IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1375

VICTOR CARABALLO,

Appellant/Cross-Appellee,

-vs-

STATE OF FLORIDA,

Appellee/Cross-Appellant.

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

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

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable William Thomas, judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, and a cross-appeal by the State of Florida. In this brief, the clerk's record on appeal is cited as "R.," and the transcript of the proceedings as "T." References to non-sequentially paginated transcripts are indicated by the volume number followed by the page number. For the sake of simplicity, the respondent's answer brief/cross initial brief will be referred to as "Answer Brief" throughout. Unless noted otherwise, all emphasis is supplied.

SUMMARY OF THE ARGUMENT

Victor Caraballo had an expectation of privacy in his apartment. He kept his belongings there, had secured it with lock, and he himself was staying within the apartment. This expectation was a legitimate one. He was a tenant in lawful possession of the apartment. While he had indicated his intention to move out, he had not yet done so. The trial court erred in finding that Mr. Caraballo lacked standing to challenge the search of the apartment, and the agents had no actual authority to enter. Nor could they rely on apparent authority. Once they found Victor, the tenant, in possession of the premises, the landlord's authority to consent became ambiguous, and the agents had a duty to investigate further. For similar reasons, there was no probable cause to support an arrest for trespass. At a minimum, the agents knew that Victor still had a right to enter the apartment and he had, moreover been licensed to do so by Ms. Cora.

The search of the entire apartment was plainly beyond the scope of a search incident to an arrest that took place in the bedroom. Likewise, the agents' search exceeded the scope of a protective sweep, the state's suggestion that the drawers and kitchen cabinets may have been big enough to hide a person. The state's attempt to justify the search on the basis of a belief that Ms. Angel might have been inside the apartment ignores the requirement that the belief be a *reasonable* one. Victor's statements and consent to search were the fruit of the illegal entry,

search, and arrest. The state's argument that the taint was dispelled by the statements and consent itself is circular. Its other arguments, including the reading of *Miranda* warnings, have already been rejected. The issue, moreover, is preserved for appeal. The trial court erred in finding that Victor Caraballo lacked standing, and the Court should reverse and remand. The appellant's remaining arguments demonstrate that there is no other basis on which to support the court's ruling.

The agents contradicted the *Miranda* warnings when they told him his statements would not hurt him, and that they would work in his favor at trial. The state's argument that these misleading statements were permissible because they came after a *Miranda* warning is untenable. Were this argument accepted, law enforcement officers would have free rein to lie to suspects about their right in order to exact a confession, so long as they first obtained a waiver of rights. The misstatements also amounted to a bargain for favorable testimony in return for a confession. This amounted to a *quid-pro-quo* that coerced Victor's statement.

The state fails to respond to many of the improper prosecutorial arguments raised in the Initial Brief. In particular, it ignores the prosecutor's avowed intention to accuse the defense of distracting the jury. The state's arguments that the defense invited the improper remarks does not explain why it was appropriate to attack defense counsel and the conduct of the defense rather than respond to the

merit of counsel's arguments. The state has also failed to demonstrate that the prosecution's golden-rule argument as well as arguments bolstering its witnesses, misstating the law, denigrating mitigation, misusing victim impact testimony are appropriate.

The Court's interpretation section 921.147 prevents some mentally retarded persons from attempting to prove their status. The state's response that Victor was free to introduce a "credible" test result simply restates the problem.

Dr. Garcia's testimony violated Florida Rule of Criminal Procedure 3.211. Contrary to the state's argument, the testimony was not proper under *Phillips v. State*, 894 So. 2d 28 (Fla. 2004), because neither of the factors relied on in *Phillips* can be found in this case.

With regard to the cross-appeal, the trial court's conclusion that the state failed to prove CCP beyond a reasonable doubt does not present an appealable error on a question of law. In any event, the decision was well not an abuse of discretion, particularly in light of the fact that the court found that that Victor Caraballo was under the influence of extreme mental and emotional disturbance.

Finally, the trial court did not abuse its discretion in finding that there was no significant history of criminal activity.

ARGUMENT[1]

I. THE FDLE AGENTS AND POLICE ENTERED VICTOR CARABALLO'S APARTMENT WITHOUT A WARRANT OR PROBABLE CAUSE, RENDERING THE FRUITS OF THE ILLEGAL ENTRY, SEARCH, AND SEIZURE, INADMISSABLE.

A Victor Caraballo Did Not Abandon His Apartment And Retained A Legitimate Expectation of Privacy Therein.

On a motion to suppress, the Court will normally defer to a trial court's findings of fact, while reviewing its legal conclusions *de novo*. *Wyche v. State*, 987 So. 2d 23 (Fla. 2008). Both the court's findings of fact and legal conclusions are wrong. The court's fact-finding was marred by its erroneous conclusion that Steve West's deposition testimony was not substantive evidence. Because of this error, the court believed there was no evidence that Victor had continued to inhabit the apartment, maintaining his effects and furniture therein. Because of the court's mistake in rejecting this testimony as substantive evidence, its determination that Victor had vacated the apartment is unworthy of deference.

[1] Counsel for the appellant has responded to the Answer Brief wherever he deemed it necessary and appropriate. The decision not to reply to the state's arguments on some issues should not be taken to imply that the appellant has abandoned those arguments.

The state maintains that: "[T]he record reflects that the trial court indicated it would consider the deposition." Answer Brief at 60. The portions of the record indicated by the state provide no support for this contention. The state directs the Court to pages 63-71 of volume 41. There the Court will find a portion of defense counsel's cross-examination of Steve West, in which counsel attempts to impeach Mr. West with his deposition. Nowhere on these pages does the judge "indicate" that he will consider the deposition as substantive evidence.[2]

[2] It is difficult to say that the judge's comments in those pages "indicate" anything at all. The judge is at his most vocal on page 64, where the following transpires:

> THE COURT: Do I have a copy of that deposition?
>
> THE CLERK: No, Judge. I am sorry.
>
> THE COURT: Will someone hand it to me?
>
> MR. DENARO: Judge, you can have mine if you would like it.
>
> MR. LAESER: Page and line.
>
> MR. ROSENBERG: I will give it to you. Give me a minute.
>
> THE COURT: I will give it back to you.
>
> MR. ROSENBERG: Pulling the stickies out.
>
> THE COURT: I want to be able to follow. All right, Counsel.
>
> MR. ROSENBERG: Your testimony here today ---
>
> THE COURT: Can you tell me what page and line?

The state misreads the record when it points to pages 169 and 170 of volume. There, defense counsel asks if he might have an opportunity to call additional witnesses should SA Hidalgo's testimony vary significantly from his deposition. (Vol. 45: 169). As an example, he points to the change in Mr. West's testimony. (Vol. 45: 169). The only remark regarding what the court would *consider*, is the following:

> [MR. ROSENBERG]: … Certainly, if I went to the Court and said, based on that new information I need to call a witness, certainly that would be something that the Court would consider.
>
> THE COURT: Well, of course I would consider it. I did not say I will not consider it. I would consider it, but Detective Hidalgo had been deposed already. Correct? … Okay. Now if something just blows you out of the water that you could not have reasonably anticipated and you want to put on a response or rebuttal to what he said to counter, I will -- obviously, I will consider that.

(Vol. 45: 169-70). Contrary to the state's claim, the trial court did not "cho[o]se to accept Mr. West's testimony instead of his prior deposition …" Answer Brief at

---

> MR. ROSENBERG: I am not on there but we will go to 14 in a minute, Judge.
>
> THE COURT: Okay.

(Vol. 41: 64). Thereafter the judge keeps his silence until, on page 69, he overrules a state objection to speculation and relevance. (Vol. 41: 69). On page 70, the judge overrules an objection to a compound question and confirms that the witness understood the question. (Vol. 41: 70). On page 71 he asks if there is to be further cross-examination of Mr. West, and invited the state to call its next witness. (Vol. 41: 71).

60. The court believed that it *could not* choose to accept the deposition as substantive evidence, and this rendered its fact-finding unreliable.

The trial court's conclusion that Victor Caraballo lacked "standing"[3] to object to the search is error on any construction of the facts. Victor had an expectation of privacy, and that expectation – that of a tenant in lawful possession of his property – is one that society recognizes as legitimate. Victor himself clearly had an expectation of privacy at the time of the search. He had possession of the property and was keeping his belongings there. In *Morse v. State*, 604 So. 2d 496, 503 (Fla. 1st DCA 1992), the court found that such behavior is inconsistent with abandonment:

> When [hotel manager] and Deputy Colette entered Room 11, it should have been immediately evident appellant had left some of his belongings there. We find no intent on appellant's part to relinquish his control over the room prior to removing his personal items such as clothing and furnishings.

