IN THE SUPREME COURT OF FLORIDA

NEIL K. SALAZAR,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC06-1381
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

CORRECTED REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of Nineteenth the Judicial Circuit
In and For Okeechobee County, Florida

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1. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL DURING THE STATE'S FINAL ARGUMENT WHEN THE STATE TOLD JURORS THAT IT HAD MADE A DEAL WITH HATCHER SO THAT APPELLANT WOULD NOT "WALK" LEST THERE BE ANOTHER ATTEMPT ON RONZE CUMMINGS' LIFE.

Before addressing in detail the arguments in the answer brief (AB), appellant notes that the AB does not refute that:

· Appellee told the jury Cummings' life was in danger.

· The judge found the argument improper, but did not correct the error in the jury's presence.

· Appellee did not withdraw its claim that Cummings' life was in danger.

A. At the bench, out of the jury's hearing, the judge disapproved the state's argument. The jury did not know about this ruling. Thus, the jury heard an improper argument and the error was not corrected. In such a case, an appellate court will look to the effect of the error **on the jury**. It will reverse unless the appellee can show that its argument could not reasonably have affected **the jury** under Parker v. State, 873 So. 2d 270, 284, n. 10 (Fla. 2004), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Accordingly, appellant cannot agree with the statement of the standard of review at AB (answer brief) 17-18. The AB gives no reason that this Court should ignore Parker. It does not even address Parker despite appellant's reliance on it in the

initial brief. Instead, it relies mainly on Ibar v. State, 938 So. 2d 451, 470-71 (Fla. 2006), which does not affect the case at bar.

Ibar **did not object** to testimony that the first lead came from the Miami-Dade homicide unit, and did not mention the testimony until a later bench conference about another matter, when he said **he had no objection**. Only later still did he object and ask for a mistrial. Thus, he did not preserve the issue for appeal. Further, the evidence could not have affected the verdict since it did not go to any issue in the case.[1] Ibar does not affect the rule set out in Parker.

The other cases at AB 17-18 also do not help appellee. In Smith v. State, 866 So. 2d 51, 58-59 (Fla. 2004), Smith said immediately after the murder that "that was the 13th or 14th people that had been-that he had shot." This Court discussed the

[1] Pages 471-72 of Ibar also refer to some other evidentiary issues, as to which this Court either explicitly or implicitly found no error and which in any event were so trivial as not to require a mistrial: (1) Ibar had fought with a witness over money and drugs. This Court noted that the evidence was too unclear to prejudice Ibar, and, though it did not say so, such evidence was relevant to the witness's motives as to his retracted identification of Ibar. (2) An officer "sensed" that Ibar did not want to talk. Ibar argued the officer made a comment on silence. This Court ruled on the merits that the officer did not comment on silence, and noted that, in any event, Ibar did not take up an offered curative instruction. (3) Evidence of **co-defendant Penalver's** gang affiliation, criminal activity and consciousness of guilt. Ibar did not object until "well after" this testimony was admitted, so there was no "opportunity to rule on the admissibility of the evidence," and he did not request a curative instruction.

issue at length, id. at 56-63, and concluded the evidence **was admissible** as being "inextricably intertwined" with the evidence of the crime. Id. at 62-63. In Anderson v. State, 841 So. 2d 390, 402-03 (Fla. 2002), the court did not abuse its discretion in denying a mistrial because it took corrective action and "instructed the jury to disregard the comment." Id. at 403. This Court wrote (id.; e.s.):

> A ruling on a motion for mistrial is within the trial court's discretion. See Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997). The use of a harmless error analysis under State v. DiGuilio, 491 So.2d 1129 (Fla.1986), **is not necessary where the trial court** recognizes the error, sustains the objection, and **gives a curative instruction**. See Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999). Rather, the correct appellate standard of review is whether the trial court abused its discretion in its denial of a mistrial. See id. A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial. See Hamilton, 703 So. 2d at 1041.

Likewise, Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002) said harmless error analysis was not necessary where the court "gave a curative instruction." Id.

Ferguson v. State, 417 So. 2d 639, 641-42 (Fla. 1982), Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1978), and Duest v. State, 462 So. 2d 446, 448 (Fla. 1985) were decided before this Court clarified the standard of review in Parker and Goodwin v. State, 751 So. 2d 537 (Fla. 1999). In Ferguson, this Court found no basis for a mistrial because Ferguson did not preserve the issue for appeal with a specific objection and the

state's argument responded directly to defense argument. In Salvatore, this Court found the evidence in question admissible. The discussion in Duest is too brief to provide guidance, and the defense did not ask for a curative instruction. None of these cases affect the rule set out in Parker.

B. AB 18 says "the scope of a prosecutor's argument" lies in the judge's discretion, judges give prosecutors "wide latitude," and prosecutors may make arguments "within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." At bar, the judge found the state exceeded that scope or wide latitude: he said its argument failed the stink test. R18 1972-73. Appellee has not cross-appealed this ruling.

C. Appellant agrees with AB 18-19 that improper argument is harmless if an appellee can prove that it could not reasonably have affected the verdict. As said at pages 32-34 of the initial brief, and as appellee does not seem to dispute, the vitiated-the-trial standard requires that the state show beyond a reasonable doubt that its argument could not have affected the jury. See State v. Murray, 443 So. 2d 955, 956 (Fla. 1984); King v. State, 623 So. 2d 486, 488 (Fla. 1993); State v. DiGuilio, 491 So. 2d at 1136-37.

D. AB 19-22 contain a long quote from the state's final argument, with the **six page bench conference removed**. A casual

reader might not notice that the jury was left to consider whether "there could be another attempt on Ronze's life, attempt to finish him" while the parties argued the issue at length at the bench.

