IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1375

VICTOR CARABALLO,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 545-1961

ANDREW STANTON
Assistant Public Defender
Florida Bar No. 0046779

Counsel for Appellant

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CONSTITUTIONS

STATUTES

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1375

VICTOR CARABALLO,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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. 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. Unless noted otherwise, all emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Victor Caraballo's life began in neglect and abuse. His parents beat him without provocation, exposed him to sexual abuse, and locked him away for their own convenience. His cognitive deficits were such that a sister three years his junior had to tutor him. Victor first experienced hallucinations at a young age. His mental illness eventually became so severe that he was "Baker-Acted"[1] five times in the year before the abduction and murder of Ana Angel. He was discharged from his last involuntary hospitalization just 15 days before the crime, still exhibiting suicidal and homicidal ideation.

Victor's Childhood

Victor was born and raised in Puerto Rico. When his mother, Mercedes Rodriguez Rivera, was pregnant with him, she drank approximately a bottle of rum each day. (T. 1839). She did not like the children to make a "ruckus" when she was drinking, so she would lock them in a room when they played too much or made too much noise. (T. 1840). She would also hit them. (T. 1842). On one occasion, Victor's brother called social services about her locking them up. (T. 1842, 1851). Ms. Rivera beat him and locked him in the room again. (T. 1843, 1852).

[1] § 394.451, Fla. Stat. (2001).

Victor's father was typically at work and not around the house much. (T. 1841, 49). When he was, he would beat the children about the head, back, and arms with an oar. (T. 1841, 1850). According to him, he did this when they would "disrespect" him. (T. 1826-27). Victor's father did not know whether Victor graduated from high school or elementary school. (T. 1822). Nonetheless, he noticed that Victor was strange and would talk to himself. (T. 1825).

When Victor was about 12, his mother had an affair with a neighbor, Alberto Gonzalez. (T. 1844-45). Alberto raped Victor. (R. 1845). When the police came to investigate the crime, Victor's mother told them this was a lie, in order to protect Alberto. (T. 1844). Victor was also molested by one of his brothers. (T. 1730).

Of the nine Caraballo children, four have been hospitalized for major mental illness. (T. 1906). Victor's grandfather, uncle, great uncle and great aunt were all hospitalized due to mental illness. (T. 1844, 1906). His father testified that he takes medication for "nervousness," including Vistaril and Paxil. (T. 1823, 1825). He explained: "If you startle me, all of a sudden, and I do not see the person then I could easily even kill her or him." He regularly hallucinates about dead people. (T. 1906).

As a child, Victor was isolated. (T. 1852). He would make up imaginary friends. (T. 1852, 1888-89). He would also get in fights and hit the walls. (T. 1852). At one point he tried to hang himself with a sheet. (T. 1852-53). His

father only knew of one friend Victor had, a boy who hanged himself. (T. 1826). He had to be reminded to bathe and brush his teeth. (Vol. 55: 64). He could not manage tasks like being given money to go to the store. (T. 1749). He had several serious head injuries as well, including a two-storey fall. (T. 1748).

Victor had difficulties understanding his lessons at school. His sister Wanda, three years his junior, attempted to tutor him. (T. 1852-53). Victor stopped going to school in the fifth grade and left home when he was 14 or 15. (T. 1830, 1853). He went to live with a woman he was seeing. (T. 1948).

When Victor came back at age 16 he got involved in "the drug life." (T. 1948). He was later able to get a job with the telephone company. (T. 1948). When he was 23 or 24, however, Victor went to prison for armed robbery. (T. 1912). He benefited from the structured environment of prison, and he seemed to do better when he got out at age 27. (T. 1913). He took and completed a welding course. (T. 1913). Women he was involved with would take care of him and manage his money. (T. 1913). But between ages 27 and 31 he made five suicide attempts, and was hospitalized for substance abuse and problems related to his mental health. (T. 1913).

When he got into trouble with a drug-dealer who wanted to kill him, Victor decided to leave Puerto Rico. (T. 1949-50). Victor's mental health continued to deteriorate after he arrived in Florida. In the year leading up to the abduction and

murder of Ana Angel, Victor was hospitalized five times. He was involuntarily admitted on May 28, 2001, after he intentionally cut his own finger when voices in his head told him to do so. (T. 1918). Doctors diagnosed him with major depression with psychotic features, as well as alcohol and substance abuse. (T. 1918).

On January 12, 2002 he was Baker-Acted again and diagnosed with depression. (T. 1922).

Six weeks later, Victor took an overdose of Vistaril after voices told him to. (T. 1924-25). He was rushed to the emergency room and Baker-Acted again. (T.1924).

Two weeks after that, he went to the emergency room with chest pains due to what appears to be a panic attack and was discharged the same day. (T. 1928).

Two days later he was Baker-Acted after an overdose of Vistaril. (T. 1929, 1931). Again, voices were telling him to kill himself. (T. 1929). Again, doctors diagnosed him with major depression with psychotic features. (T. 1929).

Finally, on April 4, 2002, Victor was placed in an intensive care unit after overdosing on Lithium. (1931-32). When he was admitted, Victor threatened to kill the paramedics and nurses in the emergency room. (T. 1934). Two days later, doctors transferred him to a psychiatric hospital which noted, among other things, delusions and "confused, disoriented thoughts, suicidal plan, ideation and gestures,

homicidal plan, ideation." (T. 1757, 1938, 1939). The hospital released Victor without medication on April 12, 2002, just 15 days before the abduction and murder of Ana Angel on April 27, 2002. (T. 1940).

The Kidnapping and Murder

On April 27, 2002, Nelson Portobanco and Ana Angel went to Miami Beach to walk on the sand. (T. 776-78). At 12:30 a.m., as they were leaving the beach, a man with a gun ordered them into a white Ford F150 four-door pickup truck. (T. 782-85). Two people sat in the front seats of the pickup. (T. 788). The man with the gun entered the rear seat area first, followed by Mr. Portobanco and Ms. Angel, and then another man. (T. 787). A fifth man lay on the floor in front of the rear seat. (T. 789). One of the men demanded the victims' belongings. (T. 789). Mr. Portobanco gave them a gold chain with a crucifix, a watch, a wallet, and a cell phone. (T. 790). Ms. Angel gave them bracelets, jewelry, a wallet, and a cell phone. (T. 790). One of the men ordered them to bend down with their faces at their knees. (T. 793). They drove for about 15 minutes before stopping. (T. 794). One of the men asked for Ana Angel's PIN. (T. 795). He came back saying he couldn't get any money. (T. 796). Ms. Angel confirmed the PIN. (T. 796). They drove to another spot where the men used the ATM successfully.

At some point, one of them made Mr. Portobanco and Ms. Angel kiss. (T. 799-800). They ordered Mr. Portobanco to touch her breasts and vagina, but he

refused. (T. 800). The men moved Mr. Portobanco to the floor and told Ms. Angel to remove her panties. (T. 801). Several of the men then repeatedly raped Ms. Angel, orally, vaginally, and anally. (T. 802). The person on the floor next to Portobanco eventually switched seats with the man in front. (T. 803).

Later, the truck stopped on the side of the road. (T. 805). Mr. Portobanco did not hear any discussion about what they should do next. (T. 805). Two of the men took Mr. Portobanco down an embankment and forced him to kneel at a wall. (T. 806-09). Based on the movements within the truck, Mr. Portobanco believed that the man who had originally been in the front passenger seat was one of these two men. (T. 805-06). The two men then repeatedly stabbed Mr. Portobanco. (T. 808-11). He fell to his side, in a fetal position, and the men began to kick him. (T. 811-12). He played dead until he didn't hear them around, and then went to the road for help. (T. 812). When he got there, he could see the truck on the shoulder further down the road, perhaps a little less than 50 yards away. (T. 813). Mr. Portobanco succeeded in waving down a car, and was taken to a hospital for treatment of his injuries. (T. 815). He told the driver who stopped, and eventually the police, that his girlfriend had been kidnapped, and the truck was still on the road. (T. 815, 820).

Ana Angel's body was later found approximately five minutes further along the highway, hidden by a clump of bushes. (T. 1352-53). She had been killed with

a single gunshot to the back of the head. (T. 1346-49). Agents eventually found the murder weapon in Cesar Mena's apartment. (T. 992-95, 1164). Vaginal swabs showed semen matching Joel Lebron. (T. 1501). Joel Lebron's fingerprints were found on the rearview mirror of the Ford F150, as were Cesar Mena's. (T. 1100-01). Joel Lebron fired the fatal shot. (T. 1462).

The Search and Arrest

FDLE agents were able to track a call from Nelson Portobanco's cell phone to a telephone for which the subscriber was Hector Caraballo. This in turn led them to the Hawthorne Village apartment complex to search for Hector at Apt. 4, 2408 Barley Club Lane. FDLE Special Agent[2] Susan Koteen went to the management office for the apartment complex and spoke to Michelle Cora. (T. 857-58). Ms. Cora told the agent that she didn't know anything about a Hector Caraballo at that address, but she did know a *Victor* Caraballo in a different unit, apartment 8, 9900 Sweepstakes Lane. (T. 858-59). Up until then, the agents had never heard of Victor Caraballo. (T. 898). The apartment management had begun eviction proceedings but had not yet obtained an order evicting Victor Caraballo. (T. 882, 889).

Two days earlier, Victor had requested the key to the apartment in order to move out his remaining belongings, and stated that it was his *intention* to move

[2] Hereafter, "Special Agent" will be abbreviated as "SA."

out. (Vol. 41: 79). Ms. Cora stated that she did not see Victor again, and the key was not returned in the next two days. (Vol. 41 79, 87-88). At the time she spoke to SA Koteen, Ms. Cora believed Victor Caraballo "was probably moving out." (Vol. 41: 83). Ms. Cora told SA Koteen that Victor had not paid his rent, and was "under eviction." (T. 863). She gave the agent keys to the apartment. (T. 900).

The agents waited outside Victor Caraballo's apartment for 15 minutes before knocking on the door. (T. 975; Vol. 42: 121-22). They tried the key, but it didn't work. (T. 901). Steve West, who was in charge of maintenance for the apartment complex, told police that it was a new lock. (T. 901). He tried to drill out the lock, but without success. At about 2:25 p.m., the agents kicked down the door. (T. 902). There they found a clearly-occupied apartment, with Victor Caraballo in possession of it. There was a suitcase full of clothing in the closet and the bathroom was stocked with supplies for washing and shaving. (Vol. 41: 59). "[F]ood, bags and things" were in the kitchen. (Vol. 41: 59). There were lawn chairs. (Vol. 42: 85). And there was bedding on the floor. (Vol. 41: 59).

The agents handcuffed Victor and proceeded to search his apartment. (Vol. 42: 128, 132). The search took 15 to 20 minutes. (Vol. 42:129). They searched the entire apartment, opening drawers, and cabinets. (Vol. 42: 129, 180-81). A cell phone that was eventually determined to be connected to the case was visible on the kitchen counter. (Vol. 42:130-31; Vol. 43: 201). The search turned up Mr.

Portobanco's and Ms. Angel's ATM cards and wallets, as well as Ms. Angel's purse and cell phone. (T. 923-24, 987-88; 1046-47). Ms. Angel's shoe was found in a dumpster. (T. 1038).