Id. at 502. Victor further took steps to ensure his lawful privacy in the premises, replacing the lock with one to which he alone held the keys. In *State v. Young*, 974 So. 2d 601 (Fla. 1st DCA 2008), police searched Young's office and computer at the church where he was a pastor. When police asked him if he had a right to

[3] In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Supreme Court dispensed with the concept of "standing" as a preliminary inquiry separate from substantive Fourth-Amendment analysis. The term survives however, usually as a stand-in for a defendant's legitimate expectation of privacy or other substantive Fourth Amendment interest.

privacy on the computer, Young replied that he supposed he did not. *Id.* at 607. The district court rejected the state's argument that Young lacked any expectation of privacy. *Id.* at 611. Among other things, the court noted that, "Young kept his office locked when he was away, thus taking specific measures to ensure his privacy in the office." *Id.* Like Young, Victor took affirmative steps to ensure the privacy he expected.[4] *See also Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980) (expectation of privacy where defendant took overt steps to show that barn was not open to the public).

Victor Caraballo's expectation of privacy was a legitimate one. As a tenant, Victor Caraballo was in lawful possession of his apartment until there was a judgment of eviction entered against him. § 83.59, Fla. Stat. (2002). "[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy …" *Rakas*, 439 U.S. 128, 144 n.12 (1978). The trial court relied on testimony that Victor's *intention* was to move out. (R. 1517). A departing tenant's expectation of privacy during the time he is moving out – and while he is actually present – is a legitimate one which society is prepared to recognize.

[4] Consistent with *Young*, Victor's words to SA Hidalgo, that he believed: "You are here to investigate this trespass …" – made more than an hour after he had been arrested and handcuffed for trespass – does not destroy the expectation of privacy he demonstrated by his actions.

B The Agents Could Not Reasonably Rely on Ms. Cora's Apparent Authority.

Police may enter and search property based on the consent of someone who shares authority over the premises with a defendant. *United States v. Matlock*, 415 U.S. 164 (1974). The police may also rely on consent where they reasonably but wrongly believe the consenter has authority over the property. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). In *Matlock* the government relied on the consent of the woman who cohabited with Matlock in the room searched. In *Rodriguez*, the consent came from Rodriguez's girlfriend, whom the police reasonably believed to live in his house.

Landlords, however, do not have authority to consent to the search of their lawful tenants' homes. *Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United States*, 365 U.S. 610 (1961). Law enforcement is not entitled to rely on a landlord's authority to search unless the tenant has given up his reasonable expectation of privacy therein. *Morse*, 604 So. 2d at 501.

The state maintains that the agents were entitled to rely on Ms. Cora's apparent authority to consent to the search. Answer Brief, 62-63. The state does not, however, address the Initial Brief's argument that the agents had a duty to question this apparent authority once they discovered Victor and his possessions in his apartment and secured by a lock. Where any ambiguity concerning the authority to consent arises, law enforcement must make further inquiry.

Rodriguez, 497 U.S. at 188-89. Inside the locked apartment, the agents found food in the kitchen, a suitcase full of clothing, a bathroom with washing and shaving supplies, bedding, and lawn chairs, as well as Victor himself. (Vol. 41: 59, 85). All of this was inconsistent with an abandonment of Victor's reasonable expectation of privacy. *See Morse*, 604 So. 2d at 503. The state can point to no decision suggesting agents were free to ignore the ambiguity concerning Ms. Cora's authority to consent, and the agents' reliance on that consent was unreasonable.

C The Agents Illegally Arrested Victor Caraballo Without Probable Cause.

Even if the agents had apparent authority to enter the apartment, they did not have probable cause to arrest. The state argues: "[F]inding Defendant in an apartment that was not his without permission to be there is the very definition of trespass." Answer Brief at 65. Victor Caraballo, however *did* have permission to be in the apartment. The agents knew that he held a lease to the apartment and had not yet been evicted. Whether or not his actions would have authorized an entry into the apartment on Ms. Cora's apparent authority, Victor had a legal right to be in the apartment. He had, moreover, obtained a key to the changed lock from Ms. Cora. (Vol. 41: 79). On the totality of these circumstances, no reasonable person would believe that the crime of trespassing was being committed.

D The Search Of Victor Caraballo's Apartment Exceeded The Scope Of A Search Incident To Arrest Or Protective Sweep.

The Initial Brief argued that they exceeded the scope of a lawful search incident to arrest because the police searched areas outside Victor Caraballo's immediate control. Initial Brief 31-33. The search of other rooms in the apartment cannot be justified as a search incident to arrest. *Chimel v. California*, 395 U.S. 752 (1969).[5] The state does not address the merits of this point. Nor does the state address the argument that the search exceeded the scope of a legitimate protective sweep.

Instead the state argues that the record does not establish that the police exceeded the scope of a protective sweep because "the evidence actually presented reveals nothing regarding the size of the areas searched."[6] Answer Brief at 67. The testimony makes it clear that the agents searched kitchen and bathroom drawers. As to the cabinet in which the agents found the license and credit card,

---

[5] "There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs-or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Chimel*, 395 U.S. at 763.

[6] The state couches its argument in preservation. As discussed below any deficit in the record presents a problem for the state, not the appellant. It is the state that must show that there exists a "theory or principle of law *in the record* which would support the ruling," *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (quoting *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla.1999) (emphasis supplied in *Roberts*), in order to argue that the trial court was "right for the wrong reasons."

the record contains the following testimony:

> Q. Okay. Where did you find the driver's license, ID and credit card?
>
> A. For which person?
>
> Q. Ana Marie Angel?
>
> A. It was found in the kitchen cabinet.
>
> Q. Upper or lower cabinet?
>
> A. Upper cabinet.
>
> Q. You mean the kind of cabinet we put our glasses in the kitchen?
>
> A. Correct.

(Vol 41: 182).

E The Seizure Of The Evidence Did Not Fall Under The Plain View Exception.

The state does not dispute the fact that this exception does not apply.

F The Entry And Search Were Not Justified By Exigent Circumstances.

The state refuses to address the issue that defeats any reliance on the emergency doctrine: The agents did not have a *reasonable* belief that someone inside the apartment required aid. The state agrees with the Initial Brief that police may enter and search a building where "they reasonably believe that a person within is in need of immediate aid." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978);

Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006). Answer Brief 64-65. The state avers that a kidnap victim held by her abductors who had reportedly stabbed her co-abductee presents the type of "grave emergency"[7] that may invoke the emergency doctrine. Answer Brief 65. The initial brief did not dispute this.

The Answer Brief, however, makes no attempt to demonstrate that the agents' belief that there was an ongoing emergency was reasonable. The only information the agents had on which to base their belief was that Victor was "allegedly" the brother of Hector Caraballo. Vol. 42: 50. This information does not support a belief that Ana Angel was within Victor's apartment, much less a *reasonable* belief. The state cites *Seibert v. State*, 923 So. 2d 460 (Fla. 2006), for the proposition that the need to preserve life presents exigent circumstances that would justify a warrantless entry. Answer Brief at 65. In *Seibert*, however, the police officers had a reasonable belief that a life was in danger. Seibert's roommate called 911 saying that Seibert was threatening to commit suicide, and repeated this statement in person to the officers. 923 So. 2d at 467. Here the police had no information to support even a hunch that Ana Angel might be inside the apartment, much less an objectively reasonable belief.

[7] *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

The state likewise makes no attempt to explain the agents' dilatory behavior in the face of the claimed emergency.[8] The claim of exigency is belied by the agents' own actions. They arrived at Victor's apartment at 1:45 p.m. (Vol. 42: 121). They did not even *knock* on the door until 2:00 p.m., 15 minutes later. (Vol. 42: 122). They agents kicked in the door of Victor Caraballo's apartment at 2:25 p.m., another 20 minutes later. (Vol. 42: 85). The decision to wait 40 minutes before entering the apartment is incompatible with a belief that a kidnap victim was held within it and in peril. Though the agents claim that they believed Victor was connected to Ms. Angel's kidnapping, they did not bother to question Victor about her whereabouts until after 4:10 p.m., two hours and twenty minutes after they arrived at the apartment. (Vol. 42: 8).