E. Appellant disagrees with the discussion of the bench conference at AB 22.

First, AB 22 contends the judge was talking about the state's "insurance policy" argument at the bench when he said its argument failed the stink test. This contention is not supported by the transcript. At the bench conference, the state tried to defend **what it had said to the jury**: it said it had been "explaining **to the jury** at this point" that "in the minds of all of us is a legitimate concern" about Ronze. R18 1970-71 (e.s.). It said it would phrase the issue as one of an insurance policy on Ronze's life. R18 1971. Defense counsel objected to such argument, and the state reverted to justifying its argument to the jury, saying it had the right to say "there were policy considerations that anyone would have taken into consideration in doing this." R18 1971-72. The judge said, "Without case law telling me that that's permitted, **it's failing the stink test**." R18 1972 (e.s.). Both parties treated the ruling as disapproving the state's argument to the jury: the defense asked for a curative instruction **to the jury**, and the state **did not argue** that the ruling went only to its discussion

at the bench so that a curative instruction would be pointless. R18 1972-73.[2] Thus, while the judge disapproved of the state's overall line of argument about policy considerations for the deal, the parties understood that he specifically disapproved the argument the jury did hear.

Second, the footnote at AB 22 runs together different parts of the discussion about a curative instruction. Appellant asked for an instruction without qualification at R18 1973: "We'd ask for a curative instruction that that's improper argument." The judge replied that an instruction might highlight the impropriety. (Note that the judge **did not** say he had disapproved only the argument at the bench: he was concerned about what the **jury had already heard**.) Defense counsel acknowledged this concern, but noted the legal significance of the requirement of a curative instruction: "I think I am required -- to perfect the record, I'm required to ask for the curative instruction." Id. The judge then denied the curative instruction **based on his own view** that it would highlight the improper argument: "I'm going to deny it on the basis that I think it would just highlight it that much more. You've requested it, you've preserved that you asked for it, but I think in the -- it makes more sense not to

[2] Later in the bench conference, the state ask the judge to rule on other potential arguments the state planned to make, starting with "Do you have a problem with my saying …" at R18 1974. This discussion occurred well the judge disapproved of the argument the state had made to the jury.

say anything at this point." Id. Only then did defense counsel express disapproval for the rule requiring, as he saw it, a request for an instruction even if he thought it would be detrimental. R18 1973. No one could consider such a remark as a waiver since the judge had just said that counsel had preserved his request. The judge seemed to take the remark as an attempt by counsel not to irritate him with his requests: "Okay. I -- I appreciate that." R18 1974. Further, if the state thought the request for an instruction was inadequate, it could have said so at the time, but it did not do so.

F. AB 22 and 24 contend that the state retracted its argument when the bench conference ended. Appellant disagrees. The state did not recant and disavow its argument as it did in Parker.

First, appellee began with the incorrect statement that Hatcher's deal was irrelevant: "Ladies and Gentlemen, the fact the State made a deal with the murderer is not an issue in this case and it is not something that you should be concerned with." R18 1976. Such argument hardly cured the error. Appellee had sought to minimize the injurious effect of the deal on its case by improperly claiming that it protected Ronze's life. It now sought to minimize its effect by saying it was irrelevant, even though a defendant is entitled to impeach a witness's testimony with such evidence as a matter of constitutional law.

Second, it told the jurors they could "speculate" or "wonder" why the state made the deal. R18 1976. Of course it had already laid out the idea that it made the deal to protect Cummings' life. Appellee in no way retracted that idea. It left the jurors free to draw the easy and straight line leading to point A (we made the deal to save Ronze from being killed by appellant) from point B (you can wonder why we made the deal).

Third, it said the jury should consider the deal only if it made Hatcher "so unreliable that we cannot believe him." Id. This argument reversed the state's burden. It had the burden to prove that things happened according to Hatcher's testimony, but it told the jury to ignore Hatcher's motive unless it made him completely unbelievable.

G. Appellee says at AB 23 that the evidence against appellant, without Hatcher's testimony, was overwhelming. Appellee does not elaborate this statement, which ignores the lack of physical, objective evidence and ignores that, without Hatcher, the state's case rested on the doubtful testimony of Cummings. Appellee does not address the numerous problems with Cummings' testimony set out at pages 38-41 of the initial brief. Further, the State of Florida knows perfectly well that the test **is not** one of overwhelming evidence. This Court held more than 20 years ago:

> The test is not a sufficiency of the evidence, a correct result, a not clearly wrong, a substantial evi-

> dence, a more probable than not, a clear and convincing, **or even an overwhelming evidence test**. Harmless error is not a device for the appellate court to substitute itself for the trier of fact by simply weighing the evidence. The focus is on the effect of the error on the trier of fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. This rather truncated summary is not comprehensive but it does serve to warn of the more common errors which must be avoided.

State v. DiGuilio, 491 So. 2d at 1139 (e.s.).

We may assume that the experienced prosecutor weighed out in his mind how best to handle his problems with Cummings' credibility and the effect of the deal with Hatcher for his testimony. And we may assume that he determined on the approach most likely to influence the jury in reaching its verdict. It makes no sense for the state now to claim that its argument on this crucial issue could not have affected the verdict.

H. AB 23 also says the jury was to consider Hatcher's testimony based on his July 2000 statement "given after Ronze had given his statements." In general, the state never clearly showed the exact timing of Ronze Cummings' various conflicting assertions, as discussed at T16 1724-26.[3] Further, little is proved by the fact that Hatcher's testimony and statements con-

[3] Also, Cummings denied having made various prior statements, so that one cannot make any reliable timeline of his statements.

formed to some extent with some of Cummings' statements. After all, there was no dispute about the fact that Hatcher was present at the shooting and in fact fired the shots. Hence, one cannot be surprised that they agreed on many of the facts. The important issue was whether appellant participated in the crime.