The Interrogations

SA Koteen spoke to Victor, who showed her his license and identified a picture of his brother. (T. 908). He told her he was more comfortable speaking in Spanish. (T. 909). The agents did not call for a Spanish-speaker until 3:30 p.m., more than an hour after they kicked the door in. (Vol. 42: 202). SA Francis Hidalgo arrived at the apartment sometime between 3:30 and 4:00 p.m.. (T. 1173-74). He found Victor handcuffed on the floor. (T. 1175). SA Hidalgo had Victor uncuffed, and asked him questions about where his brother was. (1175-76). Victor was nervous and was rocking back and forth. (T. 1182). Hidalgo then told Victor they were investigating a kidnapping, and had him sign a *Miranda* warning form. (T. 1177; R. 1939). The waiver was signed at 4:10 p.m. (T. 1181; R. 1939).

During the ensuing interrogation, Victor told SA Hidalgo that he had gone from Orlando to Miami with Hector, Joel Lebron, Jesus Ramon, and Cesar Mena in a rented white Ford F150. (T. 1182-83). They went to Miami Beach and tried to sneak into a dance club by the back door. (T. 1183). While they were there, Joel Lebron, Jesus Ramon, and Cesar Mena grabbed Mr. Portobanco and Ms. Angel and forced them into the truck. (T. 1183). They drove back to Orlando.

While on the way, Joel suggested beating Mr. Portobanco up and leaving him. (T. 1184). Joel and Jesus took Mr. Portobanco out of the truck and returned saying they had done just that. (T. 1184). Victor said that Ana was alive and that when they returned he had kept some of the property. (T. 1185). During this interrogation, he named the items and told SA Hidalgo where they were in the apartment. (T. 1186-87). He subsequently signed a consent to search. (T. 1188; R. 1942). When asked if Joel, Jesus or Cesar were capable of harming Ms. Angel, Victor began crying, asked for a Bible, and said they were. (T. 1190).

SA Hidalgo took Victor to FDLE headquarters where he and Detective Morales interrogated Victor on tape. (T. 1192; R. 1946). By the time of the recorded interrogation, Victor Caraballo had been in custody nearly 8 hours. Police brought Victor to FDLE headquarters at approximately 7:45 p.m.. (Vol. 41: 113). Detective Marrero and Agent Hidalgo began to interrogate Victor at 10:00 p.m. (Vol. 42: 8). They did not give a *Miranda* warning before the interrogation, relying instead on the 4:10 p.m. waiver. (Vol. 42: 7-8). By the end of the interrogation at 11:59 p.m., Victor Caraballo was "hungry and exhausted." (R. 836).

During the interrogation, the agent and the detective made a number of statements to Victor that contradicted the warnings SA Hidalgo had read six hours earlier:

- Detective Morales told Victor it was "better for you to tell me the truth," and told him: "**N-nothing is going to happen to you.**" (R. 747).

- Special Agent Hidalgo said: "Right now the best thing you can do … tell him the truth …." (R. 762).

- Shortly thereafter, Detective Morales told Victor: "So … if … you tell me the truth, the day that you go to court, I am going to help you, Francisco is going to help you." (R. 763).

- Later, Morales implied that Victor would not go to jail so long as he was honest: "Why do you want to go to jail for those people? You are going to jail, not them. You're going to jail, you're bullcrapping, instead of telling me the truth." (R. 780).

- Morales told Victor he would lodge charges against him, *if* Victor did not tell "the truth." (R. 785).

- When Victor threatened to stop talking, SA Hidalgo told him "we're not accusing you of anything." (R. 786-87). Detective Morales even told Victor that he and Agent Hidalgo would testify to his confession, and that this would **help** him, saying: "I'm going to … I and Francisco we are going to go, the day of the trial, **we're going to say what you have said here … and that is going to help you.** (R. 791).[3]

Mental Health Evidence

Two mental health experts testified for the defense: Dr. Manuel Alvarez and Dr. Michael Hughes. The doctors testified during both the hearing to determine mental retardation and the penalty phase.

[3] During the trial, the State also introduced evidence of an interview Victor gave to a local news station while in jail, as well as a letter to the prosecutor headed "voluntary confession." (T. 1142, 1453).

Dr. Alvarez, a psychologist, administered the WAIS-III, an instrument for measuring IQ. (T. 1717, 1740). He obtained a full-scale IQ of 56. (T. 1743). Because Victor was hearing voices at the time, however, the test results were invalid, underestimating Victor's true IQ. (T. 1741). Dr. Alvarez estimated that Victor's IQ could be as much as one standard deviation higher, or 71. (T. 1741, 1779). Dr. Alvarez testified that Victor's adaptive functioning was impaired. On tests he scored "below average in social behavior, poorly in conformity, very poor in trust worthiness, below average in sexual behavior, below average in self-abusive behavior and poor in disturbing interpersonal behavior." (T. 1745). Based on family reports of poor academic performance, and his inability to manage some basic tasks, Dr. Alvarez concluded that Victor's sub-average condition began before he was 18. (T. 1748). In Dr. Alavarez' opinion, Victor was not malingering. (T. 1733, 1746). Based on all this, Dr. Alvarez opined that Victor was mentally retarded. Dr. Alvarez concluded that post-traumatic stress disorder, schizo-affective disorder, and depression were all possible diagnoses. (T. 1753).

Dr. Michael Hughes, a psychiatrist, also evaluated Victor Caraballo. (T. 1871). Based on his evaluation, he determined that Victor had many serious impairments, including cognitive impairments. (T. 1875). He concluded that Victor had suffered from abuse and neglect, and diagnosed him with reactive attachment disorder, post-traumatic stress disorder, and major depression with

psychotic features. (T. 1881-87). He agreed that the 56 IQ was invalid. (T.1959-61). Based on his own impression, Dr. Alvarez' report, and the records of treating physicians, Dr. Hughes did not believe Victor was malingering, though he did exaggerate some symptoms while minimizing others. Dr. Hughes concluded that Victor was under the influence of extreme mental or emotional disturbance at the time of the crime. (T. 1987).

The State's experts were both psychologists. Dr. Lazaro Garcia testified over defense objection as he had previously examined Mr. Caraballo for competence. (T. 1998). Despite the fact that Victor had been diagnosed as psychotic during numerous involuntary commitments, Dr. Garcia concluded that Victor was fabricating his psychotic symptoms. (T. 2006). He testified that he administered the TOMM, which also indicated malingering.

Dr. Christian del Rio, the second State psychologist, opined that Victor was not mentally retarded. He did not administer a WAIS because he believes it is impossible to obtain a valid score for a Puerto Rican. (T. 2031-32; Vol. 56: 235-35). The Spanish-language WAIS-III, he explained, is normed on the population of Spain who, he asserts, are better educated than Puerto Ricans. (T. 2032). Using this test with a Puerto Rican would yield an artificially low result. (T. 2032). Instead, he administered the Wisconsin Card Sort, a test of executive function, rather than intelligence. He testified that Victor was not mentally retarded, relying

in part on the Wisconsin Card Sort and the fact that Victor has had relationships with women, could get an apartment, and had not applied for disability benefits. (T. 2041-42).

The trial court denied pretrial motions to suppress evidence and to bar imposition of the death penalty based on mental retardation. (R. 1546, 1814).

During his closing arguments, the prosecutor made numerous improper arguments, comparing defense counsel to scam artists while asserting the *prosecution* was not there to trick or mislead the jury. (T. 1529-32). He warned jurors to "keep your eye on the ball," because "defense counsel has to distract you." (T. 1538). The prosecutor attacked defense counsel for cross-examining the witnesses, with remarks such as: "Why is she on trial? Did she do something wrong? Is she the defendant? Did she kill somebody? Did she rape somebody?" (T. 1532-34). The prosecutor accused the defense of hiding evidence, and insinuated that defense counsel obtained favorable testimony from an expert by "putting dollars in [his] pocket." (T. 2116-17, 2132-33). The prosecutor offered many other improper arguments and misstated the law to the jury.

The jury convicted Mr. Caraballo and recommended death by a vote of nine to three. (R. 2148, 2641). In its sentencing order, the court found (1) that Victor had committed a prior violent felony based on the contemporaneous conviction for the attempted murder of Nelson Portobanco (great weight); (2) that the murder

occurred in the course of a sexual battery and kidnapping (great weight); (3) that the murder was committed to prevent lawful arrest (great weight); (4) the capital felony was committed for pecuniary gain (some weight); and (5) the capital felony was especially heinous, atrocious or cruel (great weight). In mitigation, the court found the statutory mitigators that (1) Victor Caraballo had no significant history of prior criminal activity (little weight); and (2) the capital felony was committed while under extreme mental and emotional disturbance (great weight). In addition, the court found as mitigating factors (3) Victor's deprived and abusive childhood (some weight); (4) the fact that Victor was not the shooter (some weight); and (5) Victor's general mental health (great weight). By its order, the court sentenced Victor Caraballo to death for the crime of first-degree murder.

SUMMARY OF THE ARGUMENT

The FDLE agents entered and searched Victor Caraballo's apartment without a warrant or probable cause. Victor Caraballo had a legitimate expectation of privacy in his apartment, and the search and seizure do not fall into any of the recognized exceptions to the warrant requirement. The trial court's finding that Victor abandoned his apartment is not entitled to deference as it was founded on the erroneous exclusion of admissible evidence. Maintenance supervisor Steve West's testimony that Victor Caraballo's apartment appeared to have been abandoned, formed a key basis for the judge's ruling. In deposition, Mr. West testified that the apartment had not been abandoned. The trial court initially showed an interest in the deposition testimony, but was persuaded by the prosecution that it was not admissible as substantive evidence. The Court should not defer to an order made unreliable by the failure to consider relevant, admissible evidence.

The evidence, moreover, demonstrates that Victor Caraballo had not abandoned his apartment. He had a legal right to remain in the apartment and retrieved a key two days earlier with the announced intention to move his things out, but did not specify a date. He retained the key until the illegal search. To the extent the agents relied on the apparent authority of the building manager, that reliance was unreasonable. By the time they entered, the agents were on notice

that the situation had become, at a minimum, ambiguous, and they were required to investigate further. Victor Caraballo was not a trespasser in his own apartment, and at a minimum had been licensed to enter by the manager. The search could therefore not be justified as incident to a lawful arrest. In any event, the search of drawers and cabinets exceeded the scope of a search incident to arrest or a protective sweep. The police cannot rely on the after-the-fact consent they obtained from Victor, which is itself a fruit of the illegality. The search could not be justified as a reaction to the exigency of finding Ana Angel. The agent's own actions belied any claim of haste, and the search exceeded the scope of a search for a human being.

Detective Morales and Special Agent Hidalgo obtained Victor's taped interrogation by contradicting the *Miranda* warnings. Police must make a suspect aware of the fact that his statements will be used against, not for him. The detective and the agent, by contrast, repeatedly told Victor Caraballo that speaking to them wouldn't hurt him. Indeed they went so far as to promise him they would testify to his confession, and that this would **help** him, saying: "I'm going to … I and Francisco we are going to go, the day of the trial, **we're going to say what you have said here … and that is going to help you.** (R. 791).

The prosecution's closing arguments were replete with improper, and sadly familiar arguments. The prosecutor repeatedly attacked defense counsel, accusing

them of, among other things, attempts to distract the jury. The prosecutor misstated the law, argued mitigation as aggravation, and offered "golden-rule" and "show-the-same-mercy" arguments.

The State also made improper use of victim-impact testimony. The prosecution used it to rebut mitigating circumstances. It also introduced evidence that the "impact" of this crime was to cause still more deaths.