Where a warrantless entry is justified by an emergency, any search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. at 393, (*quoting Terry v. Ohio*, 392 U.S. 20, 25-26 (1968)). With regard to the scope of the search, the state writes: "Upon entry, Agt. King was looking for people within the apartment, including in the attic. The only items located were a cell phone on the counter and Ana's ATM card and driver's license. Accordingly,

[8] It is possible that the state seeks to touch on this point with the following sentence: "Upon entry, Agt. King was looking for people within the apartment, including in the attic." King testified that after entering the apartment, he and others spent 15-30 minutes searching the ground floor. (Vol. 42: 129). He further stated that the attic was another area he went to search. (Vol. 42: 129-30).

an exigent circumstance existed to justify the entry and initial search." Answer Brief at 65. The initial search included a search of drawers and cabinets. (Vol. 42: 129). When the officers began to search places where a person could not be hidden, they exceeded the scope of the search licensed by any exigent circumstances.

G The Evidence And Statement Obtained As A Result Of The Illegal Search And Seizure Must Be Suppressed As The Fruit Of The Poisonous Tree.

The record demonstrates that Victor Caraballo's statements were the fruit of the illegal search and arrest. The state has the burden of proving by clear and convincing evidence an unequivocal break in the causal chain leading from the original illegality. *Brown v. Illinois*, 422 U.S. 590, 597 (1975). This the state cannot do. SA Hidalgo obtained Victor Caraballo's statement as Victor sat in his own apartment, where he had been kept in handcuffs for more than two hours pursuant to his illegal arrest, and while the illegal search of his apartment was still going on.

The state suggests that it has established an unequivocal break because:

> [Victor] provided officers with the information to locate the items associated with the crime after he waited for Agt. Hidalgo to talk to him in his chosen language, his cuffs were removed, he was given food, drink and the ability to smoke, being read and waiving his *Miranda* rights, and in conjunction with a consent to search.

Answer Brief at 68. The state's argument regarding Victor "provid[ing] … information" amounts to this: The statements regarding the location of some of the items seized are themselves the unequivocal break between the Fourth Amendment violations and the same statements. The state's position concerning the consent amounts to the same thing: These circular arguments necessarily refute themselves. Moreover, the removal of restraints, access to food and, in particular, advice of *Miranda* rights are all inadequate to demonstrate an unequivocal break. *See Brown*, 422 U.S. at 603; *see also Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979).

Brown itself directly refutes the state's arguments. Police illegally arrested Brown and searched his apartment. 422 U.S. at 593. Police placed him in an interrogation room, alone and without handcuffs. The detectives read him his *Miranda* rights and he gave an inculpatory statement. *Id.* at 594. Thereafter he and the detectives left the station and Brown took them to look for his codefendant. *Id.* Once they found the codefendant, the detectives took both men back to the station, arriving four and one-half hours after the initial arrest. *Id.* at 595. They placed Brown in the interrogation room, gave him coffee, and left him there undisturbed for one hour and forty-five minutes. *Id.* At that point an assistant state attorney again advised Brown of his *Miranda* rights and resumed questioning, and

Brown gave a second inculpatory statement. *Id.* 595-96. The Supreme Court held that Brown's confession must be suppressed.

In *Taylor*, the confession came six hours after the illegal arrest. 457 U.S. at 691. The police read *Miranda* warnings no fewer than three times. *Id.* The police also permitted Taylor's girlfriend and another friend to visit Taylor before he confessed. *Id.*

Victor Caraballo's second statement must likewise be suppressed. The state can point to no intervening circumstances that would create an unequivocal break. Indeed, whereas police re-read Brown and Taylor the *Miranda* warnings before obtaining a second statement, the agents never read the warnings to Victor after the initial interrogation at the scene. In *Brown*, the Supreme Court ordered suppressed a confession given some six hours after the illegal arrest, reasoning that, "[T]he second statement was clearly the result and the fruit of the first."[9] 422 U.S. at 605. In *Dunaway*, decided on facts similar to *Brown*, the Supreme Court ordered suppressed a second confession made the *day after* the illegal arrest. 442 U.S. 203 n.2, 218 n.20.

[9] The Court explained: "The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for Claggett, with his anticipation of leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." 422 So. 2d at 605 (citation omitted).

The state relies on *New York v. Harris*, 495 U.S. 14 (1990) and *United States v. Crews*, 445 U.S. 463 (1980), to argue that Victor's statements are not tainted because "there is no relationship with the initial illegality." Neither case supports the state's contention. Crews sought to suppress witness-identification testimony that was the product of the victim's observations *before* the illegal arrest. *Harris* held that a court need not suppress a statement obtained after a warrantless arrest upon probable cause that is made at the home, in violation of the rule of *Payton v. New York*, 445 U.S. 573 (1980). The Court observed that the *Payton* violation is complete when the defendant is removed from the home, and the continued seizure of a defendant's person pursuant to probable cause was not illegal. *Harris*, 495 U.S. at 18. The *Harris* court did not overrule *Brown*. Instead, it distinguished *Brown* because Brown, like Victor and unlike Harris, was arrested without probable cause. The state suggests that there was no relationship between the Fourth Amendment violations in this case and Victor's statements because the agents were "interested in questioning" him because he was Hector's brother. Answer Brief at 69. The agents' interest in Victor and his apartment cannot be considered a substitute for the probable cause required by *Harris*.[10]

[10] The state also appears to suggest that the reading of *Miranda* warnings brought this case within the rule of *Harris*. As discussed above, advice of *Miranda* rights is insufficient to demonstrate an unequivocal break. *See Brown*, 422 U.S. at 603.

H The Search And Seizure Are Not Justified By The Consent Form Signed After-The-Fact.

"It is well-settled that consent obtained after illegal police activity is presumptively tainted and renders the consent involuntary." *McCauley v. State*, 842 So. 2d 897, 899 (Fla. 2d DCA 2003). In the face of this authority, the state argues that this presumption is overcome because the agents removed handcuffs, Victor signed a consent form, and directed the agents to items within the apartment. Answer Brief at 18, n.8. The appellant has rebutted this argument in the preceding section.[11]

[11] By way of a footnote, and without citation to either the record or controlling authority, the state argues that the evidence would have been discovered eventually because the officers already had Victor's statements, they had "obtained Mena's phone number," and "were hot on the trail of Hector." Answer Brief at 68, n. 8. A court need not suppress illegally obtained evidence, "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). However, " '[I]nevitable discovery involves no speculative elements....' " *Moody v. State*, 842 So. 2d 754, 759 (Fla. 2003) (quoting *Williams*, 467 U.S. at 444 n. 5). The state does no more than speculate that Mena's phone numbers or the agents being "hot on the trail of Hector" would have inevitably led to a lawful search of the apartment. SA Hidalgo testified that he obtained Mena's phone number when Victor gave him a slip of paper with the number on it. Victor's statements during the illegal search and arrest were, of course, the fruit of the illegality, and cannot be used to establish inevitable discovery. Moreover, the state cannot establish that Victor's two statements would have been inevitably discovered, as it can only guess what if anything Victor might have said had it not been for the illegal detention and search. *See Jackson v. State*, 1 So. 3d 273 (Fla. 1st DCA 2009) ("It would be too speculative to conclude that Appellant would have provided the same incriminating statements to the officers if he had been arrested after the search of the shed, and we have found no other cases allowing the

I The Arguments Against the Denial of the Motion to Suppress are Preserved.

The State argues that all issues other than "standing" are unpreserved because the trial court did not rule on them. Answer Brief at 64. The issue on appeal is this: The trial court erred in denying the motion to suppress on the basis of standing, and that ruling must be reversed. Each alternative basis on which the motion might be denied is without merit, and therefore the judge was not "right for the wrong reasons." *Brace v. Comfort*, 33 Fla. L. Weekly D2750 (Fla. 2d DCA Dec. 3, 2008); *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). Indeed, it is the state that must show that notwithstanding the trial court's error in denying the motion based on "standing," there exists a "theory or principle of law *in the record* which would support the ruling." *Robertson*, 829 So. 2d at 906 (quoting *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla.1999)) (emphasis in *Robertson*).