Further, Cousin Fred Cummings could have acted as a go-between in co-ordinating their stories. Fred spoke with Hatcher before Hatcher's police statement, telling him, "Don't worry, I got your back, everything is going to be okay," R16 1735-36, and Fred was close to Ronze Cummings. Ronze did not initially mention Fred because he thought Fred was involved in the shooting. R14 1514. Ronze admitted that he testified at Shirleen Baker's trial that he thought that he heard Fred's voice behind the door, R14 1514, but his testimony at that trial was typically confused and increasingly contradictory as the questioning at the Baker trial continued. See the discussion out of the jury's presence at R14 1515-34.

I. AB 24 says the state did not suggest there **had been** a second attempt on Cummings' life by appellant. Of course! The state told the jury there could be a **future attack** on him: "there could be another attempt on Ronze's life". R18 1970. To avoid this **future attack**, it made its deal with Hatcher lest appellant "walk." During the long bench conference, jurors were left to draw the obvious conclusion that it had to convict ap-

pellant to rescue Cummings from this future attack.

J. At AB 26-27, appellee makes a claim of harmless error. Appellee's cases do not support the argument. The state does not enjoy a rule giving it one free error. Contrary to appellee's claim, the evidence at bar was not overwhelming, and, in any event, a claim of overwhelming evidence does not bar reversal.

The state's cases do not give it a rule of one free error. Kearse v. State, 770 So. 2d 1119, 1129-30 (Fla. 2000), involved an opening statement at resentencing. The state said "Kearse 'wants to live, even though he denied that right to Officer Parrish' and urged the jury to show 'this Defendant the same mercy he showed Officer Parrish.'" Id. at 1129. Kearse moved for a mistrial **without asking for a curative instruction.** Id. This Court wrote that such error did not "automatically" require reversal, and that reversal was not required in "**light of the record in this case**". Id. at 1130 (e.s.). From Kearse appellee seems to conclude that its improper argument automatically requires affirmance unless compounded. Kearse does not support that conclusion. The prosecutor said the obvious about the case on resentencing: Kearse had been convicted of killing someone, but did not want to be killed himself, and the state sought to impose on him the same fate as he imposed on his victim (that is, no mercy). At bar, by contrast, the state told the jury

that the state was concerned that Cummings could be killed **in the future** if appellant walked.

Richardson v. State, 604 So. 2d 1107, 1009 (Fla. 1992) and Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) also do not help appellee. Richardson's harmless error discussion is so brief as to give no guidance as precedent. Rhodes **reversed** the sentence, but commented that the improper comments standing alone "may" not have required reversal. These cases simply require review of the entire record, and do not support a rule of automatic affirmance.

AB 26 also cites Walker v. State, 473 So. 2d 694, 697 (Fla. 1st DCA 1985) and Broomfield v. State, 436 So. 2d 435 (Fla. 4th DCA 1983). Both preceded State v. DiGuilio, and used the "overwhelming evidence" standard disapproved in State v. DiGuilio. Walker also affirmed because defense counsel did not preserve the issue by moving for a mistrial: "More importantly, defense counsel failed to move for a mistrial when the objections were made, so we are compelled to affirm." Id. at 697.[4] Thus, it actually used a standard of fundamental error, which does not ap-

[4] Walker was wrong to require a mistrial motion after the objection was overruled. This Court has held that one need not move for a mistrial when a judge has overruled one's objection. See Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982); Holton v. State, 573 So. 2d 284, 288 (Fla. 1991); Rodriguez v. State, 906 So. 2d 1082, 1090 (Fla. 3d DCA 2004). Nevertheless, however erroneously, Walker found the issue unpreserved, so that its harmless error discussion does not affect the case at bar in which appellant preserved the issue for review.

ply at bar.

AB 26 misreads Blanco v. State, 158 Fla. 98, 7 So.2d 333, 339 (1942). At Blanco's trial for robbing the Royal Theatre, the jury heard that three co-defendants were questioned in Blanco's presence. They implicated themselves and Blanco in various crimes, and Blanco admitted involvement in the Royal Theatre "job" but not in the others. Id. 7 So. 2d at 335-36. This Court ruled this evidence admissible. Id. In final argument, the state said the three others had been convicted and the fourth should stand with them before the judge, and that the judge would not have allowed written confessions into evidence. Id. at 336-37. The judge sustained Blanco's objections **in the jury's presence**, rebuked the state, and gave a **detailed curative instruction**. Id. This Court ruled that reversal would be required "unless the error was cured by the prompt rulings of the trial court and his instructions thereon to the jury." Id. at 337. The subsequent discussion, **including the discussion at page 339**, concerned other cases in which this Court had reversed because of improper arguments, and noted the trial court's independent duty to restrain improper argument. Most of this discussion focused on Smith v. State, 147 Fla. 191, 3 So. 2d 516 (1941), which reversed because of various improper arguments even though they "were not objected to or brought to the attention of the trial court and an opportunity to rule on the pro-

priety thereof was not allowed." Id. at 338. This Court then affirmed Blanco's conviction, apparently because of the detailed curative instruction. Thus, AB 26 confused the holding in Blanco (brief comments on matters outside the record did not require reversal because judge rebuked prosecutor and gave detailed curative instruction) with its discussion of the Smith case (which held that a long improper argument required reversal even without objection). From the foregoing the state's cases do not set out a rule of automatic affirmance or a rule of one free error.