As interpreted by this Court, section 921.147 presents an insuperable barrier to some mentally retarded persons attempting to prove their status. Proof of mental retardation is dependent on "valid" testing results, with no allowance for diagnostic impressions. This leaves some populations categorically unable to prove mental retardation. In this case, the only IQ testing available was invalid because Victor Caraballo was actively psychotic at the time of testing. The State's expert testified that there could never be a valid score for Victor because he is Puerto Rican. The expert, Dr. Christian del Rio, explained that the Spanish WAIS-III is normed on Spaniards, whom he termed better-educated than Puerto Ricans, and could not yield a valid result for anyone from that island.

Florida's death penalty scheme remains unconstitutional. Despite its prior rulings, the Court should take this opportunity to examine the effect of the United States Supreme Court's decision in *Cunningham v. California*, 549 U.S. 270 (2006).

The errors in this case, if not each individually sufficient to merit a new trial or sentencing, should be considered cumulatively. Taken together, they vitiate the reliability of Victor Caraballo's trial and sentence.

Finally, the death penalty is disproportionate in this case. Although the trial court found serious aggravation, the abundant mental mitigation relating to Victor's persistent mental illness makes this case not one of the "least mitigated" for which the death penalty is reserved.

ARGUMENT

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, INADMISSIBLE.

Law enforcement officers entered Victor Caraballo's apartment without a warrant, in violation of his rights under Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I section 12. The home is where a person enjoys the highest expectation of privacy. *Payton v. New York*, 445 U.S. 573, 585 (1980). "As a general rule, a warrantless search or seizure is per se unreasonable, unless the search or seizure falls within one of the well established exceptions to the warrant requirement." *Jones v. State*, 648 So. 2d 669, 674 (Fla. 1994). Among these are searches conducted pursuant to a valid arrest, with probable cause under exigent circumstances, or with consent. *See Reed v. State*, 944 So. 2d 1054 (Fla. 4th DCA 2006). Victor Caraballo had a legitimate expectation of privacy in his apartment, and none of these exceptions justified the agents' warrantless entry and search.

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

An enforceable expectation of privacy is determined by a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978). A person who owns or lawfully possesses property will normally have a legitimate expectation of privacy therein. *Id.*; *see Norman v. State*, 379 So. 2d 643, 647; *Morse v. State*, 604 So. 2d 496, 501 (Fla. 1st DCA 1992) ("Florida law governing the duration and termination of a tenancy is relevant to the question whether appellant retained a legitimate privacy interest …"). By virtue of his lease, Victor Caraballo was in lawful possession of his apartment until there was a judgment of eviction entered against him, 4 days later. § 83.59, Fla. Stat. (2002); *compare Green v. State*, 824 So. 2d 311 (Fla. 1st DCA 2002) (no expectation of privacy where hotel owner had repossessed room in compliance with § 509.141, Fla. Stat. (2002)).[4] Although a landlord may have the right to enter a tenant's dwelling, the landlord's consent will not authorize police to search the property. *See Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United States*, 365 U.S. 610 (1961); *Blanco v. State*, 438 So. 2d 404 (Fla. 4th DCA 1983).

[4] Section 509.141 relating to the "ejection of undesirable guests" permits immediate ejection upon oral notice, and makes it a misdemeanor to refuse.

The trial court found that Victor Caraballo had abandoned his apartment. (R. 1516-20). In reviewing a motion to suppress the Court normally presumes a trial judge's findings of fact to be correct, while reviewing de novo the application of the law to those facts. *Wyche v. State*, No. SC05-1509, 2008 WL 2678058 (Fla. 2008). The Court should not defer to the trial court's findings of fact, however, because the judge erroneously excluded evidence relevant to these findings. *Compare State v. Fernandez*, 826 So. 2d 375 (Fla. 3d DCA 2002). The judge placed significant reliance on Steve West's testimony that Victor Caraballo's apartment was abandoned when West checked it prior to April 28th, quoting it in his order. In his deposition, however, Mr. West testified that the apartment had not been vacated. (Vol. 41 65-66). The judge placed his reliance on Mr. West's trial testimony only after wrongly concluding that the deposition could not be used as substantive evidence.

The trial judge expressed concern about the effect of Mr. West's deposition testimony during the prosecution's argument on the motion:

> THE COURT: Let me ask you a question. I wrote down here when I was taking notes on this case, a couple of inconsistencies on cross-examination. I have here that Steve West – Steve West testified that I think it was – I guess it was his deposition, page 14, lines 19 through 25. Then again on page 16, lines three through six, where you all were asking him about the abandonment issue. And the question was something along the lines: Did you see any evidence that people had moved out? And then there was an answer: No. And I informed management, the management office – and I informed the management office that there had been no change.

> Again, I am just going by memory. This is not the transcript. Okay.
>
> And then there was testimony, I thought this tenant was still living in the apartment. I am assuming that that came from a deposition.
>
> MR. LAESER: It did come from a deposition, Your Honor. By Rule 3.220, it could only come in to impeach or contradict. The Court cannot accept that as being substantive evidence.
>
> THE COURT: No. No.

(Vol. 50: 222-23). Thus, the trial court was troubled by Mr. West's deposition testimony, but accepted the State's argument that it could only be used to question West's credibility. (Vol. 50: 224). The court erred. The deposition testimony was admissible as substantive evidence: It was a prior inconsistent statement under oath. § 90.801(2)(a), Fla. Stat. (2006). In any event, hearsay is admissible in a motion to suppress hearing. *See Lara v. State*, 464 So. 2d 1173 (Fla. 1985); *State v. Cortez*, 705 So. 2d 676 (Fla. 3d DCA 1998). Because the judge erroneously excluded evidence he found relevant to his fact-finding, his conclusions are unreliable and unworthy of deference.

Even accepting the limited evidence considered by the court, the State failed to prove abandonment. The portion of Michelle Cora's testimony relied upon by the judge in his order does not establish that Victor Caraballo had abandoned his apartment. (R. 1516-17). In the excerpted testimony, Ms. Cora stated that approximately two days before the April 28th search, Victor requested the key to the apartment in order to move out his remaining belongings, and stated that it was

his *intention* to move out. (Vol. 41: 79). In her testimony, she also stated that she did not see Victor again, and the key was not returned in the next two days. (Vol. 41 79, 87-88). At the time she spoke to SA Koteen, Ms. Cora believed Victor Caraballo "was probably moving out." (Vol. 41: 83).

All of this is consistent with Victor having not yet relinquished his possession of his apartment. Instead he planned to use the time remaining to complete the move. He was entitled to remain in the apartment until an eviction judgment issued. A man who has retrieved and retained a key to his apartment, in which he has the legal right to remain, with the *intention* to move out, may *plan* on abandoning the premises, but he has yet to do so.

The remaining evidence of apparent abandonment is, to say the least, contradictory. Upon cross-examination, Ms. Cora conceded that she had *not* known whether or not Victor was still in his apartment. (Vol. 41: 90). She further stated that Victor was still a tenant when he was arrested. (Vol. 41: 90-91). As noted above, the trial court relied on Steve West's testimony that the apartment was abandoned, while in the improperly-excluded deposition, Mr. West testified that he had seen no evidence that Victor had moved out. (R. 1517-18; T. Vol. 41 55, 65-66). SA Koteen testified that Ms. Cora told her the tenant in apartment 8 had been evicted. (Vol. 42: 81). On direct examination, Ms. Cora said she told SA Koteen that Victor was "under eviction proceedings." (Vol. 41: 81). During cross-

examination, Cora said she never discussed the eviction with the agent. (Vol. 41: 88-89). This contradictory record provides scant support for a finding of abandonment.

Of course, there is an additional, undisputed, and dispositive fact proven at the hearing: Victor was inside his apartment and had indeed taken steps to secure his possession of it with a new lock. (Vol. 41:56; Vol. 42: 123-24). When courts must decide the issue of abandonment, it is because the alleged abandoner is not in physical possession of the premises.[5] Victor Caraballo was lawfully in physical possession of the apartment. It cannot be said that he had abandoned his rights therein.[6]

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

The agents were not entitled to enter and search the apartment based on Ms. Cora's "apparent authority" to consent to the search. Police may make a warrantless entry based on the consent of a third person where they reasonably but mistakenly believe that person had authority to give consent. *Illinois v. Rodriguez*,

---

[5] *See, e.g., Morse v. State*, 604 So. 2d 496 (Fla. 1st DCA 1992) ; *Paty v. State*, 276 So. 2d 195 (Fla. 4th DCA 1973); *United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981); *Issa v. City of Glencoe*, 118 Fed. Appx. 103 (8th Cir. 2004) (unpublished opinion); *State v. Brauch*, 984 P.2d 103 (Idaho 1999).

[6] The agents themselves apparently believed that Victor had not abandoned the apartment. They would not have been so eager to enter the apartment otherwise.

497 U.S. 177 (1990). A claim of authority by a third party does not, however, give police carte blanche to search. Where any ambiguity arises, they must make further inquiry. *Rodriguez*, 497 U.S. at 188-89; *Morse v. State*, 604 So. 2d 496, 503 (Fla. 1st DCA 1992).

SA Koteen claimed that Ms. Cora told her Victor Caraballo had been evicted. (Vol. 42: 81). If the Court accepts this over Ms. Cora's testimony to the contrary, it might conclude that Koteen at some point reasonably believed Ms. Cora consented and had apparent authority to do so. But by the time the agents entered Victor's apartment, the situation was ambiguous, at best. As they stood at the door to his apartment, the agents knew: 1) Victor Caraballo had leased the apartment; 2) that two days earlier he had indicated his *intention* to retrieve his belongings and move out, without giving a precise date; 3) that Victor had obtained a key to the new lock on the apartment, and had not yet returned it; 4) that he had placed another lock on the door. They also knew that Ms. Cora had either said that Victor had been evicted, or that he was "under eviction proceedings." Ms. Cora had, however, given SA Koteen the lease and file for Victor's tenancy. (Vol. 41: 86). The file reflected that eviction proceedings were underway, but there was no order for the eviction. (Vol. 41:46-47). In determining apparent authority, officers are presumed to know the applicable law. *State v. Young*, 974 So. 2d 601 (Fla. 1st DCA 2008).

If the situation were not ambiguous when the agents stood outside Victor's door, any "apparent authority" based on the putative eviction or abandonment was called into serious question once they kicked the door in. There they found a clearly-occupied apartment, with Victor Caraballo in possession of it. There was a suitcase full of clothing in the closet and the bathroom was stocked with supplies for washing and shaving. (Vol. 41: 59). "[F]ood, bags and things," were in the kitchen. (Vol. 41: 59). There were lawn chairs. (Vol. 42: 85). There was bedding on the floor. (Vol. 41: 59). And, of course, Victor himself was there.

At this point, the agents were on notice that Victor had not in fact vacated his apartment, and they could no longer rely on Ms. Cora's apparent authority to consent to their entry. At a minimum, the agents had a duty to investigate further. *Rodrigez*, 497 U.S. at 188-89.

United States v. Purcell, 526 F.3d 953 (Fla. 6th Cir. 2008) illustrates when apparent authority will dissipate in light of ambiguity. Purcell's girlfriend consented to a search of a duffle bag, claiming it was her own. *Id.* at 958. When they opened the duffle, they discovered it did not contain the girlfriend's belongings, but instead contained men's clothing. *Id.* The court found that once the agents became aware of this fact, they could no longer rely on the girlfriend's apparent authority without further inquiry. *Id.* at 964.