The state, moreover, does not point to any case holding that a party having presented his grounds for relief and having had his motion denied or objection overruled must demand that the court expressly address each and every subsidiary

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admission of a defendant's statements under similar circumstances."); *United States. v. Vasquez De Reyes*, 149 F.3d 192 (3rd Cir. 1998).

issue in order to appeal the trial court's order.[12] Courts need not rule on one ground where a second is dispositive. *See, e.g., Stewart v. State,* 801 So. 2d 59, 65 (Fla. 2001) ("[B]ecause the *Strickland*[13] standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."). Courts routinely remand for consideration on the merits where a trial court erroneously denied a motion on other grounds.[14]

The state further argues that the defense never argued arrest without probable cause, and the scope of the search. Answer Brief at 64. Contrary to the state's claim, the defense explicitly argued that there was no probable cause for Victor's arrest. In its memorandum of law, the defense wrote: "[The FDLE agents]

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[12] *Lipe v. City of Miami*, 141 So. 738 (Fla. 1962), cited by the state, involves an argument by the appellee that was never presented to the trial court.

[13] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[14] *See, e.g., Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004) (jurisdiction relinquished for ruling on the merits of motion to suppress where trial court erroneously denied motion based collateral estoppel); *Adams v. State*, 900 So. 2d 598 (Fla. 2d DCA 2004) (reversing with directions to consider habeas petition on the merits where lower court denied petition on grounds that petitioner was not incarcerated); *Cartier-McDonald Const., Inc. v. Waterview Development, Inc.*, 833 So. 2d 822 (Fla. 4th DCA 2002) ("Cartier admitted in the briefs that the motion was not untimely but argued that pre-judgment interest should be denied on the merits. Because the trial court denied the motion as untimely and did not rule on the merits of the motion, we are unable to entertain arguments on the merits. Therefore, we reverse only the order on pre-judgment interest and remand for the trial court to consider the merits of the pre-judgment interest motion.")

had no reasonable suspicious [sic] to hold Victor in custody." (R. 1525). During oral argument on the motion, counsel expressly argued that the police had arrested Victor for trespass, a crime he did not commit. (Vol 50: 209). Later, counsel argued, "If there is no probable cause that he is a trespasser. Then the search is illegal." (Vol. 50: 238). The defense also questioned the scope of the search. (Vol. 50: 237-38).

J The Error In Denying The Motion Was Harmful.

The state bears the burden of proving that the trial court's error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla.1986). The appellee simply states: "Defendant would still have been convicted based on these confessions and the other evidence properly admitted." Answer Brief at 70. This misstates the appellee's burden. The Court has explained:

> ... The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. *The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, 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*.

Rigterink v. State, 2 So. 3d 221, (Fla. 2009) (quoting *DiGuilio*, 491 So. 2d at

1135-39) (emphasis supplied in *Rigterink*). The question is not whether Victor Caraballo "would still have been convicted without the error." Answer Brief at 70. The question is whether the error *contributed* to the verdict. Error contributes to the verdict where the improper evidence may have been relied on, even though the jury may have reached the same result without the error. *DiGuilio*, 491 So. 2d at 1136, (citing *People v. Ross*, 429 P.2d 606 (1967) (Traynor, C.J. dissenting), *rev'd sub nom*, *Ross v. California*, 391 U.S. 470 (1968).

Tasked with the proper test, the state cannot meet its burden of proof beyond a reasonable doubt. The prosecution spent three pages of a nineteen-page opening statement discussing the search and confessions, without mentioning the subsequent television interview and letter. (T. 705-24). In the transcript of the closing argument, the state attorney adverted to the search and Orlando statements on one-fifth of the pages. (T. 1531, 1532, 1534-36, 1543-47, 1552, 1556). The prosecutor used this evidence to argue that Victor had a major role in the crimes, and to present his statements as a series of calculated, opportunistic lies. (T. 1525, 1545-47). Even if the Court were persuaded that the evidence was overwhelming, even if it was convinced that the jury would have reached the same result, it cannot find the error harmless. The improperly-admitted evidence contributed to the conviction and eventual sentence. Having urged the jurors to rely on that evidence in reaching its verdict, the state cannot now prove beyond a reasonable doubt that

they did not.

II. THE AGENTS OBTAINED THE RECORDED INTERROGATION BY STATEMENTS NEGATING THE *MIRANDA* WARNINGS.

A Misleading Statements Negated the *Miranda* Warnings, Rendering Any Waiver Invalid.

When SA Hidalgo and Det. Morales interrogated Victor at FDLE headquarters, they did not reread the *Miranda* warnings.[15] Instead, they *"un-Mirandized"* him. Six hours after warning him that, "Anything you say may be used against you in a court of law, or in any other proceeding," they told him that "N-nothing is going to happen," if he told the truth, and that what he said would *help* him in court. (R. 747, 791). These statements negated the original *Miranda* advice. *Hart v. Attorney General*, 323 F.3d 884 (11th Cir. 2003).

The state maintains that once a suspect has received the *Miranda* warnings and made agreed to talk, the validity of the waiver is a closed subject. Answer Brief at 71. In the appellee's world, once police obtained a waiver, they would be

[15] The state relies on *Johnson v. State*, 660 So. 2d 637 (Fla. 1995), for the proposition that a suspect, once *"Mirandized,"* need never be warned again. The police gave Johnson full *Miranda* warnings, but did not give a complete second warning before administering a polygraph as part of the "overall interrogation." *Id.* at 642. The Court held: "There is no requirement of additional warnings *during the same period of interrogation* where it is clear detainees are aware of their rights …" 660 So. 2d 642 (emphasis supplied). Whether or not police have a duty to remind a suspect of his rights at some point of attenuation, they may not undo the advice already given.

free to contradict any of the warnings. A waiver in hand, the police are free to tell jurors that statements will be used to help them in court, not against them. Presumably, officers would be free to contradict the other *Miranda* rights, as well. Courts have, however, rejected this theory. For example, in *Jackson v. State*, 832 So. 2d 932 (Fla. 3d DCA 2002), the district court held that an officer's statement that he was just asking questions for a use-of-force report vitiated the preceding *Miranda* warnings. As discussed in the initial brief, the courts in *Hart*, and *United States v. Earle*, 473 F.Supp. 2d 131 (D. Mass. 2005) likewise rejected this safe-harbor construction of *Miranda*.

The state relies on language in *United States v. Bezanson-Perkins*, 390 F.3d 34 (1st Cir. 2004) to support its position. There the court ultimately concluded that taken in context the officers' statements conveyed that a truthful statement would help Bezanson-Perkins obtain a reduced sentence, and that this proved to be true. *Id.* at 43. Here Hidalgo and Morales' claim that their testimony would help Victor proved grievously false.

B The Tainted Interrogation Rendered The Statement Involuntary.

The state maintains that Hidalgo's and Morales' statements amounted to no more than permissible suggestions that it would go easier for Victor if he told the truth, or that his cooperation would be made known to the prosecution. Answer

Brief at 71. It declines to discuss any of the particular remarks at issue. Hidalgo's and Morales' statements cannot be shoe-horned into these categories. For example, the statement that nothing would happen to Victor if he told the truth went well beyond suggesting that it would be easier on him if he told the truth. (R. 747). Hidalgo and Morales did not stop at suggesting that Victor's cooperation might be made known in a favorable light. They promised that it would result in testimony in his favor. (R. 763, 791).

Detective Morales also stated that the decision to charge Victor would depend upon the production of testimony deemed to be truthful. The detective promised: "[T]ell me the truth … N-nothing is going to happen to you." (R. 747-48). He also threatened: *"I'm going to charge you if you don't tell me the truth."* (R. 785) (emphasis supplied). "[C]onfessions induced by promises not to prosecute or promises of leniency may render a confession involuntary." *Blake v. State*, 972 So. 2d 839 (Fla. 2007). Florida courts have repeatedly suppressed confessions derived from statements that truthful testimony will result in reduced charges. In *Chambers v. State*, 965 So. 2d 376 (Fla. 4th DCA 2007), the district court found that a confession had been coerced where police told defendant he could be charged with murder if he refused to tell the truth. In *Edwards v. State*, 793 So. 2d 1044, 1047 (Fla. 4th DCA 2001), a fire marshall threatened to "hit" Edwards with "every charge he could hit him with," if he did not tell the truth. In

finding the confession coerced, the district court observed: "Certainly, a threat to charge a suspect with more, and more serious, crimes unless he or she confesses is coercive."

Agent Hidalgo and Detective Morales promised Victor that a confession would not hurt him, and that it would help him when they testified in court. At the same time they threatened to charge him if he didn't tell the truth. These statements, unlike vague assertions that cooperation will make things easier or will be reported to prosecutors, amounted to threats and promises rendering Victor's statement inadmissible.