The state bears a heavy burden to show the error could not reasonably have affected the verdict. See State v. DiGuilio (reversing for **single isolated remark** where state could not sustain burden to disprove prejudice beyond a reasonable doubt). It cannot just say an error is harmless or that the evidence was overwhelming, it must **show** this Court that there was no prejudice, and it must show this beyond a reasonable doubt based on a **thorough review of the record as a whole**. At bar, appellee has not presented such a thorough review of the record, it has not made the required showing, and it has not sustained its heavy burden. This Court should order a new trial.

K. AB 27 makes a brief argument as to prejudice at penalty. This argument ignores that (1) the same aggravating circumstances would apply to Hatcher as to appellant, and (2) the

state **told the jury at penalty** that the “real issue” in the case was the difference between the treatment of appellant and Hatcher. R19 2189. The improper argument at bar affected this “real issue” because it presented the disparate treatment of Hatcher as necessary to save the life of Ronze Cummings from a future murderous attack by appellant. Appellee has failed to meet its burden as to prejudice at penalty.

II. WHETHER THE COURT ERRED IN LETTING THE STATE PRESENT DET. BROCK'S TESTIMONY THAT HE WAS "TRYING TO FIND THE TRUTH" IN HIS INVESTIGATION.

A. Appellant agrees with AB 28-29 that this Court reviews for an abuse of discretion, but adds that the Evidence Code and case law narrow the judge's discretion. See Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003), Johnson v. State, ___ So. 2d ___, 32 Fla. L. Weekly S445, 2007 WL 1933048, *6 (Fla. July 5, 2007), and McDuffie v. State, ___ So.2d ___, 2007 WL 4124241, *11 (Fla. Nov. 21, 2007).

B. AB 29 suggests that appellee presented Det. Brock's testimony that he was seeking the truth in order to meet: (1) appellant's general challenge to the state's evidence, and (2) his cross-examination of Major Stephens about the lack of forensic evidence developed at the house. These claims lack legal substance.

(1) The defense challenges the evidence in all civil and criminal trials. This basic fact of litigation does not authorize improper self-bolstering evidence. At bar, appellant challenged the conflicting testimony of Cummings and Hatcher, which was not supported by objective forensic evidence. The claim that **Brock** sought the truth served only to divert the jury from its duty of evaluating the state's evidence for guilt.

(2) As for Stephens' cross-examination, the only mention of Brock came when Stephens said he did not consult Brock

at the crime scene because "I tried to stay away from that so it doesn't taint my ideas so I can let this crime scene show me, tell a story as to what or how it happened." R14 1442. On re-cross, Stephens again briefly said his information about the crime came from the crime scene rather than from Brock. R14 1453-54. Stephens had **zero involvement** in Brock's later investigations in Miami and other areas. Brock's self-serving testimony that he sought the truth had nothing to do with the cross-examination of Stephens.

C. Appellee presents no authority supporting Brock's self-bolstering testimony, and instead argues that the cases in the initial brief did not involve testimony factually identical to the testimony below. Although no case shows strict factual identity with the case at bar, the rule against self-bolstering is well established.

For instance, Wrobel v. State, 410 So. 2d 950 (Fla. 5th DCA 1982) held that defendants cannot bolster their own credibility by showing a lack of felony convictions. Wrobel cited numerous out-of-state cases and has been consistently followed in Florida. The same rule applies to the prosecution: it may not bolster a witness's credibility by asking about a lack of a criminal record. See Welch v. State, 940 So. 2d 1244 (Fla. 2d DCA 2006). Welch followed Wrobel and surveyed the case law forbidding self-bolstering testimony, such as occurred in Jacob v.

State, 546 So. 2d 113, 115 (Fla. 3d DCA 1989). Jacob reversed a conviction because the state bolstered an officer's testimony by having him testify about his lack of disciplinary complaints. Likewise, Hall v. State, 634 So. 2d 1124 (Fla. 5th DCA 1994) found error when a deputy testified to his own good conduct record. Error occurred in Simpson v. State, 824 So. 2d 280 (Fla. 4th DCA 2002) when officers bolstered their own credibility by saying that they did not receive bonuses or salary incentives for arrests or seizures of guns. It "is improper on direct examination to introduce evidence to support the credibility of a witness." Linn v. Fossum, 946 So. 2d 1032, 1039 (Fla. 2006).

Thus settled case law forbids self-bolstering testimony, and the judge had no discretion to allow it at bar. Nevertheless, with no citation of authority, AB 34 suggests that no error occurred because "there was **no direct comment** on the truthfulness of any evidence or witness account nor any comment on facts not in evidence." (E.s.) The foregoing cases refute such a narrow reading of the rule against self-bolstering. Further, the testimony did comment on facts not in evidence – the book of evidence that Brock showed the jurors, and his interviews of many persons throughout South Florida.

D. At AB 34-35, appellee relies on blood evidence on the wall as corroborating Cummings' account and the presence of Nutter's car "in South Florida" as supporting the testimony of

Cummings and Hatcher. But there was no dispute about the fact that Hatcher killed Nutter and stole her car, and neither the blood evidence nor the car's presence "in South Florida" incriminated appellant.

E. AB 35 briefly claims harmless error, but does not meet appellee's heavy burden to show beyond a reasonable doubt that the evidence could not have affected the verdict. In effect, Brock vouched for the integrity of the investigation, with the obvious purpose of convincing the jury that they could trust the state's evidence. Why else did the state introduce his self-bolstering testimony? It said it wanted to show why the investigation was ongoing. T17 1870. But Brock established no element by his testimony that he engaged in an ongoing wide-ranging investigation, interviewed many people, and developed a book of evidence in his search for the truth. Such evidence only served to divert attention from the weakness in the state's case and vouch for the credibility of the police investigation.