The facts of *Morse v. State* are very similar to those now before the Court. In *Morse,* a deputy sheriff searched Morse's hotel room without a warrant. 604 So. 2d 496, 499-500. He relied on the consent of the hotel owner, who said he had evicted Morse. The owner, however, had evicted Morse on insufficient notice. *Id.* at 500. When the deputy entered the room, it was immediately apparent that Morse had left some of his belongings there. *Id.* at 502. The court found that the deputy could not rely on the owner's apparent authority. *Id.* at 503. The district court found that: "[A]t the very least, the officer was faced with the kind of ambiguous situation that, pursuant to *Rodriguez* and *Whitfield*,[7] should have foreclosed him from proceeding into Room 11 without additional inquiry. No such further inquiry appears in the record."

Here, as in *Purcell* and *Morse*, the apparent authority on which the agents relied "evaporated." The agents could not reasonably rely on Ms. Cora's consent without further inquiry. They nevertheless did not pause in their warrantless search, and made no further investigation. The agents acted outside *Rodriguez's* apparent authority exception, and in violation of Victor Caraballo's rights.

---

[7] *United States v. Whitfield*, 939 F.2d 1071 (D.C.Cir.1991).

C The Agents Illegally Arrested Victor Caraballo Without Probable Cause.

The agents lacked probable cause to arrest Victor Caraballo. The trial court and, to a lesser extent, the agents, relied on the conclusion that Victor was a trespasser in the apartment. In its order, the trial court concluded that Victor was trespassing. (R. 1520). SA Burke testified that Victor, handcuffed on the floor of his apartment, was not under arrest, was not free to go, and could "potentially" be considered a trespasser. (Vol. 42: 69-70). He later testified that they were not "holding" Victor. (Vol. 42: 73). Agent Koteen stated that Victor was "probably trespassing." (Vol. 42: 111). She also agreed that Victor was being held because there was a possibility he might know something they wanted to find out. (Vol. 42: 113). Detective Morales testified that he was the one who arrested Victor, and that probable cause was provided by Victor's statements and the fruits of the search. (Vol. 42: 33, 35). SA King testified that Victor was not under arrest. (Vol. 42: 176, 183). Agent Hidalgo testified that he was informed Victor was under arrest for trespassing. (Vol. 49: 90).

Probable cause for an arrest depends upon whether the evidence known to the police would lead a reasonable person to believe that a crime has been committed. *Brinegar v. United States*, 338 U.S. 160, 171 (1949). This judgment is to be made on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983). Moreover, "[a]n arresting officer is required to conduct a reasonable

investigation to establish probable cause." *City of St. Petersburg v. Austrino*, 898 So. 2d 955, 959 (Fla. 2d DCA 2005) *quoting Rankin v. Evans*, 133 F.3d 1425 (11th Cir. 1988).

There was no probable cause to support an arrest for trespassing. As discussed above, Victor Caraballo had a right to be in his apartment until there was an order of eviction. For the same reasons the agents could not act on apparent authority, once they found Victor in his own apartment, the agents were required to conduct a "reasonable investigation" before they could determine if there was probable cause. What is more, Ms. Cora gave Victor a key and with it permission to enter the apartment. Even if the agents concluded that the apartment was no longer Victor Caraballo's, they should have known that he was nevertheless licensed to enter it.[8]

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

Once the agents entered the apartment, they found Victor Caraballo on a

[8] In its order, the trial court relied on Victor's statement to SA Hidalgo that he believed: "You are here to investigate this trespass; why I am still living in this apartment." (Vol. 49: 77). It is understandable that a man detained in handcuffs by agents who believed he was trespassing would believe that SA Hidalgo was there to question him about trespassing. In any event, ambiguous statements such as this can hardly justify an arrest made hours earlier. They also cannot extinguish his legitimate expectation of privacy. *See Young v. State*, 974 So. 2d 601, 611 (Fla. 1st DCA 2008).

bedroll in one of the bedrooms. (Vol. 42: 127-28). They handcuffed him and proceeded to search the apartment. (Vol. 42: 128, 132). The search took 15 to 20 minutes. (Vol. 42: 129). They searched the entire apartment, opening drawers, and cabinets. (Vol. 42: 129, 180-81). A cell phone that was eventually determined to be connected to the case was visible on the kitchen counter. (Vol. 42: 130-31; 201). Agent King maintained that the items of evidence were found as part of a "protective sweep," though he also said that they were found approximately one hour after the agents kicked down the front door. (Vol. 43: 201). Ana Angel's license and credit or ATM card were found in an upper kitchen cabinet. (Vol. 42: 129, 182).

The State and Federal Constitutions permit a warrantless search incident to a legal arrest. *Chimel v. California*, 395 U.S. 752 (1969); U.S. Cons. amends. IV, XIV; Art. I § 12, Fla. Const. The purpose of such a search is to ensure the safety of law enforcement officers and the integrity of evidence. *Chimel*, 395 U.S at 763. The scope of such a search, however, is limited to the area within the arrestee's "immediate control." *Id.* This means "the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

> 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. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

Id.

Consistent with *Chimel*, Florida courts have suppressed evidence seized in rooms other than the one in which the arrest took place, or indeed in the same room but outside the arrestee's immediate control. In *Holloman v. State*, 959 So. 2d 403 (Fla. 2d DCA 2007), the court suppressed evidence seized in the bathroom of the motel room where Holloman was arrested. In *Amburn v. State*, 701 So. 2d 568 (Fla. 2d DCA 1997), the court rejected a warrantless search of a coffee-table drawer in the room where the arrests took place.

The search of Mr. Caraballo's apartment was contrary to the rule of *Chimel*. Special Agent King succinctly described the items within the scope of a search incident to arrest:

> Q. The area immediately around the defendant, I noted that you mentioned that there had been a bedroll of some sort. Were there other items, let's say, within arm's reach of where he had been lying down?
>
> A. I remember there was a Bible within arm's reach. There was a pair of woman's underwear in the bedroll and other personal effects, clothing, belt, that type of thing.

(Vol. 42: 134). The search, however, extended to rooms beyond the bedroom in which the arrest took place. The agents searched his bedroom and kitchen, opening drawers and cabinets along the way. Even assuming police properly arrested Mr. Caraballo for trespass, the evidence discovered in the subsequent search should have been suppressed as it was beyond the scope of a search incident

to arrest.

Nor may the search be justified as a "protective sweep." In *Maryland v. Buie*, 494 U.S. 325, 327 (1990), the court announced that police could make a "protective sweep" – defined as a "quick and limited search of premises" – to make sure there is no other person who might pose a threat to their safety. As a matter of course, police may search "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. In order to search further afield, there must be "articulable facts" that would warrant the belief that someone "posing a danger" is in the area to be swept. *Id.*

There is no evidence establishing "articulable facts" that would support a belief that an attacker might be found. What is more, the initial questioning did not focus on whether there might be others in the apartment. *See Runge v. State*, 701 So. 2d 1182, 1186 (Fla. 2d DCA 1997) ("The questioning concerned the ownership of the stolen truck, not whether there were others in the apartment. This conduct is not consistent with concern for safety.") Any search beyond the bedroom and the immediately adjoining areas cannot be justified as a *Buie* sweep. *Compare Nolin v. State*, 946 So. 2d 52 (Fla. 2d DCA 2006).

Even if the facts supported an extended sweep, the search here exceeded the permitted scope. Such a sweep is "not a full search of the premises, but may

extend only to a cursory inspection of those spaces where a person may be found." *Buie*, 494 U.S. 335. The FDLE agents searched cabinets, drawers, and toilet tanks, none of which is a space where person might be found. *Compare Dortch v. State*, 642 So. 2d 652 (Fla. 1st DCA 1994) (contraband discovered under hat and in closed paper bag).

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

Assuming the agents could properly sweep the entire apartment, they could not justify the discovery of the property under the plain view doctrine. *See Buie* 494 U.S. 329 (items in plain view during legitimate sweep admissible); *Nolin*, 946 So. 2d at 57. "It is well established that the police may seize items in plain view without a warrant if the seizing officers are lawfully in a location where the item is observed and have probable cause to believe that the item is evidence of a crime." *Rimmer v. State*, 825 So. 2d 304, 313 (Fla. 2002), *citing Horton v. California*, 496 U.S. 128 (1990). The only object even arguably in plain view was the cell phone. (Vol. 42: 131). But the plain view doctrine requires that the incriminating nature of the evidence be immediately apparent. *Rimmer*, 825 So. 2d 304. "It is well settled that when closer examination of an item observed in plain view is necessary to confirm its incriminating nature, its nature is not considered 'immediately apparent.'" *Minter-Smith v. State*, 864 So. 2d 1141, 1144 (Fla. 1st DCA 2003).

There was nothing immediately incriminating about the cell phone. It had to be examined before it could be linked to the crime. It consequently fell outside the scope of the plain view doctrine. *See Arizona v. Hicks*, 480 U.S. 321 (no plain view where officer lifted turntable to see serial numbers).

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

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). Thus police may, of course, enter a burning building to render assistance, *Michigan v. Tyler*, 469 U.S. 499 (1978), or to protect a resident from domestic violence, *Georgia v. Randolph*, 547 U.S. 103, 118 (2006), or to prevent a suicide, *Seibert v. State*, 923 So. 2d 460 (Fla. 2006). The prosecution must, however, demonstrate a "grave emergency" making a warrantless search "imperative to the safety of the police and of the community." *Illinois v. Rodriguez*, 487 U.S. 177 (1990) (*quoting McDonald v. United States*, 335 U.S. 451, 455 (1948)); *Riggs v. State*, 918 So. 2d 274 (Fla. 2005). The officers' belief that there is an ongoing emergency, must, however, be reasonable. *Vanslyke v. State*, 936 So. 2d 1218 (2006).

The agents had no reasonable belief that anyone within Victor Caraballo's apartment was in need of immediate aid. Victor, and his apartment, had at most a

tangential relationship to the crime – his brother's phone was tied to the incident. This would provide no more than a hunch.[9] The agents may as well have searched every unit in the development and the homes of every member of Hector's extended family. In *Vanslyke*, the court found that an anonymous report that children were being exposed to drugs and guns was insufficient to support a warrantless search. The available information in this case was below even the level of an anonymous tip. No information other than a shared surname linked Victor Caraballo and his apartment to the exigency.

The claim of exigency is belied by the agents' own actions. They waited outside Victor Caraballo's apartment for 15 minutes before even knocking on the door. (Vol. 42: 121-22). The agents kicked in the door of Victor Caraballo's apartment at 2:25 p.m. (Vol. 42: 85). They did not bother to question Victor about Ms. Angel's whereabouts until after 4:10 p.m., almost two hours later. (T. Vol.42 8). Although questioning might have been hindered by Victor's limited English, the agents did not call for a Spanish-speaker until 3:30. (Vol. 42: 202).

