of escape, and additional taxpayer expenses of prisoners who do not receive death sentences

The Appellee cites Asay v. State, 769 So.2d 974, 984 (Fla. 2000) in support of its argument that defense counsel could ". . . choose to rebut the Prosecutor's view of prison (pleasant prison lifestyle) rather than object." However, Asay says nothing about prosecutor comments about any pleasant prison lifestyle. Furthermore, Asay says nothing about rebuttal serving as an acceptable alternative to objections. Asay does not support the State's argument that it is acceptable for

"rebut" rather than object to damaging, prosecution evidence.

The Appellee also cites Brown v. State, 755 So.2d 616, 623 (Fla. 2000) in support of its argument (Answer Brief, p. 69-70) that the subject prosecutor's comments and witness statements about the pleasant prison lifestyle were not objectionable or harmful error. In fact, the witness statements and prosecutor argument discussed in Brown were not nearly as inflammatory as those in the subject case. In Brown, the prosecutor merely told the jurors:

> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn — you live to learn about the wonders that the future holds. In short, it is life.
>
> Brown v. State, 755 So.2d 616, 623 (Fla. 2000)

In the present case, the prosecutor went much farther by arguing that life-sentenced prisoners also get to work outside of prison, and prepare legal pleadings. TR21, p. 1654-1655, 1701. The prosecutor elicited witness testimony – without objection– that prison inmates get to work outside prison, unshackled, and the inmates get to monitor the progress of their appeal. TR21 p. 1654-1655, 1697-1698.

What possible prosecutorial purpose could such statements serve other than to arouse the fear and indignation of the jurors? The obvious implication is that a life sentence will lead to either escape or the defendant writing an appeal and getting out of prison after a short, pleasant stay. By making this kind of presentation in the present case –without any objection by defense counsel– the prosecutor went far beyond what than the prosecutors did in the cases cited by the State.

The subject prosecutor crossed the line of allowable testimony and argument. The prosecution traversed far into the realm of improper, emotion-evoking testimony and argument.

Issue 11: The trial Court erred in not finding ineffective assistance of counsel in failing to call additional, nonstatutory mitigation witnesses to testify at the penalty phase of Defendant's trial

At the evidentiary hearing held on his motion for post-conviction relief, the Defendant presented the testimony of various persons he contends should have been called as mitigation witnesses during the penalty phase of Defendant's jury trial. R 20, p. 1559- R21, p. 1765. In its Answer Brief, page 79, the State essentially argues that the testimony of such witnesses repeats what was already said by others during Defendant's trial and hence amounts to nothing more than redundant, "cumulative" evidence. Alternatively, the State argues that omitting

the additional mitigation witnesses was wise because they would have revealed information about the Defendant's criminal past. Answer Brief, p. 78-79. Appellant respectfully disagrees.

During the sentencing phase of Defendant's jury trial, the defense called several witnesses , including fellow prison inmates, who acknowledged their awareness of Defendant's prior arrests (TR20, p. 1556-1557), and imprisonments. TR20, p. 1569-1570, 1577 1580, 1582, 1608; TR21, p. 1636, 1665, 1674, 1686, 1712-1715, 1733, 1752). Given this, there could be no legitimate concern that calling additional mitigation witnesses would somehow reveal damaging information about Defendant's criminal past.

The State's claim that the additional mitigation testimony presented at the evidentiary hearing was "cumulative" and merely repetitive of what others had already said at trial is an overstatement. The mitigation witnesses who testified at Defendant's jury trial spoke mainly of the good ways in which Defendant guided and motivated fellow prison inmates. TR20, p. 1581, TR21, p. 1632-1642, 1665, 1672, 1685, 1712-1715, 1773, 1752.

The mitigation witnesses who testified at Defendant's jury trial hearing, in contrast, spoke primarily about how the crime-infested neighborhood of Defendant's youth had adversely affected him, and how the Defendant

nonetheless made the most of his prison existence. TR20, p. 1556-1568, 1582, 1577, 1612-1616 ; TR21, p. 1633, 1636, 1636-1643, 1686, 1694, 1738.

The witnesses who testified at Defendant's subject, post-conviction motion evidentiary hearing also testified about how the Defendant managed to be a positive father figure and a beneficial member of an extended family outside of prison notwithstanding his incarcerations. R2, p. 284-285, 291-292, 292-294, 317-318, 321-323, 326-328. 328-329.

The adverse effects of growing up in a crime-infested public housing project (where Defendant had been raised) was revealed as never before at the evidentiary hearing. R2, p. 302-305, 313, 316, 316-317. Such evidence cannot be considered cumulative.

Issue 12 (designated Issue 14 in Initial Brief): The trial Court erred in not finding ineffective assistance of counsel in connection with the cumulative errors of trial counsel

Defendant will rely solely on the argument he submitted in his Initial Brief for this Issue. Should any new case law or legislation arise which Defendant deems beneficial on this Issue, he will notify the Court and counsel in the form of a Notice of Supplemental Authority.

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar # 0976385

645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-appointed attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned, Court-appointed attorney hereby certifies that copies of this brief have been served by U.S. Mail addressed as follows:

A.A.G. Charmaine Millsaps, Esquire
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
ATTN: Capital Collateral Appeals

James Belcher, DC# 86173
Union Correctional Institution
7819 Northwest 228th Street
Raiford, FL 32026-4460

on this the ____day of _____, 2006.

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar # 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448

Court-appointed attorney for Defendant

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Fla. R. App. P.

CHRISTOPHER J. ANDERSON, ESQ.
Florida Bar # 0976385
645 Mayport Road, Suite 4-G
Atlantic Beach, FL 32233
(904) 246-4448
Court-appointed attorney for Defendant