On direct examination, a party lays out the evidence it thinks will most likely produce a favorable verdict. Our law presumes that the state presents evidence in order to obtain a conviction, and it presumes prejudice from improper evidence. Appellee has failed to meet its heavy burden to disprove prejudice. This Court should order a new trial.

III. WHETHER THE COURT ERRED IN FINDING THE COLD, CALCULATED AND PREMEDITATED (CCP) CIRCUMSTANCE.

A. Appellee's argument consists mainly of reciting several times the evidence on which the judge relied in finding CCP. AB 38-39 (quoting from judge's order), 39-40 (repeating same facts),[5] 42-44 (repeating same facts). Neither these facts nor the state's cases support CCP at bar.

1. The judge cited actions leading up to the entry in the house, but these actions show only a plan to confront Nutter and get information. First, driving from Miami to Okeechobee only showed an intent to confront Nutter. Appellant and Hatcher lived in Miami and Nutter lived in Okeechobee, so that simple geography dictated the length of the drive. Arriving late at

[5] Appellee also relies on evidence that **neither the state nor the judge** relied on below: that Hatcher said on cross-examination that he was bound and imprisoned under a bed upstairs at the home of Fred Cummings and Shirleen Baker and then abducted from the home by Baker and appellant while still bound. AB 39, 42-43. It says this evidence shows that appellant "prime[d]" Hatcher to commit the crimes. Id. This evidence was presented by the defense to show the absurdity of Hatcher's account, and the state and the judge did not rely on it. No doubt they did not rely on it because the record contains the deposition of Baker refuting Hatcher's story. R3 456-536. She said appellant, Hatcher and Fred were talking downstairs. R3 487. Fred left and appellant and Hatcher talked together outside. R3 489-90. Although she was not sure, she believed it was **Hatcher** who asked to use her car, and **Hatcher** said he wanted to go to Okeechobee. R3 495-97. She was sure that **Hatcher** said, "Let's go to Okeechobee," and appellant paid her a hundred dollars. R3 526. Hatcher was not bound: he "walked out the door just like we did." R3 500. While she drove, Hatcher sat in the front and appellant in the back, and she did not see any firearms. R3 499.

night assured that Nutter would be at the house. Second, bringing Hatcher helped in the confrontation because he could and did help secure Nutter and Cummings. Third, unscrewing the porch light showed nothing about an intent to kill. In this regard, appellee's brief, but not the trial judge, cited to the fact that Green's car was parked far from the house, which fact refutes CCP, as it shows a desire to keep the victims from seeing the men escape.

2. Most of the cited actions inside the house show little or nothing about premeditation, let alone CCP. First, disconnecting the telephone **once inside** refuted an intent to kill since there would be no need to disconnect the phone at that point if the plan was to kill. Second, having two firearms did not indicate whether the intent was to kill or merely to subdue. Appellant's holding both guns did not show an intent to kill. It served to prevent Cummings or Nutter from snatching at a gun while Hatcher bound them up. Third and fourth, the use of duct tape and plastic bags did not indicate whether the intent was to kill or to subdue. Fifth, supposedly arranging to have only Hatcher do acts that might leave forensic evidence does not show an intent to kill rather than a simple desire not to leave evidence even if the intent was only to subdue and extract information. Further, the facts show only that appellant held the guns while Hatcher bound and gagged the victims, and they do not show

any more sophisticated plan regarding forensic evidence. Because of the lack of significant forensic work, one cannot tell if the intruders left evidence all over the place. For instance, Major Stephens did not process the phone in the house for prints, R14 1437, and, if appellant was there and unplugged the phone, he could have left prints or trace evidence, refuting the claim that he carefully avoided leaving forensic evidence. Sixth, the fact that only the car was stolen shows lack of an intent to rob, a fact that does not affect the question of whether there was an intent to get information rather than to kill.

3. Thus, we are left with the judge's finding that appellant planned to cause a slow death by use of duct tape and the bags, then told Hatcher to cut their throats, then had Hatcher shoot Nutter and Cummings. R4 659.

Before addressing this finding, we may consider Guardado v. State, 965 So. 2d 108, 117 (Fla. 2007). As quoted at AB 41, Guardado requires that the state show "that the defendant had a careful plan or prearranged design to commit murder **before the fatal incident** (calculated)". (E.s.) Likewise, Philmore v. State, 820 So. 2d 919, 933 (Fla. 2002), as quoted at AB 40, says the state must prove "that the defendant had a careful plan or prearranged design to commit murder **before the fatal incident**

(calculated)". (E.s.)[6] The state met this element in Guardado because Guardado told the officer he planned to kill the victim **before he went to her house**. 965 So.2d at 117. It met the element in Philmore because Philmore told the officers that, before setting out to rob a car, he and his codefendant "**discussed killing the person**." 820 So. 2d at 934 (e.s.).

In light of this well-established rule, the judge's finding does not establish CCP: the state did not prove an intent to kill **before the fatal incident**. Rather, the evidence is consistent with intending to extort information out of Nutter, and deciding to kill only when that plan failed.

The case at bar may be compared with Thompson v. State, 619 So. 2d 261 (Fla. 1993), in which a girl was methodically tortured to death. AB 45 seeks to avoid Thompson by saying the evidence there showed an intent to extort money before the first blows. This fact hardly distinguishes Thompson from the case at bar: appellant sought to extort information, and Thompson sought to extort money. The subsequent acts, however torturous and purposeful, did not establish CCP.