C The Objection to the Introduction of Victor's Statement Is Preserved And The Error Is Harmful

"[M]agic words are not needed to make a proper objection." *Williams v. State*, 414 So. 2d 509, 512 (Fla. 1982). An issue is sufficiently preserved where the objection is specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Id.* at 511. Here, the motions and objections were sufficient to place the court on notice of his position that the statement was inadmissible. Counsel filed a motion to suppress Victor Caraballo's statements. (R. 330). A list of motions filed in anticipation of the court's hearing included both a "motion to suppress evidence" and a "motion to suppress statements." (R. 451). At the hearing on the motion to suppress, the

prosecution introduced extensive evidence concerning the confession and how it was extracted. In his argument on the motion, counsel pointed to the failure to re-read the *Miranda* warnings. (R. 240). During the trial, counsel objected to the introduction of the *Miranda* waiver and statement on the basis of his "previously made" objection. (T. 1179, 1214, 1218). Before closing arguments, defense counsel stated: "I just want to renew all pre-trial motions including the motion to suppress statements and evidence and previous objections made during the course of the evidence presentation." (T. 1491-92). Everyone in the courtroom understood that the defense objected to the statement. This was sufficient to apprise the trial judge of the error, and the record allows "intelligent review on appeal."

The state has not proven the error harmless beyond a reasonable doubt. As already discussed in detail,[16] the prosecution relied on the statement and urged the jurors to consider it. The trial cannot conclude beyond a reasonable doubt that the error did not contribute to the verdict.

[16] *See* Argument I-J, *supra*.

III. THE CONVICTION AND SENTENCE WERE THE PRODUCT OF PERVASIVE IMPROPER PROSECUTORIAL ARGUMENT.

A The Prosecution Improperly Denigrated Counsel And The Conduct Of Victor Caraballo's Defense.

The state fails to respond to many of the arguments in the initial brief concerning the prosecution's attacks on counsel and the conduct of the defense. It does not, for instance, attempt to explain or justify the prosecutor's comparison of the defense to a "Nigerian email" scam. The Answer Brief likewise does not discuss the prosecutor's assurance to jurors that while lawyers change white to black, *he* was not there to mislead them. Also ignored is Mr. Laeser's warning to "keep your eye on the ball," because "defense counsel has to distract you."[17] (T. 1538). The prosecutor admitted it was his intention to argue that defense counsel was out to confuse the jury. At sidebar he explained that he believed that, "in order to proceed [defense counsel] have got to distract the jury and make them look somewhere other than at the clear evidence," and that he was entitled to point this tactic out to the jury. (T. 1539). As the Initial Brief demonstrates, our courts have long held such arguments improper and prejudicial. *See, e.g., State v. Benton*, 662 So. 2d 1364 (Fla. 3d DCA 1995); *D'Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th

[17] It is possible that the state intends a response to these points when it states: "Arguing that it is the jury's duty to formulate justice, that the jury should fight for an innocent person, use its common sense, and not be misled, was appropriate commentary in response to Defendant's theory and cross examination conducted."

DCA 1999); *Hightower v. State*, 592 So. 2d 689 (Fla. 3d DCA 1991); *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978).

The state does attempt to argue that the prosecutor's later remark criticizing the defense for its cross-examination of Dr. Garcia was legitimate. During that examination, defense counsel established that Garcia, unlike the other experts, had not reviewed Victor's psychiatric history, a tactic clearly aimed at showing that the defense experts were in a better position to evaluate Victor's psychosis. (T. 2014-18). The state maintains that the prosecutor's comment, "why the distraction?" "was merely pointing out that these questions did not prove anything because of the limited nature of the evaluation and testimony." Answer Brief at 75. The prosecutor was free to argue that Dr. Garcia's lack of information on some subjects did not devalue his opinion. The state points to no case showing that the prosecutor could also denigrate the legitimate exercise of the right to cross-examination as part of a campaign of distraction.

The state ignores the bulk of the prosecution's attacks on defense counsel's cross-examination. It does seek to justify a portion of the prosecutor's assaults on defense counsel's cross-examination of SA Koteen. The state presumably refers to the following remarks:

> What else comes out in cross-examination? Susan Koteen is a bad person because she only had one Spanish interpreter available.

> How does that have anything to do with whether or not this guy had committed a crime? You mean, if he had confessed an hour and 45 minutes earlier that would have been different?

(T. 1537). The state suggests that a portion of this argument was fair response to a defense argument that this delay had coerced the confession, referring the court to pages 1506 through 1507. Answer Brief at 74. Defense counsel makes no such argument on those pages. Instead, he argues that the agents violated the Fourth Amendment in their searches, ultimately pointing to a conflict between the testimony of agents King and Koteen and that of Hidalgo concerning whether the property was discovered before or after Hidalgo arrived.[18] (T. 1506-08).

It is worth noting that this was not the explanation given by the prosecutor when he explained the purpose of these remarks to the court. It was following the quoted argument, that the prosecutor stated: "defense counsel has got to distract you," and explained to the court his intention to tell jurors that the defense's only tactic was "to distract the jury and make them look somewhere other than at the clear evidence." (T. 1539).

The Answer Brief simply ignores the prosecutor's deceitful argument that defense counsel put on false testimony concerning Victor's IQ testing. Mr. Laeser

[18] Even assuming the defense had made the argument imagined by the state, the Answer Brief does not explain why fair response to this argument would be an attack on defense counsel's cross-examination rather than a rebuttal of the argument.

accused the defense and Dr. Alvarez of trying to hide the invalidity of the 56 IQ score. After telling the jury that the 56 IQ was the only evidence of retardation, he stated:

> You know what's terrible about that? That came out in direct examination as though it was the truth, as though he was presenting -- you know, his IQ is 56 and all the sudden at cross-examination he's saying well, that score is not valid. I -- I'm vouching for the 56 as being accurate.

(T. 2116-17). As detailed in the initial brief, defense counsel pointed out the invalidity of the test in his opening, and Dr. Alvarez testified to it on direct. (T. 1698, 1749-50). The prosecutor's argument, founded on a falsehood, directly accused the defense of willfully eliciting false testimony.

To this the state has no reply. It does seek to defend the prosecutor's arguments concerning the amount of money the defense paid its experts. The impropriety of those remarks can only be understood in the context of the prosecutor's allegations regarding the IQ testimony. In light of that attack, the comment, "Is it just a coincidence that months before he is facing a jury on a capital murder trial somebody decided that he was retarded? Do you think that random – happened at random, by accident?" and the (false) accusation that Dr. Hughes, "spent 87 hours with defense counsel preparing the case," after they were "putting dollars in his pocket," take on a more sinister cast. (T. 2132-33).

B The Prosecutor Used Improper Arguments To Bolster His Witnesses.

The prosecutor argued that, in contrast to the defense experts, Drs. Garcia and Del Rio had no interest in the case because they were the court's witnesses. (T. 2132). In a footnote, the state responds to this argument by saying that the state did not argue that "its witnesses are credible because they are State's witnesses." Answer Brief, 76-77 n.12. The appellant agrees that they did not. Instead, the prosecution argued that its witnesses worked for the court, and had no reason to be biased. It is improper to assert that a witness is more credible because he or she has no interest in the outcome. *Servis v. State*, 855 So. 2d 1190, 1194-95 (Fla. 3d DCA 2003). The suggestion that state witnesses are more credible because they were selected by the judge is, if anything, worse than the argument that witnesses are more credible by virtue of being witnesses for the state.

C The Prosecutor's Arguments Misstated The Law.

The prosecutor told jurors their duty was to acquit the innocent. (T. 1528-29). According to the state, this was merely an observation that "justice is done both when the innocent were acquitted and when those who have been proven guilty were convicted." Answer Brief at 77. In fact, the prosecutor told the jurors that it was their "duty" and "obligation" to acquit a "truly innocent" person.