Even if the initial entry had been justified, a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey*, 437 U.S. 393, (*quoting Terry v. Ohio*, 392 U.S. 20, 25-26 (1968)). Police may seize

[9] For example, SA Koteen agreed that Victor Caraballo was detained because there was a "possibility" that he might know something. (Vol. 42: 113).

evidence in plain view, but once they determine that the exigency that authorized the entry no longer exists, any subsequent search is illegal. *Davis v. State*, 834 So. 2d 322, 327 (Fla. 5th DCA 2003). In *Thompson v. Louisiana*, 469 U.S. 17 (1984), police had responded to a call reporting a murder and attempted suicide. The court held that once the police had dealt with the emergency and assured themselves that no other victims or suspects were on the premises, the ensuing general search was unconstitutional. *Id.*, 20-23. In *Anderson v. State*, 665 So. 2d 281 (Fla. 5th DCA 1995), police properly entered a home based on a reasonable belief that a burglary had occurred. Their subsequent search through a bag of papers in an effort to find the homeowner's contact information, however, exceeded the scope of a search authorized by exigent circumstances. *Id.* at 283.

In this case, the agents conceded that they were searching for evidence as well as people. (Vol. 42: 181). They searched the entire apartment, including drawers and cabinets. (Vol. 42: 129, 180-81). This search was not authorized by exigent circumstances. Once the agents satisfied themselves that Ana Angel was not in Victor Caraballo's apartment, the subsequent warrantless search violated the Fourth and Fourteenth Amendments, as well as Article I, section 12.

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.

Evidence obtained through an illegal search or seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963). This rule applies to statements and consents no less than physical evidence. *Id.* 485-86; *Brown v. Illinois*, 422 U.S. 590 (1975). Here the constitutional violations led directly to the physical evidence found in the apartment and in the dumpster outside, as well as to both of Victor Caraballo's statements. In order to avoid the rule of *Wong Sun* 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*, 422 U.S. at 597; *Vasquez v. State*, 870 So. 2d 26 (Fla. 2d DCA 2003).

The inadmissibility of the items found during the search is self-evident. Moreover, there can be no question that Victor Caraballo's statements to SA Hidalgo were the direct result of the illegal entry, search and seizure. The only evidence to even suggest a break in the chain is the reading of the *Miranda* warnings. This, however, does not establish a break in the causal chain. *Brown*, 422 U.S. 602-04. As a result, the confession, the consent, and the items in the dumpster found as a result of that statement are all tainted by the agents' illegal conduct. *See, e.g., State v. Young*, 974 So. 2d 601 (Fla. 1st DCA 2008).

The statements made during the formal interrogation at FDLE headquarters are likewise inadmissible. The agents did not re-read the *Miranda* warnings. The State can offer only one possible break in the chain: The time that passed between the first statement on the scene and the recorded interrogation. This time-gap is insufficient. In *Brown*, the defendant's first inculpatory statement began three hours and 45 minutes after the illegal arrest. *Id.* at 593-94. Formal interrogation and the re-reading of *Miranda* warnings took place nine hours after the arrest. *Id.* at 593-95. The Supreme Court found that both statements were tainted by the illegal arrest. *Id.* at 590. Here, SA Hidalgo read the *Miranda* warnings and began the on-scene interrogation at 4:10, one hour and 45 minutes after the agents kicked in the door. (Vol. 42: 85; Vol. 49: 25). Police brought Victor to FDLE headquarters at approximately 7:45. (Vol. 41: 113). Detective Morales and Agent Hidalgo began to interrogate Victor at 10:00 p.m., less than seven hours after the illegal entry, search, and seizure, and just under six hours after SA Hidalgo read the warnings. (Vol. 42: 8). If anything, the record here demonstrates even less of a break in the chain than that in *Brown*. *See also*, *Adams v. State*, 830 So. 2d 911 (Fla. 3d DCA 2002).

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

The retroactive "consent" obtained by Special Agent Hidalgo does not

legitimate the search that preceded it.[10] The agents kicked in the door of Victor Caraballo's apartment at 2:25 p.m. (Vol. 42: 85). They entered with firearms drawn. (Vol. 42: 125). The agents immediately handcuffed Victor and began to search the apartment. (Vol. 42: 128, 132). The search continued for either 15-20 minutes, or up to an hour. (Vol. 42: 129, Vol. 201). At 5:15, almost 3 hours after the agents entered his apartment, Victor signed a handwritten consent to search form. This consent is involuntary and the fruit of the initial illegal entry, search, and arrest. It cannot be used to justify the search.

The question of whether a search is voluntary is one to be determined on the totality of the circumstances. *Schneckloth v. Bustamante*, 412 U.S. 218, 227 (1973). The State has the burden of proving that consent was given freely and voluntarily. *Id.* at 222; *Florida v. Royer*, 460 U.S. 491, 497 (1983). Mere "acquiescence to a claim of lawful authority" is not sufficient. *Schneckloth*, 412 U.S. 283, *quoting Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). In the absence of illegal conduct by the police, the State must prove voluntariness by the preponderance of the evidence. *Reynolds v. State*, 592 So. 2d 1082, 1086 (Fla. 1992). Where, as here, the consent is the product of an illegal detention or search, the prosecution must prove by clear and convincing evidence that it was voluntary.

[10] As explained above, the consent itself is the fruit of the illegal search and seizure.

Id. "[W]hen consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search." *Norman v. State*, 379 So. 2d 643, 647-48 (Fla. 1980); *Gonzalez v. State*, 578 So. 2d 729 (Fla. 3d DCA 1991).

The State cannot meet its burden under either standard. The fact that the form informed Victor that he had the right to withhold consent is not dispositive. *Reynolds*, 592 So. 2d at 1086. When the premises are searched before consent is obtained, "it would be reasonable for [the suspect] to think that refusing consent would be a futile gesture amounting to no more than 'closing the barn door after the horse is out.'" *United States v. Chambers*, 395 F.3d 563, 570 (6th Cir. 2005); *Grant v. State*, 978 So. 2d 862 (Fla. 2d DCA 2008) (illegal search not cured by owner's subsequent offer to show deputies around the property); *Norman*, 379 So. 2d at 647-48..

The totality of the circumstances here establishes coercion. Before the "consent" was obtained, the armed agents kicked down Victor Caraballo's door, handcuffed him and searched his apartment. Among the factors to be considered in determining whether consent is voluntary, are: "(1) the time and place of the encounter; (2) the number of officers present; and (3) the officers' words and actions." *Kutzorik v. State*, 891 So. 2d 645, 647 (Fla. 2d DCA 2005). Each of these factors weighs toward coercion. The encounter took place in Victor's home,

a more coercive setting than a public place. *Id.* at 648, *Miller v. State*, 865 So. 2d 584 (Fla. 5th DCA 2004). Numerous agents and officers entered his apartment. The agent's actions included a violent entry into Victor's home, the brandishing of firearms, handcuffing, and an extensive non-consensual search. *See United States v. Drayton*, 536 U.S. 194, 205 (2002) (holstered firearm noncoercive "absent active brandishing of the weapon."); *Reynolds*, *supra*, 592 So. 2d 1086-87 (noting that three officers frisked and handcuffed defendant before obtaining consent); *Kutzorik*, 891 So. 2d at 646-47.

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

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

The right to remain silent and the warning that anything said will be used against the individual are indispensable components of the *Miranda* warnings:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. *It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege*. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system – *that he is not in the presence of persons acting solely in his interest*.

Miranda, 384 U.S. at 469 (emphasis supplied).

The police and FDLE agents violated this core principle. Though they obtained Victor Caraballo's signature on a rights-waiver form, their subsequent statements rendered the waiver invalid. (R. 1039). Contrary to the form and *Miranda*, the police led Mr. Caraballo to believe his statements would help him and could not hurt him – when in fact they could be and were used to obtain his conviction and death sentence.

The interrogation took place nearly six hours after Agent Hidalgo read the *Miranda* warnings to Victor Caraballo at his apartment. He and Detective Morales chose not to re-read the warning before questioning Victor on tape at FDLE headquarters. (Vol. 42: 7-8). During the interrogation, they repeatedly contradicted the warning that Mr. Caraballo's statements would be used against him:

- Detective Morales told Victor it was "better for you to tell me the truth," and told him: "**N-nothing is going to happen to you.**" (R. 747).
- Special Agent Hidalgo said: "Right now the best thing you can do … tell him the truth …" (R. 762).
- Shortly thereafter, Detective Morales told Victor: "So … if … you tell me the truth, the day that you go to court, I am going to help you, Francisco is going to help you." (R. 763).
- Later, Morales implied that Victor would not go to jail so long as he was honest: "Why do you want to go to jail for those people? You are going to jail, not them. You're going to jail, you're bullcrapping, instead of telling me the truth." (R. 780).

- Morales told Victor he would lodge charges against him, *if* Victor did not tell "the truth." (R. 785).

- When Victor threatened to stop talking, SA Hidalgo told him "we're not accusing you of anything." (R. 786-87).

- Detective Morales even told Victor that he and Agent Hidalgo would testify to his confession, and that this would **help** him, saying: "I'm going to … I and Francisco we are going to go, the day of the trial, **we're going to say what you have said here … and that is going to help you.** (R. 791).

These lies completely undid the *Miranda* warnings given some six hours before. "The phrase 'honesty will not hurt you' is simply not compatible with the phrase 'anything you say can be used against you in court.'" *Hart v. Attorney General*, 323 F.3d 884, 894 (11th Cir. 2003). A signed *Miranda* waiver form is not conclusive proof of a valid waiver of rights. *Hart*, 323 F.3d at 893 (*citing North Carolina v. Butle*r, 441 U.S. 369, 373 (1979)), *Blasingame v. Estelle*, 604 F.2d 893, 896 (5th Cir.1979). "There are indeed steps that police might take in conjunction with or in advance of giving the Miranda warnings that would nullify or at least undermine them – for example, telling the suspect that if he refuses to talk to them his lack of cooperation will be reported to the prosecutor." *United States v. Ramirez*, 112 F.3d 849, 853 (7th Cir.), *cert. denied* 522 U.S. 892 (1997).

In *United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991), the court found error where the defendant signed the waiver after FBI agents told him that doing so would not hurt him: "[B]y telling Lavin that signing the waiver would not hurt him the agents contradicted the *Miranda* warning that a defendant's statements can be

used against the defendant in court, thereby misleading Lavin concerning the consequences of relinquishing his right to remain silent." *Id.* at 1435. In *Brown v. Crosby*, 249 F.Supp. 1285, 1307-08 (S.D. Fla. 2003), the district court found that a rights waiver form that stated that anything Brown said could be used in court "for or against you" was misleading.

A rights-waiver may also be negated by post-waiver statements contradicting the *Miranda* warnings. *Hart, supra*, 323 F.3d at 895 n.21. In *Hart*, police "carefully explained each *Miranda* warning …" *Id.* at 893. The Circuit Court held that post-waiver statements by police were incompatible with the *Miranda* warnings because they "suggested to Hart that an incriminating statement would not have detrimental consequences …"[11] *Id.* at 894; *see also U.S. v. Earle*, 473 F.Supp. 2d 131 (D. Mass. 2005) (statement that ICE agents "could help [Earle] with whatever problems he might have" if he was honest led him to believe his answers could help rather than hurt him).

Morales and Hidalgo used precisely the same tactics as those condemned by these decisions. If anything, their conduct differs from these decisions only insofar as the number of times they contradicted *Miranda*. The officers told Victor Caraballo that the best thing he could do was tell the truth, and that "nothing would

[11] Police also told Hart there were "pros and cons" to having a lawyer. 323 F.3d at 894.

happen" to him, and that they would help him if he did so. (R. 747, 763). They told Victor "we're not accusing you of anything" and implied that they would not charge him and he would not go to jail if he was honest. (R. 780, 785-77). Going still further beyond the statements condemned above, Morales and Hidalgo even told Victor that his statement would help him at trial. (R. 763, 791). The interrogation amounted to a campaign to negate the *Miranda* warnings, and the statement must be suppressed. U.S. Const. amends. V, XIV; Art. I, § 9, Fla. Const.