We may compare the facts of Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) with the judge's finding that appellant had Hatcher try to asphyxiate Nutter and Cummings, then told him to cut

[6] Accord Williams v. State, ___ So.2d ___, 2007 WL 1774389, *24 (Fla. June 21, 2007).

their throats, then told him to shoot them. AB 46 says that in Wyatt the evidence did not show "prior planning to kill" before Wyatt slowly tortured and murdered three persons with a gun he brought to the pizza parlor. The facts at bar do not show any more **prior planning to kill** than in Wyatt.

The AB makes much of the statement that "somebody dies tonight." But as AB 43 concedes, the statement was made during the interrogation. Thus, it was used as a threat to extort information, just as Thompson sought to extort money from the girls in his case in which this Court struck CCP.

Although AB 43 says appellant had an intent to kill "as is evident from his early statements," the same could be said of Thompson: the opinion in the first appeal showed that "at the time of the **initial beating** of the victim, the appellant left the bedroom and told the witness, Barbara Savage, that he (appellant) was so angry he '**felt like killing Sally** (the victim).'" Thompson v. State, 389 So. 2d 197, 200 (Fla. 1980) (e.s.). See also Douglas v. State, 575 So. 2d 165 (Fla. 1991) (Douglas kidnapped couple at gunpoint, saying he "felt like blowing our … brains out," later forced them to perform sex acts, fired gun into air, bludgeoned man and then shot him).

AB 43 also relies on the fact that "several different methods were used to accomplish the killing." But the same can be said for Thompson. See also Spencer v. State, 645 So. 2d 377

(Fla. 1994) (Spencer repeatedly beat victim's head with a brick, stabbed her repeatedly, bashed her head against concrete wall); Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (bound victim beaten and stabbed to death); Bedford v. State, 589 So. 2d 245 (Fla. 1991) (bound victim anally raped, beaten, strangled); Douglas (Douglas kidnapped couple, saying he wanted to kill them, hit man so hard in the head with the rifle that the stock shattered, shot him); Castro v. State, 644 So. 2d 987 (Fla. 1994) (Castro choked victim until blood came from his mouth, then got knife and stabbed him repeatedly). Cf. Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990) (striking CCP even though "Farinas had to unjam his gun three times before firing the fatal shots"). Also, Wyatt, Power v. State, 605 So. 2d 856 (Fla. 1992), Green v. State, 583 So. 2d 647 (Fla. 1991), and Hamblen v. State, 527 So. 2d 800 (Fla. 1988) show a similar purposefulness once the criminal episode began, and they show actions no less relentless than the actions at bar.

B. We now turn to the other cases at AB 40-47 which were not already discussed in the initial brief. In Farina v. State, 801 So. 2d 44, 53-54 (Fla. 2001), and Thompson v. State, 648 So. 2d 692, 696 (Fla. 1994), the evidence showed CCP because the defendant's initial intent was not thwarted, unlike at bar. In Bell v. State, 699 So. 2d 674 (Fla. 1997), Bell "told several people that he planned to kill Theodore Wright, and he purchased

a gun for that purpose," and he killed two other persons in an act of transferred intent. Wuornos lured the victim to a remote location as part of a deliberate plan to kill. Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994). At bar, the location was simply where the victims lived. In Williamson v. State, 511 So. 2d 289, 293 (Fla. 1987), the defendant decided to murder the victim before going to meet him, and he argued only that he had a pretense of a justification. The discussion in Eutzy v. State, 458 So. 2d 755, 757 (Fla. 1984), is so brief as to give no guidance, but it appears that Eutzy decided to commit the murder before he left with the taxi driver. Further, and most importantly, this Court later held that the 1984 Eutzy decision had used an improper definition of CCP. See Eutzy v. State, 541 So. 2d 1143, 1147 (Fla. 1989) (holding that Rogers v. State, 511 So. 2d 526 (Fla. 1987) had changed definition of CCP).

Argument at AB 47 shows the fallacy of appellee's arguments. It says: "for hours before the killing, Salazar was contemplating the killing by priming Hatcher, even threatening to kill him for the same reason Nutter was killed, i.e., talking to the FBI." Once we accept the AB's claims equating appellant's supposed treatment of Hatcher with his treatment of Nutter, we see that the record shows that appellant did not plan to kill Nutter any more than he planned to kill Hatcher. He threatened Hatcher and got his cooperation, and, just as he did not kill Hatcher

and even let him go, so was he not going to threaten Nutter go get her cooperation. The AB's argument refutes a careful plan or prearranged design to commit murder **before the fatal incident**. Cf. Randall v. State, 760 So. 2d 892, 901-02 (Fla. 2000) (evidence did not prove premeditation in case in which defendant abducted, assaulted and strangled woman to death, despite Randall's prior similar crimes: "In view of the fact that the other women that Randall choked during sexual activity did not die, it is reasonable to infer that Randall intended for his choking behavior to lead only to sexual gratification, not to the deaths of his sexual partners."); Hoefert v. State, 617 So. 2d 1046, 1048-49 (Fla. 1993) (evidence did not prove premeditation where Hoefert abducted, assaulted and strangled woman to death, and evidence showed history of similar crimes against women who survived attacks).

AB 48-50 misunderstand appellant's argument about the state's presentation of CCP in the trial court. As appellant pointed out at pages 85-86 of the initial brief, the state told the jury that CCP would apply even if appellant did not intend to kill before arriving at the house. R19 2188-89. Such a theory is contrary to the well-settled rule that the state must prove a careful plan or prearranged design to commit murder before the fatal incident under Guardado, Philmore, Williams,

Rogers, and many other cases. The law does not support appellee's theory of CCP.