The state also contends that the prosecutor did not misstate the law by telling jurors they had to return a death recommendation if the aggravators outweighed the mitigators. Answer Brief at 81. This argument proceeds from a misunderstanding of both the law and the record. The state asserts that in *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001), the Court held that "only those comments that informed the jury that it must, or was required by law to, return a recommendation of death if the aggravators outweigh the mitigators were improper." Answer Brief at 81. In *Franqui*, while the Court did not hold that these precise phrases alone constituted error. 804 So. 2d 1192-93. Based on its reading of *Franqui*, the state places great emphasis on the prosecutor's use of the term "should," contending that it is not a term forbidden by *Franqui*, and is precatory in nature. Answer Brief at 81. Whatever the merits of the state's argument may be, "should" is not the word the prosecutor used in his opening statement. (T. 1681-82). In the context of explaining the "rules" governing their recommendation, the prosecutor told them that in a case where the jurors found one aggravator and no mitigation: "then if you balance those two, the aggravating factor would outweigh the zero and that *would* be the nature of your recommendation. You *would* recommend, 'I find the aggravating circumstances outweigh the mitigating circumstances.'" The prosecutor told the jurors what they would do if they followed the law. There is no difference between this and telling the jury that a death recommendation was what

the law required. Moreover, in *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988), the Court condemned the argument that: "The law is such that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty."

Perhaps as a result of its reading of *Franqui*, the state chooses to ignore the prosecutor's comments in closing argument:

> You even took a second oath when we began this portion of the trial and you said, "I will follow the law and the evidence in making my decision. I will follow the rules of this Court. I will look at those aggravating circumstances, and if any one of them is so powerful that it outweighs everything presented by the defense, that's how I should vote.
>
> And if two of them together are so powerful that they outweigh everything presented by the defense, or even if all six together are so powerful they weigh – outweigh everything by the defense, that's how I'm going to vote *because that's what the law requires*.

(T. 2138) (emphasis supplied). Even under the state's own test, the prosecutor's argument was unquestionably improper. *See* Answer Brief at 81.

The prosecution further misled jurors concerning the standard for mitigation and denigrated the mitigating evidence presented by the defense. The state responds that: "As the State never argued that Defendant's childhood or evidence regarding his mental state could not be considered in mitigation, Defendant's claim is without merit." The state misapprehends the appellant's argument. The prosecutor told jurors to reject mitigating evidence because it did not "excuse" the

crime, that there must be a cause-and-effect relationship between the mitigation and the crime, and that to accept the defendant's mitigation would be to give him a "free pass." (T. 2109). In so doing, it instructed jurors to consider evidence mitigating only if it caused or excused the crime. Rather than tell the jurors that particular circumstances could not be mitigating, the prosecutor imposed a standard so high that mitigation could not be found by the jury.

D The Prosecution Commented On Victor Caraballo's Exercise Of The Right To Remain Silent.

The state maintains that it was free to comment on Victor's post-arrest silence because, in context, the prosecutor was trying to show that silence was inconsistent with his defense. This is precisely what the Florida Constitution prohibits. Post-arrest, pre-*Miranda* silence is inadmissible in Florida, even where it is arguably inconsistent with a defendant's theory of defense. *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998). The state points to cases analyzing ambiguous remarks to see if they were fairly susceptible of being interpreted as a comment on the defendant's failure to take the stand at trial. Answer Brief at 79, *citing State v. Jones*, 867 So. 2d 398 (Fla. 2004), *Pace v. State*, 854 So. 2d 167 (Fla. 2003). In *Jones*, the Court decided that the prosecutor's exhortation to "tell the defendant what he knows sitting there today, that he is guilty of indecent assault," did not meet the fairly susceptible test. In *Pace*, the Court concluded the remarks in

question pertained to Pace's pre-arrest statement and behavior, and not a comment on his failure to testify. Here, the prosecution directly argued that Victor's silence at the apartment negated his argument that the others, and not he, were responsible for the crimes. This was improper and violated Victor Caraballo's rights under the Florida Constitution. Art. I, § 9, Fla. Const.

The state also argues that the prosecutor's comment on Victor's failure to testify to the coercive nature of his interrogation was an invited response. Answer Brief at 80. This position is also meritless. The state points to *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000) and *Caballero v. State*, 851 So. 2d 655 (Fla. 2003), in support of its position. In *Rodriguez*, the Court found that the prosecutor's arguments, including the argument that, "we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," were improper. 753 So. 2d 39. In *Caballero*, the Court found the argument that the defendant's own statements were uncontradicted to be an invited response to Caballero's argument that he did not want to kill the victim. 851 So. 2d 660. Here, the prosecutor directly pointed to Victor's failure to testify in support of the claim that the agents forged his signature on the consent to search and *Miranda* waiver. The prosecutor's improper comments could not be an invited response to defense arguments because the defense never in fact argued that the agents forged those documents.

E The Prosecution Argued Mitigating Circumstances as Aggravation.

"[T]he State may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty-like, as in this case, the defendant's mental impairment." *Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997). Here the prosecutor deliberately elicited testimony that Victor was "damaged beyond repair." Mr. Laeser originated the phrase himself, and repeated the question to make sure he could attribute it to Dr. Hughes in closing argument. (T. 1985-86). Having thus set the hook, he told the jury:

> [T]here is one thing that obviously Dr. Hughes told us that does make sense. He is damaged, damaged beyond hope of repair. It's a terrible thing to say.
>
> Now the question is, what's the right punishment for somebody who is damaged beyond hope of repair. For somebody who, as Dr. Hughes himself said, *if he didn't kill on this night he was in the same emotional and mental state six months before, six months after. What's going to happen?* What's the right punishment for that person?

(T. 2128-29). The prosecutor made a direct argument that Victor's mental state meant that he could have killed before the murder of Ana Angel, and he could still kill after. This is a direct equation of Victor's (mitigating) mental illness with (non-statutory aggravating) future dangerousness.

The appellee argues that this was permissible comment on Victor's veracity[19] and "capacity to commit crimes." The state points to no case that a defendant's "capacity to commit crimes" is a proper inquiry in the capital sentencing process. The phrase itself sounds like a euphemism for future dangerousness. The state also points out: "This argument was completely unlike the situation where the prosecutor repeatedly calls for the death penalty in order to prevent the defendant from killing again," citing *Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983). Answer Brief at 83. A prosecutor need not *repeatedly* raise the specter of future dangerousness before the argument becomes improper. In *Walker*, the Court reversed on the basis of a single, unanswered question posed to the defense expert. 707 So. 2d 314.

With regard to the prosecution's condemnation of the defense decision to call Victor's family as witnesses, the state maintains that this was a permissible comment on the weight to be given mitigation. Answer Brief 82-83. Some of the prosecutor's arguments may be relevant to the weight of the mitigators. The remarks raised on appeal are not. The prosecutor complained: "One of their children commits a terrible crime and then they have to come in, and what do they do? They bear [sic] their souls … Why? Because this defendant committed

[19] The state does not attempt to explain how this line of argument was relevant to Victor's veracity.

murder and his parents have to publicly shame themselves in order to ask 12 people to do something on their own son's behalf." This argument did not address the weight to be given to Victor Caraballo's mitigation. It criticized Victor for hurting his family and added the presentation of mitigating evidence to the list of crimes for which he must be punished.

F The Prosecution Invited The Jury To Show Victor Caraballo The Same Mercy He Had Shown to Ana Angel.

The state observes that the argument that Ana Angel's killers "snuffed out" her potential life is not itself a "show the same mercy argument." Answer Brief at 83. This is aside from the point. The prosecution compared the weighing process the jurors were required to undertake with the co-defendants' failure to give any thought to what considerations might merit her death and what might militate against it. This contrast invited the jurors to give Victor the same consideration Ms. Angel received, and to show him the same mercy. In addition, the prosecutor's argument concerning all the things Ms. Angel would no longer be able to do was an improper appeal to sympathy and "urged consideration of factors outside the scope of the jury's deliberations." *Jackson v. State*, 522 So. 2d 802 (Fla. 1988).

G The Prosecution Made A "Golden Rule" Argument, Inviting Jurors To Imagine Themselves In Ana Angel's Place.

Mr. Laeser required jurors to sit in silence for a minute thinking what 15 of those minutes must have been like for Ms. Angel. This could only be an appeal for jurors to imagine themselves in her place. The state disputes this argument because the court has "rejected similar claims that references to the victim's manner of suffering was improper golden rule argument." Answer Brief at 84. Mr. Laeser's argument went far further than merely referring to Ms. Angel's manner of suffering. It called upon the jurors to "place themselves in the victim's position, [or] imagine the victim's pain and terror …," a classic violation of the Golden Rule. *Pagan v. State*, 830 So. 2d 792, 812 (Fla. 2002) (*quoting Williams* v. State, 689 So. 2d 393, 399 (Fla. 3d DCA 1997)).