B The Tainted Interrogation Rendered The Statement Involuntary.

Beyond the violation of *Miranda*'s prophylactic rule, Victor Caraballo's confession was involuntary. In order for a statement to be voluntary, a statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (*quoting Bram v. United States*, 168 U.S. 532, 542-43 (1897)); *accord Johnson v. State*, 696 So. 2d 326 (Fla. 1997), *cert. denied* 522 U.S. 1120, 118 S.Ct. 1062. The police extracted Victor's confession by threats and promises, rendering it involuntary. The admission of this statement at trial violated the state and federal constitutions. U.S. Const. amends. V, XIV; Art. I, § 9, Fla. Const.

By the time of the recorded interrogation, Victor Caraballo had been in custody nearly 8 hours. Police kicked in the door of his apartment at 2:25. p.m. (Vol. 42: 85). When Agent Hidalgo arrived between 3:30 and 4:00: "He was sitting, leaning against a wall, and he was looking down and doing – his body was rocking back and forth against a wall." (Vol. 49: 16,18). The rights-waiver form was signed at 4:10. (Vol. 49: 25). Police brought Victor to FDLE headquarters at approximately 7:45. (Vol. 41: 113). Detective Morales and Agent Hidalgo began to interrogate Victor at 10:00. (Vol. 42: 8). They did not give a *Miranda* warning before the interrogation, relying instead on the 4:10 waiver. (Vol. 42: 7-8). By the end of the interrogation at 11:59, Victor Caraballo was "hungry and exhausted." (R. 836).

It was in this context that the detective and agent threatened to charge Victor and put him in jail if he did not tell them the truth. (R. 780, 785-77). Morales and Hidalgo extracted the statement by promising Victor it wouldn't hurt him, and that they would help him at trial. (R. 763, 791). Courts have found statements given in similar circumstances to be involuntary. In *White v. State*, 771 So. 2d 537 (Fla. 1st DCA 2000), the district court held that White's statement was involuntary where police told White he would not be arrested. In *Samuel v. State*, 898 So. 2d 233 (Fla. 4th DCA 2005), a threat to prosecute Samuel for other crimes rendered the statement involuntary. In *Brewer v. State*, 386 So. 2d 232 (Fla. 1980), "[t]he

officers raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial."

This Court has held that for a confession to be voluntary, "the mind of the accused should at the time be free to act, uninfluenced by fear or hope." *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992) (*quoting Simon v. State*, 5 Fla. 285, 296 (1853)). Nor may the circumstances be "calculated to delude the prisoner as to his true position." *Id.* The interrogation of Victor Caraballo manifestly deluded him as to his position, convincing him that his statements could only help him and that the interrogators would help him at trial. He confessed with the fear that he would be arrested and charged and with the hope – fanned by Detective Morales and Agent Hidalgo – that they would protect him and act on his behalf. His statements given under these circumstances were involuntary and inadmissible.

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

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998).

> As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Here the prosecution repeatedly ventured improper arguments. Not satisfied with merely striking hard blows, it instead struck foul ones. *See Berge*r, 295 U.S. at 88. This prosecutorial misconduct deprived Victor Caraballo of the due process of law, trial by an impartial jury, and a reliable sentencing process. U.S. Const. amend. VI, VIII, XIV: Art. I, §§ 9, 16, 17, Fla. Const.

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

Over defense objection, the prosecution repeatedly and flagrantly attacked defense counsel and denigrated the conduct of the defense. "A prosecutor may not ridicule a defendant or his theory of defense." *Riley v. State*, 560 So. 2d 279, 280 (Fla. 3d DCA 1990); accord *Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998).

During his guilt-phase closing argument, Assistant State Attorney Laeser attacked defense counsel's credibility. Updating the classic "used car salesman"/"sell a bridge" argument,[12] he compared the defense to a "Nigerian email" scam:

[12] *See Jackson v. State*, 421 So. 2d 15 (Fla. 3d DCA 1982); *Thornton v. State*, 852 So. 2d 911 (Fla. 3d DCA 2003); *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001).

> Now, defense attorney opened his case. He said we need to look at the evidence and who is actually responsible for these crimes. And the one thing I can tell you is you have all the equipment necessary to make that decision. You have good common sense.
>
> If you have got a computer somebody probably every once in a while sends you a letter saying that there's 40 million-dollars in a bank in Nigeria, boom, you'll send a few bucks their way. Or, in the old days somebody would come by with a vacuum cleaner, they want to sell you this new handy-dandy vacuum cleaner for only 500 bucks and it is really guaranteed forever.
>
> And all of your common sense is saying, I've learned enough in my life to know this is a scam and I'm going to have nothing to do with it, and that's all you need. You don't need any legal training.

(T. 1529-30). Mr. Laeser went on to argue that defense counsel were liars, while he would not mislead them:

> There is a proverb in this age which says only lawyers and painters can change white to black. That's a pretty hard slap against my profession, but I have to tell you my job is not to mislead you.
>
> My job is not to trick you. My job is not to tell you that the Judge is going to tell you one thing and it turns out the Judge is going to tell you the other thing. My job is to guide you if I can to come to the right decision.

(T. 1531-32). The prosecutor went on to warn jurors to "keep your eye on the ball," because "defense counsel has to distract you." (T. 1538). Counsel objected, and the court denied his motion for mistrial. (T. 1538-41). Mr. Laeser returned to this theme in the penalty phase, asking: "why the distraction?" (T. 2130).

Florida courts have repeatedly held that arguments attacking the integrity of defense counsel or suggesting that counsel is seeking to confuse the jury are

improper. The prosecution's arguments against defense counsel here are nearly identical to misconduct the courts have rejected in those cases. For example, in *State v. Benton*, 662 So. 2d 1364 (Fla. 3d DCA 1995), the court held that arguing it was defense counsel's "job to cross things up, to muddy the water," was improper. In *D'Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th DCA 1999), the court rejected arguments characterizing the defense as a "sea of confusion" which "defense counsel prays you will get lost in." *See Hightower v. State*, 592 So. 2d 689 (Fla. 3d DCA 1991) (argument that it was counsel's job to "to confuse witnesses, to try to put words in witnesses' mouths"); *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978) (argument that defense counsel was trying to distort the record and mislead the jury).

The prosecutor expanded on his theme by criticizing the defense counsel's cross-examination of the witnesses testifying against Victor Caraballo. Mr. Laeser finished his redirect examination of SA King by asking:

> Q. One more question. Any idea why every single question defense counsel asked you in cross-examination had to do[13] with whether or not Victor Caraballo is guilty of these crimes?
>
> A. No. No idea, no, sir.

(T. 1020). In closing argument, Mr. Laeser returned to this attack on defense counsel:

[13] Read in context, it is abundantly clear that Mr. Laeser said "did not have to do."

> Sometimes you can get an insight into a case by watching what questions are asked on cross-examination of each witness. Let's talk about that.
>
> Everybody is on the same path except all of a sudden she gets cross-examined about, well in the lease you have a certain number of days and a lawyer, there are going to be hearings and technically he wasn't really evicted. And then when she had trouble understanding where he was going, there was a question that went something like, let me ask you slowly.
>
> Why is she on trial? Did she do something wrong? Is she the defendant? Did she kill somebody? Did she rape somebody?
>
> So once you get into that sort of mind set that you have to be sort of cutesy or mean or whatever it is, it gives you a clue about what there really is in the case.
>
> Every single witness got cross-examined about the law. You don't decide the law. The Judge decides whether or not going into that apartment was lawful. The Judge decides whether or not that confession should be admissible. Those aren't your responsibilities so why spend all that time --
>
> MR. ROSENBERG: Objection, Your Honor. It is on voluntariness.
>
> THE COURT: Sustained.
>
> MR. LAESER: Why spend any time whatever cross-examining people about matters of the law? The reason is simple, the facts kill you. The facts hurt you, no matter how you say it …

(T. 1532-34). Mr. Laeser soon returned to this theme:

> 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).

Florida courts have consistently condemned such attacks. For example, in *Adams v. State,* 830 So. 2d 911, 915 (Fla. 3d DCA 2002), the court found improper an argument that "implied to the jury that defense counsel acted in a demeaning, discourteous and unprofessional manner during the cross-examination …" *See Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001) ("Do you recall the abuse and ridicule piled on him by Defense counsel on cross-examination? … I thought we were in a rape case and I had a woman up here who had been raped."); *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) ("And I guess it's part of that little saying when you don't have the facts you argue the law, or when you don't have the law, you argue the facts. And when you don't have either, you just sort of try to conjure up, sign (sic) your fists and say no one is believable.").

The prosecutor also insinuated that defense counsel had suborned perjury. In his penalty-phase closing, the prosecutor suggested that counsel had paid-off his experts, obtaining favorable testimony by putting "cash in [their] pockets." (T. 2132-33). Mr. Laeser 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). In fact, defense counsel pointed out this problem in his opening statement, and Dr. Alvarez testified that Victor's psychosis rendered the score inaccurate during his direct examination. (T. 1698, 1749-50). Later, Mr. Laeser suggested that counsel had bought Dr. Hughes' testimony:

> I'm not saying that he's doing anything wrong. Maybe if you get $35,000 it's sort of your instinct to start calling people by their first name, you have spent a lot of time with them. You know how $35,000 breaks down at $400 an hour; 87 hours. He spent 87 hours with defense counsel preparing the case.
>
> MR. DENARO: Objection, Judge.
>
> THE COURT: Overruled.
>
> MR. LAESER: Am I telling you that it flavored his testimony? I don't know. I -- I'm not going to suggest that. I mean, he seemed like a decent man and I'm not suggesting that he did anything wrong, but it's just sort of human nature. Somebody's putting dollars in your pocket, you know, maybe you're going to be a little bit kinder to them.
>
> Maybe when the opposing counsel asks you a question on cross-examination, you're just going to say what you want to say no matter what the answer to the question might be because you want to get it all out there.

(T. 2132-33).

Mr. Laeser's meaning was clear: Defense counsel had spent 87 hours[14] coaching Dr. Hughes, who would "say what you want to say no matter what the answer to the question might be," because defense counsel was "putting dollars in [his] pocket." "A suggestion that the defendant suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is completely improper." *Cooper v. State*, 712 So. 2d 1216 17 (Fla. 3d DCA 1988); *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001). Mr. Laeser's claim that he was not "suggesting that [the doctor] did anything wrong," did nothing to ameliorate this attack. "The denial of the attack is in itself tantamount to the attack." *D'Ambrosio*, 736 So. 2d at 48.

B The Prosecutor Used Improper Argument To Bolster His Witnesses.

While accusing the defense of buying favorable testimony, the State bolstered its own experts' credibility by giving them the Court's imprimatur and asserting that they had no interest in the case. In the course of criticizing the defense experts, Mr. Laeser told the jury:

[14] The prosecutor must have known that even this calculation was a lie, as he knew that the doctor had spent the bulk of his time reviewing documents and interviewing Victor and other witnesses.

> Do you think that the two doctors who were hired by the defense came to one conclusion and the judge – and the people appointed by the judge came to a different conclusion? I didn't hire those people.
>
> I'm not paying them out of the State Attorney's money. I pay Dr. Hughes in order to have the privilege of taking his deposition at $400 an hour, door to door.