C. The initial brief argued that CCP needs the narrowing definition of Rogers in order to be constitutional. Appellee makes a cursory response at AB 50-51, relying mainly on Donaldson v. State, 722 So. 2d 177, 187 n. 12 (Fla. 1998) in arguing that CCP has survived constitutional challenge. The discussion in Donaldson is so brief that one cannot tell the nature of Donaldson's argument, but Donaldson cited to, and relied on, a line of cases arising from Jackson v. State, 648 So. 2d 85 (Fla. 1994), which clearly established to that the narrowing construction **is necessary to make CCP constitutional** (id. at 89-90 (e.s.)):

> Thus, in order to find the CCP aggravating factor under our case law, the jury **must determine** that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder **before the fatal incident** (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So. 2d 221, 224-25 (Fla.1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). Certainly these requirements call for more expansive instructions to give content to the CCP statutory factor. [FN omitted.] **Otherwise, the jury is likely to apply CCP in an arbitrary manner**, which is the defect cited by the United States Supreme Court in striking down HAC instructions. See, e.g., Godfrey, 446 U.S. at 428-29, 100 S.Ct. at 1764-65. We do not suggest that every court construction of an aggravating factor must be incorporated into a jury instruction defining that

> aggravator. However, because the CCP factor is so susceptible of misinterpretation and has been the subject of so many explanatory decisions, we cannot say that the current instruction sufficiently informs the jury of the nature of this aggravator.

AB 51 also cites Walker v. State, 707 So. 2d 300, 316 (Fla. 1997), but Walker challenged the **coldness** element and not the **calculation** element, which requires the intent to kill before the fatal incident. Further, Walker also relied on Jackson, which held that the state must establish the intent to kill before the fatal incident.

IV. WHETHER THE COURT ERRED IN ALLOWING APPELLEE TO ARGUE TO THE JURY THAT CUMMINGS AND HATCHER WERE TERRORIZED DURING THE BURGLARY.

A. AB 51 says a judge has discretion as to final argument and that the judge's rulings are reviewed for an abuse of discretion. To review a judge's discretionary ruling one must review the decision the judge **actually made**. Here, the judge voiced no agreement with the claim below that the argument went to a theory of kidnapping, and he did not say he found that the jury argument properly addressed the felony murder circumstance. The judge ruled that the state's argument **went to the heinousness circumstance**:

> THE COURT: You want -- I thought you were -- all right, I'm going to -- I'll overrule the objection. I think that given the fact that heinous, atrocious and cruel is to be argued probably in the next five minutes or so, and one of the words used for that is torturous, terrorized -- they don't use "terrorize," they use "torturous," but I think given the facts and circumstances and the future instructions they'll receive that it is permitted. So I'll overrule the objection.

R19 2180.

Thus, the question is whether the court abused its discretion in ruling that the argument properly went to HAC. A court abuses its discretion if it bases its ruling on an erroneous view of either the law or the facts. Cf. Johnson; McDuffie. At bar, the judge based his ruling on a misapprehension of the circumstances concerning the state's argument and the law governing HAC.

First, the judge factually erred because he apparently thought the state was about to argue that HAC applied because Nutter and Cummings were terrorized. In fact, the state never used any form of the word "terrorize" in its HAC argument, R19 2182-87, and it used it only regarding felony murder. R19 2177-78, 2182. Manifestly, the state addressed the argument in question to the felony murder circumstance.[7]

Second, the judge erred on the law in that he ruled that HAC could be supported by argument that **both** Nutter **and** Cummings were terrorized. Cummings' terror is irrelevant to HAC under Clark v. State, 443 So. 2d 973, 977 (Fla. 1983) and Riley v. State, 366 So. 2d 19, 21 (Fla. 1979). The AB says those cases do not apply because the judge did not carry the error into the sentencing order. The sentencing order was written in chambers **two months** after the jury sentencing proceeding. Appellee does not explain how the sentencing order could affect the questions of whether the judge erred in his ruling at the bench during the

[7] Thus, it is irrelevant whether the state could have made such argument as to HAC. The question here is not whether the evidence supported HAC, but whether the judge erred in ruling that the state's argument was directed to HAC. Nevertheless, appellant notes that much of the argument at AB 55 addresses facts not pressed by the state below regarding HAC. AB 55 says Nutter heard appellant order Hatcher to slit her throat and shoot her. When the state argued HAC based on these claims, appellant objected that such argument was "speculating as to what Evelyn Nutter was able to hear," the judge sustained the objection, and the state abandoned its argument as to what Nutter may have heard. R19 2185-86.

sentencing proceedings and whether the jury could have been affected by the state's argument.

From the foregoing, the judge abused his discretion in finding that the state's argument properly addressed HAC.

B. The AB also says the judge did not abuse his discretion because the argument properly addressed the felony murder circumstance. Review for an abuse of discretion involves **deference to the judge's decision**, yet the state urges deference to a decision that **the judge never actually made**.

As already noted, the judge did not accept the state's contention that the argument supported a claim of kidnapping. One cannot know if he would have allowed such argument in the exercise of his discretion. Review for an abuse of discretion **defers** to the trial judge, it does not **substitute** the appellate court's judgment for the judge's. Cf. Chodorow v. Moore, 947 So. 2d 577, 581 (Fla. 4th DCA 2007) (assessment of fees; "the appellate court should not substitute its judgment for that of the trial court"). Regardless whether the members of this Court would have exercised their discretion at trial to allow the state's argument, its appellate review is limited to consideration of whether the judge properly exercised his discretion in ruling that the argument went to HAC. Further, the judge could hardly have agreed with the state's contention that the argument went to kidnapping, since the jury was never instructed on kid-

napping.