The state does not respond to the appellant's discussion of *Davis v. State*, 928 So. 2d 1089, 1121 (Fla. 2005). That decision bears further scrutiny here. The Court decided *Davis* on the *Strickland*[20] standard for ineffective assistance of counsel. There, the prosecutor argued:

> … Mr. Landis would have been conscious for approximately five minutes prior to his death. Folks, I ask you to do something. If any of you have a second hand on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate Orville Landis and the

[20] *Strickland v. Washington*, 466 U.S. 668 (1984)

> time he spent, not two minutes, but closer to five minutes with his throat cut, bleeding profusely, then with that man continuing the attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones, with enough force in his back to have nine of the eleven stab wounds, again, through his breaking bones. And that two to five minutes to Orville Landis, I suggest to you, was like an eternity of pain, suffering and hell. That is cruel punishment, that is cruel treatment to the victim. That's what this [HAC] aggravating factor is all about. I suggest to you that we have met that burden.

Id. at 1122. The Court concluded:

> Although a close question, we conclude that failing to object to the comments complained of clearly did not so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined. No prejudice has been established and, therefore, this claim cannot be sustained.

Mr. Laeser, unlike the prosecutor in *Davis*, actually required the jury to sit in silence and imagine themselves in Ms. Angel's position. If Davis's ability to established prejudice under the *Strickland* standard was a close case, the harm from the prosecutor's argument against Victor is beyond question.

H The Prosecution Argued Victim Impact Evidence As A Reason To Reject Mitigating Evidence.

The prosecution used victim-impact evidence to negate Victor Caraballo's case in mitigation. The state says it merely argued that Victor's mitigating evidence should not be given weight. Answer Brief at 85. This may be so. The point, however, is that it used the victim-impact evidence to make this argument.

That use of victim-impact evidence is squarely forbidden by section 921.141 and this Court's decisions. § 921.141(7), Fla. Stat. (2006).

"Under the limited scope of the victim impact statute in Florida, victim impact evidence is not to be used by the jury to compare, contrast or weigh the relative worth of the life of the victim against that of the defendant in deciding whether to recommend the death penalty." *Wheeler v. State*, 34 Fla. Weekly S80 (Fla. Jan. 29, 2009). In *Wheeler*, the prosecutor announced that he "intended to use the victim impact as a contrast to the defendant's mitigation of his life and his character." The Court disapproved the following argument:

> But within all this realm of choicelessness, we do choose how we will live. Either courageously or cowardly, or honorably or dishonorably, with purpose or a drift, we decide what's important and trivial in life. We decide what makes us significant is either what we do or what we refuse to do.
>
> But no matter how indifferent the entire universe may be to these choices, these choices and decisions are ours to make. We decide. We choose. And as we decide and as we choose, our destinies are formed.
>
> That's what I want you to look at as we walk through this case and these facts and these aggravating and mitigating circumstances.

Id. Mr. Laeser's comments were significantly worse. He dismissed Victor's life of abuse and neglect as mitigation, and told the jury: "We can understand why people like that might be in dire straits and may be motivated to commit awful acts, but the final choice is up to the person and we are not talking about a child." (T.

2110). He then went on to make a direct comparison between Victor Caraballo and Ana Angel:

> … Lots of lives are hard. Was Ana's life hard? She's a child in Colombia. She's about seven or eight or nine and her stepfather sexually assaults her, and as a result of that, the family is split up and her mother flees in order to keep her family safe. Her one person family, her child, her only child. They come to the United States with a single mother trying to raise a child in the best way she can.
>
> They are certainly not rich. Their life has to be hard. She is learning a new language. She is adjusting to a whole new culture. She doesn't make those choices to go the wrong way.
>
> Those choices are in front of her just like they are in front of every single person. She makes the choice to go the right way.

(T. 2111-12).[21] In light of *Wheeler*, it could not be more clear that the prosecutor's argument violated section 921.141(7) and Victor Caraballo's right to due process under the State and Federal constitutions. U.S. Const. amend. 14, Art. I, § 9, Fla. Const.; *Payne v. Tennessee*, 501 U.S. 88 (1991).[22]

[21] While these quotes appear in the Initial Brief, it is worthwhile to compare them side-by-side with those condemned in *Wheeler*, which the Court decided subsequent to the filing of that brief.

[22] The state cites *Bertolloti v. State*, 476 So. 2d 130 (Fla. 1985) as authority supporting its claim that the prosecutor's argument was "appropriate comment on mitigation evidence." *Bertolloti* condemns the improper arguments made by the prosecutor in this case. It is unclear what comfort the state draws from that decision.

I The Prosecution Improperly Invoked Religion.

The state cites *Lawrence v. State*, 691 So. 2d 1068 (Fla. 1997) as authority for its position that the prosecution's references to religion were appropriate. In *Lawrence*, the Court found that the references to religion did not rise to the level of fundamental error, or that they were harmless under the facts of the case. The Court did not suggest such comments might be appropriate, and cautioned prosecutors against references to religion. *Id.* at 1074. Whether or not the improper reliance on religion in this case would, on its own, amount to fundamental error, the Court must consider its contribution to the cumulative effect of the erroneous arguments in this case. *See* Argument III-J, *infra*.

J The Harm Of The Preserved Errors Must Be Considered In Light Of The Remaining Improper Arguments.

The State argues that the court must reject each of the improper arguments that the defense did not object to in the trial court, and that the preserved errors do not merit a new trial. The state ignores this Court's opinion in *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999), cited in the Initial Brief. In *Ruiz*, the Court concluded it could consider "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" 743 So. 2d at 7; *see also Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001); *Rivero v. State*, 752 So. 2d 1244 (Fla. 3d DCA 2000). The Initial Brief sufficiently describes the combined effect of the preserved and

unpreserved errors.[23] The prosecutor's pervasive misconduct robbed Victor Caraballo of a fair trial and reliable sentencing phase. The Court must reverse for a new trial.

IV. THE PROSECUTION PRESENTED VICTIM IMPACT TESTIMONY BLAMING VICTORY CARABALLO FOR THE UNCHARGED DEATHS OF MS. ANGEL'S RELATIVES.

The Initial Brief argues that the prosecution presented victim-impact evidence that exceeded what the constitutions will permit. The appellant argued that the death of relatives, supposedly as a result of the victim's death, exceeds the scope of the foreseeable consequences useful in accessing Victor's moral culpability. The state responds by pointing to cases approving arguments that a victim's death had devastated his family. Answer Brief at 88. The foreseeable consequences of a human's death certainly include devastation to family members. They do not include an unproven and causal relationship between a murder and a relative's death which the defendant has no opportunity to rebut.

[23] Alternatively, the appellant has established fundamental error because the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." *Caraballo v. State*, 762 So. 2d 542, 547 (Fla. 5th DCA 2000) (*quoting Silva v. Nightingale*, 619 So. 2d 4, 5 (Fla. 5th DCA 1993)).

V. THE TRIAL COURT ERRED IN PERMITTING A DOCTOR APPOINTED TO EVALUATE VICTOR CARABALLO FOR COMPETENCE TO TESTIFY IN THE PENALTY PHASE IN VIOLATION FLORIDA RULE OF CRIMINAL PROCEDURE 3.211

Florida Rule of Criminal Procedure 3.211 limits the use of competency examinations. *Phillips v. State*, 894 So. 2d 28 (Fla. 2004) permitted trial testimony by a doctor appointed to evaluate competency based on the facts that the (1) doctor had been reappointed to evaluate Phillips regarding mental mitigation, and (2) the doctor "did not state that he had interviewed Phillips for the determination of competency." 894 So. 2d at 41. Neither of these factors is present in this case. The state argues that Dr. Garcia's testimony satisfied the first factor because he testified to aspects of the competency evaluation that tended to rebut the mental mitigation. (Answer Brief at 89). Here, however, the court did not reappoint Dr. Garcia to reevaluate Phillips regarding mental mitigation as required by the first factor in *Phillips*.

The second factor is likewise unfulfilled. The state does not dispute that Dr. Garcia testified he evaluated Victor for competency. It argues that the defense opened the door to this testimony by cross-examining the doctor to demonstrate that he, unlike the defense experts, did not examine Victor's records in formulating his opinion. The state's argument demonstrates that the Rule 3.211 violation left the defense in an untenable position. Under the state's argument, the prosecution

would be able to use the competency evaluation in its case while insulating the witness from any meaningful cross-examination.