(T. 2132).

The State impermissibly bolstered its experts' credibility by asserting they had no interest in the outcome of the case. *See Servis v. State*, 855 So. 2d 1190, 1194-95 (Fla. 3d DCA 2003); *Caraballo v. State*, 762 So. 2d 542, 544-45. (Fla. 5th DCA 2000). Moreover, it told the jurors that the witnesses were selected by the trial judge, thus giving them an aura of official sanction and impartiality. In a different context, this Court has observed: "It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999). Mr. Laeser went further by invoking the sanction of the judge himself to bolster the credibility of its own witnesses.

C The Prosecutor's Arguments Misstated The Law.

Mr. Laeser also repeatedly misstated the law. During his guilt-phase closing argument he urged the jury to apply the wrong standard, shifting the burden of proof to the defense:

> This is a difficult order. I think every juror maybe when they come in for jury duty might have a fear, a fear that they are placed on a jury and they might be in a situation where they were deliberating a case and they really thought the person was innocent.
>
> They didn't want to get involved in the possibility that a truly innocent person could be the victim [sic] of a crime. That's justice. That juror should fight all day and all night to acquit the innocent person. That's your duty. That's your obligation.

(T. 1528-29). The prosecutor completed his argument by telling jurors:

> You tell the Judge what is the truth as you understand it about what really took place for those few hours from roughly midnight on the 27th to about 3 a.m. to the 28th of April, 2002 and by your verdict, you will be creating justice.

(T. 1564).

A jury does not have to find a defendant innocent in order to acquit. *Stires v. State*, 824 So. 2d 943, 946 (Fla. 5th DCA 2002); *McNish v. State*, 45 Fla. 83, 85 (Fla. 1903). Likewise, a verdict does not turn on what jurors think is "true." *Clewis v. State*, 605 So. 2d 974, 975 (Fla. 3d DCA 1992) (error to argue guilt turned on which side the jury believed). Instead, the State must prove each element of each crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). By inviting the jury to convict on a standard other than proof beyond a reasonable doubt, the State shifted its burden to Victor Caraballo in violation of his constitutional rights.

The State continued to mislead jurors about the law in the second phase of the trial. In his penalty-phase opening argument, Mr. Laeser told jurors:

> So, for example – and it may not fit in this case but I need to explain it to you – so let's assume the State can prove one aggravating factor, and you listened to all the evidence and you found absolutely zero in 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."

(T. 1681-82). The prosecutor repeated this misstatement during his 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).

The prosecutor's arguments are directly contrary to the law. A jury is "neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Henyard v. State*, 689 So. 2d 239, 249-50 (Fla. 1996). The Court has condemned precisely the same argument. *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988). *See also Urbin v. State*, 714 So. 2d 411, 421 n.12 (Fla. 1998). In *Garron*, the

Court found this argument to be one of several it termed "egregious, inflammatory, and unfairly prejudicial."

The prosecution also misstated the standard for mitigation. Mr. Laeser told jurors that evidence was not mitigating because it did not *excuse* Victor from culpability. After conceding that Victor had a "hard home life," he pointed out that many people who were abused did not commit murders, then told the jury:

> Can that be an excuse? Can it really be an excuse? Do we say to every orphan, do we say to every child who grew up in the inner city, you know, if you commit a crime in the future, you get a free ride.
>
> It's okay, you don't have to be held responsible. We understand why people like you would commit crimes.

(T. 2109).

A mitigating factor is: "'any aspect of a defendant's character or record and any of the circumstances of the offense' that reasonably may serve as a basis for imposing a sentence less than death." *Ford v. State*, 802 So. 2d 1121 (Fla. 2001), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978). To be mitigating, circumstances need not excuse the defendant from criminal culpability, as would insanity or self-defense. *Clark v. Arizona*, 548 U.S. 375, 126 S.Ct. 2709, 2734 (2006); *Carter v. Carter*, 88 So. 2d 153, 159 (Fla. 1956) (examples of excuse include "self-defense, accident or insanity"). The prosecutor misguided the jury when he told them that by considering mitigating factors such as Victor's abusive childhood, they would be giving him a "free pass." Mr. Laeser further misled the

jury when he told them Victor's abusive childhood was not mitigating because not *everyone* who was abused or had a poor upbringing committed murder. He asked the jury: "Is there a cause and effect between what happened to Ana and how the defendant grew up or was raised or anything else?" (T. 2121). This argument falsely suggests that a circumstance cannot be mitigating unless it is a direct cause of the crime.

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

Any argument "fairly susceptible" of being interpreted as a comment on a defendant's failure to testify violates the right to remain silent guaranteed by the Fifth Amendment and Article I, Section 9. *Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000); *State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla.1986). The standard for determining whether a comment is "fairly susceptible" of being thus interpreted is a liberal one. *Id.* If the defendant is the only person who could contradict the State's evidence, the argument that the evidence is uncontradicted is a comment on the defendant's silence. *Rodriguez*, 753 So. 2d at 38. In its guilt-phase closing argument, the State commented on Victor Caraballo's silence both directly and indirectly.

First, the Assistant State Attorney openly argued that Victor's initial silence at his apartment showed he was guilty:

> Victor Caraballo really just decided not to call the police and for some reason he's totally and completely innocent and they go in that apartment and they say to him, what do you know about this?
>
> Does he say, oh, I'm so glad you're here? I'm safe now. The police are here to help me. I can tell you everything that I know. I can disclose the information. I can help you with your investigation.

(T. 1533-34).

Next, the prosecution commented on Victor's failure to contradict evidence. Defense counsel contested the voluntariness of Victor Caraballo's statement. He made this clear both in his own closing argument and by an objection during the State's argument. (T. 1506, 1509, 1533). Just three pages after that objection, the prosecutor told the jury:

> Anybody can come in and say, he didn't really waive his rights to an attorney. We just forced him to make a statement and then we put his signature there at the bottom. *We didn't hear that.* That is not what happened.

(T. 1536). The State thus used Victor's silence as both proof of his guilt and to convince jurors his statement was voluntary. These comments violated the Fifth Amendment and Article I, Section 9.

E The Prosecution Argued Mitigating Circumstances as Aggravation.

The State repeatedly argued that the jury should treat mitigating evidence as non-statutory aggravation. Florida's death-penalty statute strictly limits the factors the jury and judge may consider in aggravation. § 921.141, Fla. Stat. (2003); *see*

State v. Steele, 921 So. 2d 538, 544 (Fla. 2005) (*citing Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979)). The Court must "guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." *Miller*, 373 So. 2d at 885. Here the State used non-statutory aggravators to put its thumb on those scales. Treating "conduct that actually should militate in favor of a lesser penalty" as aggravation results in a denial of due process. U.S. Const. amend. XIV; Art. I § 9, Fla. Const.; *Zant v. Stephens*, 462 U.S. 862, 885 (1983), *quoted in Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997).

During the cross-examination of defense mitigation witness Dr. Michael Hughes, Mr. Laeser elicited testimony that Victor was "damaged beyond repair." (T. 1985). The State later argued this as a reason to impose death:

> [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).

This argument suggests that Victor's mental illness – a factor that "should militate in favor of a lesser penalty" – is in fact a reason to impose the death

penalty because he is irredeemable. *See Walker*, 707 So. 2d at 314 (a defendant's mental impairment militates in favor of a lesser penalty, and cannot be used as aggravation). Nothing in this argument attempts to *rebut* the mental illness mitigation. Instead, the prosecutor told the jury that because Victor was "damaged beyond repair," the appropriate penalty was death. In *Miller*, the Court reversed a death sentence where the trial judge "considered as an aggravating factor the defendant's allegedly incurable and dangerous mental illness." 373 So. 2d at 885.

This argument also urges future dangerousness as an aggravating factor. The prosecutor coupled the "damaged beyond repair" argument with the remark: "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?*" (T. 2129). Future-dangerousness arguments are an improper appeal to extra-statutory aggravation. *See Teffeteller v. State*, 439 So. 2d 840, (844-46). Both *Miller* and *Walker* condemned the use of mental-illness testimony to suggest that the defendant would present a danger in the future.

Mr. Laeser argued other mitigating evidence as aggravation, criticizing Victor for presenting testimony about his abusive childhood:

> 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. They tell you the worse things about their life, they tell you about sexual relationships, they tell you about terrible things that have happened in their family. Why? Because this defendant committed murder and

> his parents have to publicly shame themselves in order to ask 12 people to do something on their own son's behalf.
>
> * * *
>
> That father was on the witness stand talking about his own infidelity. His own mistakes, his own awful events. Why? Did he rob somebody? Did he kill somebody? Did he rape somebody? Did he kidnap somebody? Did he stab anybody?

(T. 2112-13). This argument in no way rebuts the mitigating evidence. Instead, it told the jury that the very act of presenting mitigation was yet another of Victor Caraballo's misdeeds to be counted against him in sentencing him to death.

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

The prosecutor offered a subtle variation on the "show the same mercy" argument this Court has condemned repeatedly. *See Brooks v. State*, 762 So. 2d 879, 901 (Fla. 2000); *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998). Mr. Laeser described the victim impact evidence in detail and at length, concluding: "That's the person that they killed." (T. 2107). He continued:

> Those five people didn't sit around and say, "What are the aggravating circumstances. What are the mitigating circumstances. Does this child deserve to live on?"
>
> Now, they made a decision in a greedy, awful and selfish and brutal way to take her life. Whatever those dreams were, whatever those possibilities were, it was all snuffed out that day, and what we ask you to do, is to decide upon a recommendation.

(T. 2108). Mr. Laeser contrasted the weighing of aggravation and mitigation due Victor Caraballo, with the thoughtless manner of Ana Angel's death, then immediately called for the jury's recommendation. Though perhaps more artful, this argument is no different than the "same mercy" argument. This Court has condemned such an argument as "blatantly impermissible." *Urbin*, 714 So. 2d at 421. It was an "unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation." *Rhodes v. State,* 547 So. 2d 1201, 1206 (1989).

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

The State inflamed the jurors' passions by making an improper "Golden Rule" argument. "In general, a 'golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." *Pagan v. State*, 830 So. 2d 792, 812 (Fla. 2002) (*quoting Williams v. State*, 689 So.2d 393, 399 (Fla. 3d DCA 1997)). In this case, the prosecutor did not merely *request* that jurors put themselves in Ana Angel's position and imagine her terror. He forced them to do so:

> …15 minutes when you're at a party and you're enjoying yourself just passes so quickly you don't even remember it took place.

> Let's talk about these 15 minutes. 15 minutes of crying and begging and screaming. I don't know what words she said to beg for her life. I don't know how loud. I didn't know how tearful she was, but for 15 minutes she was there.
>
> What I'm going to do is run this stopwatch for one minute. And start when I say the word "start" and stop when it saw the word "stop." I want you to think what 15 of those minutes must have been like for Ana and you decide whether or not it was cruel to make her suffer like that.
>
> Start. (Indicating) Stop. Were her minutes longer than that? When she knew in her heart that these people had probably killed Nelson and that they were going to kill her. What were those 15 minutes like? How excruciatingly slow as they were standing were those 15 minutes while those five men in the truck did nothing?

(T. 2137).