Appellee argues at AB 56-57 that it directed the argument to the crime of burglary with assault, of which the jury found appellant guilty. Appellee did not make this argument to the jury or the judge, so that the judge hardly could have exercised his discretion in allowing such argument. Further, under the jury instructions, jurors could have based the conviction for burglary with assault by finding either an assault **or a battery**. R18 2030, 2028.

AB 57 briefly claims that the argument could not have affected the verdict. (AB 52 also refers in passing to the vitiated-the-trial standard, but as already noted, that standard is identical the standard requiring that the state prove that the error could not reasonably have affected the jury. See State v. Murray; King v. State; State v. DiGuilio.) It says the error could not have affected the jury because the evidence supported the aggravating circumstances. Such argument ignores that the state directed its argument to the **weight** of the circumstance. Given Hatcher's life sentence, the state had to urge the jury to give as much weight as possible to all of the aggravators. It made its argument, and persisted in its argument despite the objection, because it considered it would affect the jury. The jurors would surely be amazed to hear that the state made such a dramatic argument in order to influence its verdict and then

later claimed that the argument had no effect on the verdict.

Appellee says the argument did not affect the judge's sentencing order. AB 58-59 It does not matter whether judges or lawyers, who are trained to read the evidence in the light most favorable to the verdict, might not have been affected by the argument, the question is whether jurors could reasonably have relied on it when the judge let the state continue with it. Under the circumstances at bar, appellee has failed to meet its high burden as to prejudice, and this Court should order resentencing.

V. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED (CCP) CIRCUMSTANCE ON THE GROUND THAT IT FAILED TO REQUIRE THAT THE STATE PROVE THAT APPELLANT INTENDED TO KILL BEFORE THE CRIME BEGAN.

Appellee makes a very brief argument on this point at AB 50-51. Before addressing appellee's specific claims, appellant notes that its argument does not refute that:

· The jury must find an intent to kill before the fatal incident.

· The jury cannot make this finding without an instruction.

· The judge overruled appellant's objection to the standard instruction on this ground.

A. Appellant agrees with appellee that Stephens v. State, 787 So. 2d 747 (Fla. 2001) applies to the related issue of requested jury instructions. Under Stephens, a judge has discretion as to but a defendant is **entitled** to a special instruction if (1) the evidence supports it, (2) the standard instruction does not adequately cover the issue, and (3) the special instruction correctly states the law and is not misleading or confusing. Id. at 756. These criteria were met at bar:

(1) The evidence supported appellant's objection to the instruction. The jury could have concluded from the evidence that appellant did not intend to kill before the fatal episode began. In fact, the state could only argue to the jury regarding CCP that "the evidence would certainly **suggest** … that

the intent was there to kill all along." R19 2187-88 (e.s.). Further, the state argued to the jury in the first phase: "Neil Salazar says 'If I don't get answers tonight, somebody is going to die.' Maybe -- I mean, **you can interpret that as he made up his mind after he got in there to kill,** or he came in and meant to kill from the very beginning.'" R18 1945 (e.s.).

(2) The standard instruction does not adequately cover the issue. The instruction given at bar did not tell the jury that it needed to find an intent to kill before the fatal episode began.[8]

(3) Appellant's objection correctly states the law. Appellee does not dispute that the "**jury must first determine** … that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)." See, e.g., Foster v. State, 778 So. 2d 906, 921 (Fla. 2000) (e.s.); Williams. Likewise, appellee does not dispute that appellant's objection covered this issue, and makes no argument that it was misleading or confusing.

[8] This omission in the standard instruction seems to have arisen from an historical accident at the time of Jackson. Jackson's defense to CCP seems to have been based on mental health issues which would have refuted the "coldness" element. Although this Court held that "the jury must determine" an intent to kill "before fatal incident," 648 So. 2d at 89, it approved a temporary instruction (apparently adapted to Jackson's specific issue) which did not address the requirement of proof of an intent before the fatal episode. Id., n. 8. This omission in the temporary instruction addressed to Jackson's argument has carried over into the now-standard instruction.

B. Appellee's other cases do not help its argument. First, James v. State, 695 So. 2d 1229, 1236 (Fla. 1997), **approved** giving a special instruction on the prior violent felony circumstance because the special instruction was "consistent with our caselaw." Appellant's objection is likewise consistent with this Court's caselaw. Second, Parker involved an instruction on circumstantial evidence, which this Court has put entirely in the discretion of the trial court. Third, Elledge v. State, 706 So. 2d 1340 (Fla. 1997) involved instructions contrary to this Court's caselaw. Fourth, Trease v. State, 768 So. 2d 1050, 1053, n.2 (Fla. 2000) involved a ruling on whether to appoint co-counsel, a matter entirely within the judge's discretion. Fifth, as already noted, the discussion in Donaldson shed no light on the nature of Donaldson's challenge, and it does not address the issue now at bar. Donaldson should not be read to mean that approval of a standard instruction bars any later challenges to the instruction. Such a reading would be contrary to cases such as Yohn v. State, 476 So. 2d 123, 126 (Fla. 1985), in which this Court disapproved of the standard jury instruction on insanity. "The standard instructions are 'a guideline to be modified or amplified depending upon the facts of each case.'" Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991) (quoting Yohn). Sixth and finally, Walker v. State, 707 So. 2d 300, 316 (Fla. 1997), addressed the "coldness" element, and hence does not af-

fect the issue at bar.

CONCLUSION

Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Corrected Reply Brief has been furnished to by courier on Leslie Campbell, Counsel for Appellee, Assistant Attorney General, Counsel for Appellee, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, on 9 January 2008.

_____
Attorney for Neil K. Salazar

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

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Attorney for Neil K. Salazar