VI. FLORIDA LAW AS INTERPRETED BY THIS COURT PREVENTS SOME MENTALLY RETARDED PERSONS FROM ESTABLISHING THEIR CONDITION.

The state maintains that section 921.147, as interpreted by this Court, does not prevent defendants in Victor Caraballo's position from establishing mental retardation – so long as they can present a "credible" WAIS-III or Stanford-Binet test showing a full-scale IQ of 70 or below. Answer Brief, 89-92. This ignores the point. There is a class of people who, though retarded and ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), cannot ever establish their retardation under Florida law. Victor's 56 IQ score was invalid because he was actively psychotic. The state, moreover, presented evidence that no valid test could ever establish retardation for Victor Caraballo *because there is no valid IQ test for Puerto Ricans.* Because the only way this Court will permit a defendant to establish retardation is a valid score of 70 below, the Court bars Victor and other defendants from proving their condition by other "credible" means, such as an expert's clinical impression. The Court's rigid reading of section 921.147 ensures that some mentally retarded defendant's will face execution, in violation of *Atkins* and our Constitutions. U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

CROSS-APPEAL

VII. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN FINDING THAT THE STATE HAD FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

A The Court's Order Is Not Appealable.

The state is permitted to appeal a "ruling on a question of law if a convicted defendant appeals the judgment of conviction." Fla. R. App. P. 9.140(c)(k); § 924.07(1)(d), Fla. Stat. (2007), *see Pardo v. State*, 563 So. 2d 77 (Fla. 1990) (trial court erred in rejecting aggravator based on misstatement of the law). The state argues that "it appears that the trial court rejected CCP because it believed that CCP only applied to the person who actually did the shooting and only when there were no other crimes being committed." Answer at 95. The record does not support this argument.

The state's contention that the judge "apparent[ly]" misunderstood the law is highly speculative. The judge correctly stated the law governing this aggravating circumstance, relying on this Court's decisions and section 921.141(5)(i). (R. 2749-50). The suggestion that the trial judge believed CCP applies "only when there are no other crimes being committed" is refuted by the sentencing order itself. The order states: "Evidence that a Defendant coldly, with calculation and premeditation planned a robbery may be sufficient to support a conviction under a

felony murder theory but does not **necessarily** establish beyond a reasonable doubt that the resulting murder was sufficiently premeditated for the CCP aggravator to apply." (R. 2750) (emphasis supplied). This is a correct statement of the law as determined by this Court. *See, e.g. Pomeranz v. State*, 703 So. 2d 465, 471 (Fla. 1997). To qualify as CCP, the killing itself must be the product of calculation.

Likewise, the order does not establish that the judge thought the fact that CCP was barred where the defendant is not the shooter. The judge determined there was "insufficient evidence, concerning the heightened level of premeditation required …"[24] (R. 2750). The observation that Victor Caraballo did not himself commit the murder is surely not irrelevant to the degree of calculation or premeditation he exhibited, particularly in light of the trial court's finding of statutory mental mitigation.

VIII. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN FINDING THAT THE STATE HAD FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

A The Court's Order Is Not Appealable.

[24] In the decisions relied upon by the state, the defendants carefully planned the murders in advance, although a codefendant committed the act directly responsible for the victim's death. *See Lugo v. State*, 845 So. 2d 74, 114-15 (Fla. 2003); *San Martin v. State*, 705 So. 2d 1337, 1349 (1997).

Even assuming that the trial court's rejection of CCP is appealable, the state has failed to establish error. "In order to establish CCP, the State must establish that the killing was the product of cool and calm reflection and was not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification." *Connor v. State*, 803 So. 2d 598, 610 (Fla. 2001). Where a trial court finds that the state has failed to prove an aggravating factor beyond a reasonable doubt, this Court reviews for abuse of discretion. *See Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998). The trial judge did not abuse his discretion when he did not find CCP beyond a reasonable doubt.

The sentencing order demonstrates that Victor Caraballo could not have acted with cold calculation and heightened premeditation. The court found that he acted under the influence of extreme mental or emotional distress, relying on his extensive history of mental illness, including involuntary hospitalization just days before the killing. (R. 2751-52). This court analyzes the statutory mental health mitigators and CCP together, with one tending to negate the other. *See Conde v. State*, 860 So. 2d 930, 956 (2003) (finding of CCP supported rejection of extreme

emotional disturbance mitigator);[25] *Almeida v. State*, 748 So. 2d 922, 932-33 (Fla. 1999).[26]

Spencer v. State, 645 So. 2d 377 (Fla. 1994), illustrates this point. This Court found extensive evidence of premeditation. Prior to the killing, Spencer told a friend that Spencer should take the victim out on his boat and throw the victim overboard. 645 So. 2d at 379. He later told the friend that the victim had been unwilling to go on the boat with him. *Id.* On the date of the murder, Spencer parked his car at a distance from the victim's home and approached the house wearing surgical gloves. 645 So. 2d at 381. Nevertheless, the Court found the trial court erred in finding CCP: "Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator." 645 So. 2d at 385. This Court found reversible error in applying the CCP aggravator to Spencer. On the record now before it, the Court cannot say that the trial judge erred in concluding that the state failed to carry its burden of proof beyond a reasonable doubt.

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[25] "Where competent, substantial evidence exists to support a finding that the crime was committed upon 'calm and cool reflection,' the same evidence will often support a trial court's rejection of the statutory mitigating circumstance of extreme emotional disturbance." *Conde v. State*, 860 So. 2d 930, 956 (2003).

[26] This is not to say that extreme emotional disturbance *always* negates CCP. *See Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000).

IX. THE COURT DID NOT ERR IN FINDING THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

"[I]t is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it." *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983). "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." *Perry v. State*, 522 So. 2d 817 (Fla. 1988) (quoting *Stano v. State*, 460 So. 2d 890, 894 (Fla. 1984). The Court reviews a trial court's finding of a mitigating circumstance for an abuse of discretion. *Scull v. State*, 533 So. 2d 1137, 1143 (Fla. 1988). The finding of no significant history of prior criminal activity and according that mitigator "little" weight was "within the trial court's domain," and the state cannot show an abuse of discretion.

The record does not support the state's contention that the court's finding was based on a misunderstanding of the law. It points to discussion of this mitigating circumstance during the charge conference, and claims that the trial court stated "that it understood this [second] portion of the instruction to be referring to Defendant's other convictions in this case." Answer Brief at 99. The fractured exchange upon which the state relies is the following:

> THE COURT: In other words, I guess what I understand the instruction to say, and maybe I'm incorrect, is that the fact that he has no significant history of prior criminal activity.
>
> MR. ROSENBERG: Okay.
>
> THE COURT: But you can consider the convictions in this case, as –
>
> MR. ROSENBERG: It says in the reading –
>
> THE COURT: Conviction of the crime –

(T. 2082).

Nowhere does the court assert that the second paragraph of the instruction refers to the other convictions in this case. The state simply guesses that this is what the judge *would* have said had he finished his sentence. It is at least as likely that the judge was trying to say: "But you can consider the convictions in this case, as – [aggravating circumstances]," – in contrast to the prior offenses described in the second paragraph of the instruction. In any event, the trial court expressly set aside the contemporaneous convictions in finding this mitigating factor." (R. 2750).[27]

The state cites no case holding that the trial judge was *required* to reject the no significant history mitigator. The fact that this Court would not find an abuse of

[27] The state complains that, by omitting discussion of this mitigator in his sentencing memorandum, defense counsel left the trial court "misinformed." Answer Brief at 100. This overlooks the fact that the prosecution *did* discuss the no significant history of prior criminal activity mitigator in *its* sentencing memorandum. (R. 2081-82).

discretion if the judge *had* rejected it does not imply the converse. Both the statute and the jury instruction leave the term "significant" undefined. When the court asked "what is considered significant history?" the state replied: "For them to decide, that's the whole point." Likewise, when the judge made his findings the significance of Victor Caraballo's record was for him to decide. Reversal is not warranted simply because an appellant draws a different conclusion.

CONCLUSION

For the foregoing reasons, the judgment of convictions and the sentence of death must be reversed and vacated, and this cause must be remanded for a new trial..

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Andrew Stanton, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by courier to counsel for the Appellee, Lisa Davis, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on April 9, 2009.

_____
ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

_____
ANDREW STANTON
Assistant Public Defender