The Court has found golden-rule violations in extremely similar arguments. In *Garron v. State*, 528 So. 2d 353, 358-59 (Fla. 1988), the Court condemned the following argument: "[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying.... Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired." In *Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992), the Court found a golden rule violation where the prosecutor said: "it might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck." Just as the *Davis* prosecutor told jurors to think about how the knife would feel, Mr. Laeser required

the Victor Caraballo's jurors to spend a silent minute thinking about Ana Angel's suffering.

In *Davis v. State*, 928 So. 2d 1089, 1121 (Fla. 2005), the prosecutor suggested that in their deliberations, jurors should sit in silence for two minutes in order to appreciate the five minutes the victim remained conscious. The Court concluded that trial counsel may have been deficient but, while it was a "close case," no prejudice was established.

Mr. Laeser's argument was calculated to inflame the jurors' passions, and invite them to sentence Victor Caraballo based on something other than a sober weighing of the circumstances, undermining Victor's right to a trial before an impartial jury.

The State made a further inflammatory argument in a bid for sympathy. Victim impact testimony is admissible for the limited purpose of proving a victim's uniqueness and the impact of her death on the community. § 921.141(7), Fla. Stat. (2006); *see Windom v. State*, 656 So. 2d 432 (Fla. 1995); *Payne v. Tennessee*, 501 U.S. 88 (1991). The prosecution went further to argue what Ana Angel's future might have been like had she not been killed. (T. 2106-07). Such arguments are nothing more than improper appeals for sympathy. *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001) ("Someone is not going to grow old and enjoy … the everyday things that you and I take for granted …").

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

The prosecution used the victim impact testimony to urge the jury to reject the mitigating circumstances established by the defense. First, the State used victim impact testimony to argue that Victor Caraballo's abusive childhood should not be treated as a mitigating circumstance. Mr. Laeser argued that Victor's childhood was not mitigating because other abused people do not murder. (T. 2109-10). He concluded this thought by saying: "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 went on to compare Victor Caraballo to 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).

These arguments go far beyond the permitted use of victim impact testimony. Victim impact evidence is admissible only to show a victim's

"uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla. Stat. (2006). The State instead attempted to use this evidence to contrast the relative worth of Ana Angel and Victor Caraballo and suggest this as a reason to disregard mitigating factors.

I The Prosecution Improperly Invoked Religion.

The State invoked religion to tilt the scales in its favor. In presenting victim impact evidence, the State elicited testimony that Ana Angel was religious and attended Mass every week. (T. 1710). In his subsequent argument, Mr. Laeser invoked the name of God to suggest that his was the side of right. (T. 2105). He quoted the "Reverend Billy Graham." (T. 2137). He told the jury that "[s]ome of those seven deadly sins were running through" Victor. (T. 2138).

This Court has repeatedly warned against arguments invoking religion. *See, e.g., Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997); *Bonifay v. State*, 680 So. 2d 413, 418 n.10 (Fla. 1996). Such arguments "can easily cross the boundary of proper argument and become prejudicial argument." *Bonifay*, 680 So. 2d at 418 n.19. The State's improper argument here crossed that boundary.

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

The State cannot prove these arguments were harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla.1986). By the time the jury retired to render a verdict in the guilt phase, defense counsel's honesty and reliability had been undermined by improper attacks. The prosecution had commented on Victor Caraballo's silence, and told the jurors their duty was to acquit if Victor was *innocent*. When the jury began its penalty phase deliberations, the defense attorneys' integrity lay in tatters, destroyed by accusations of misleading the jury, comparisons to scam artists, and the insinuation that they had bought testimony. The prosecution had again misled jurors about the law that controlled their decision, had urged them to reject mitigation on incorrect grounds, and had inflamed their passions with improper arguments.

The defense attorneys objected to the arguments that they were trying to distract the jury, the attacks on the exercise of the right to cross-examination, and the suggestion that they had bought testimony. (T. 1533, 1538-41, 2130, 2132-33). In evaluating harm, however, the objected-to arguments do not stand in isolation. The Court will consider "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). Through the combined effect of the State's improper and inflammatory

arguments "the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted." *Id.*

IV THE PROSECUTION PRESENTED VICTIM IMPACT TESTIMONY BLAMING VICTOR CARABALLO FOR THE UNCHARGED DEATHS OF MS. ANGEL'S RELATIVES, AND USED VICTIM IMPACT TO INJECT RELIGION INTO THE JURORS' DELIBERATIONS.

Margarita Osorio's penalty-phase testimony blamed Victor Caraballo for two deaths in addition to Ana Angel's. This exceeded the scope of victim-impact testimony permitted by the state and federal constitutions. In *Payne v. Tennessee*, 501 U.S. 88 (1991), the Supreme Court held that there is no *per se* rule against the admission of evidence "about the victim and about the impact of the murder on the victim's family." *Id.* at 827. It recognized, however, that unduly prejudicial victim-impact testimony may nevertheless violate the right to due process. *Id.* at 825. The State presented victim-impact evidence against Victor Caraballo that deprived him of due process.

Ms. Osorio testified:

> I think the worse effect was on the two grandparents. One of them grandparents when seeing the news on TV fell on the ground and never saw again, and died a few months later.
>
> Q. Was that in the United States?
>
> A. In Colombia. My father also passed away a few months later after a deep depression.

(T. 1713).

Victim impact testimony is admissible to show "moral culpability" or blameworthiness. *Payne*, 501 U.S. at 825. This culpability turns in part on the foreseeable consequences of a defendant's actions. *Payne*, 508 U.S. at 838 (Souter, J., concurring). Every murderer knows that he will leave survivors "who will suffer harms and deprivations from the victim's death." The *death* of relatives, supposedly as a result of the victim's death, goes far beyond the type of foreseeable consequence useful in assessing Victor Caraballo's moral culpability. Moreover, defense counsel had no way to rebut this questionable lay testimony concerning the cause of these deaths. Ms. Osorio's inflammatory testimony was unduly prejudicial and violated the constitutional right to due process. U.S. Const. amend. 14, Art. I, § 9, Fla. Const.

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

The Court appointed Dr. Lazaro Garcia to evaluate Victor Caraballo's competence to stand trial. (R. 1588). Over defense objection, the court permitted the State to call Dr. Garcia as a penalty-phase witness. In doing so the Court violated Rule 3.211.

Rule 3.211 states, in pertinent part:

> (e) Limited Use of Competency Evidence.
>
> (1) The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.
>
> (2) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the state may request the production of any other portion of that report that, in fairness, ought to be considered.

Fla. R. Crim. P. 3.211(e). The admission of Dr. Garcia's testimony directly violated Rule 3.211.

Though superficially similar, this Court's opinion in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004), does not render Dr. Garcia's testimony admissible. In *Phillips*, the Court's conclusion that there was no Rule 3.211 violation relied on two factors not present here. First, the doctor in *Phillips* "did not state that he had interviewed Phillips for the determination of competency." 894 So. 2d at 41. Second, the doctor had been reappointed and reevaluated Phillips in response to his notice of mental mitigation. Neither of these factors applies to Dr. Garcia's testimony.

The court never appointed Dr. Garcia to evaluate Victor concerning mental mitigation. What is more, the doctor repeatedly stated that he had evaluated Victor Caraballo for competency, and this was the source of his testimony. (T. 2014, 2017, 2021, 2022). As an example, when asked whether he had requested medical records, he responded: "Yeah, I could have, but I was basically evaluating the person for competency." The State later directly elicited the fact of the competency evaluation:

Q. Your purpose was limited to one thing; is that right?

A. That's correct.

Q. And what was that?

A. Competency.

(T. 2021).

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

The Constitutions and Florida law forbid the execution of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002); § 921.147 (Fla. Stat. 2006). In order to establish mental retardation, a defendant must establish an IQ of 70 on a valid and reliable test. 65 Fla. Admin. Code 65G-4.011. The Court has interpreted this definition as creating a bright-line cut-off IQ of 70, without allowance for the

standard error inherent in psychological testing. *See Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007).

Taken together, the statute, the administrative code, and this Court's decisions make it impossible for a mentally retarded defendant to establish his condition where no valid test is available. The code requires a valid test, and the Court's interpretation of section 921.147 demands a precise number that cannot be established by a clinical impression. Under these standards, it was impossible for Victor Caraballo to carry his burden to prove mental retardation. All the witnesses agreed that the IQ testing was invalid. Victor scored 56 on the IQ test administered by Dr. Alvarez. (Vol. 55: 49). Because Victor was actively psychotic at the time, that number was invalid, and the doctor had to offer an opinion based on his clinical impression. (Vol. 55: 51-53). He concluded that Victor is mentally retarded, and estimated that Victor's IQ might be up to one standard deviation higher. Dr. Hughes agreed that Victor was mentally retarded, based on his own clinical impression, and also concluded the 56 IQ was invalid. (Vol. 56: 158, 174, 178). The state's expert, Dr. del Rio, went further: Dr. del Rio testified that there could never be a valid IQ score for a Victor because the available test was normed on Spaniards, not Puerto Ricans. (236-37).

The trial judge directly relied on this Court's 70 cut-off and the lack of a valid score in denying the motion to bar the death penalty. The judge's decision

and this Court's rigid interpretation of section 921.147 deprived Victor Caraballo of his rights to due process and equal protection, and exposed him to execution in violation of *Atkins*. U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

VII THE IMPOSITION OF THE DEATH SENTENCE BASED ON JUDICIAL FACT-FINDING IS CONTRARY TO *RING V. ARIZONA*, 536 U.S. 584, 589 (2002).

The judicial fact-finding required by Section 921.141 violates the Sixth and Fourteenth amendments as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see also Ring v. Arizona*, 536 U.S. 584, 589 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). In light of *Apprendi*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. 296, 303-04 (emphasis in the original). Moreover:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. *If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.*

Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 869 (2006).[15]

There can be no doubt that the Florida capital sentencing scheme violates the Sixth Amendment as interpreted by *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. A Florida defendant convicted of first-degree murder may be sentenced to death if and only if the judge makes findings of fact rendering the defendant death-eligible. § 921.141(3), Fla. Stat. (1999). Here as in *Ring* the "factfinding necessary to put [a defendant] to death" is the province of judges alone. This Court has succinctly stated:

> Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice.

State v. Steele, 921 So. 2d 538, 546 (Fla. 2005). [16]

---

[15] The Court has yet to address the effect of *Cunningham* on its post-*Ring* jurisprudence. *But see Williams v. State*, 967 So. 2d 735, 768 (2007) (Anstead, J. concurring and dissenting).

[16] The Court fears that knowledge of the jury's factual determinations could have *too great* an effect on judicial factfinding:

> [S]pecific jury findings on aggravators without guidance about their effect on the imposition of a sentence could unduly influence the trial court's own determination of how to sentence the defendant.

921 So. 2d at 546.

Florida cannot escape the requirements of *Apprendi* and *Ring* by recharacterizing the judge's statutorily-mandated findings as something other than "facts." The *Cunningham* majority rejected precisely this reasoning. In *Cunningham* the dissent argued that the California sentencing statute at issue did not require judicial factfinding. 127 S.Ct at 879 (Alito, J., dissenting). Instead, the statute referred to "circumstances in aggravation," permitting California judges to increase a sentence based on factors such as policy considerations. *Id., citing* Cal. Penal Code Ann. § 1170(b) (emphasis added in the opinion). The majority disagreed with this position. 127 S.Ct. at 863.

In rejecting this argument the Court emphasized that the California rules repeatedly refer to "facts." 127 S.Ct. 862-63. The same reasoning applies to the Florida capital sentencing scheme. Section 921.141 distinctly denominates the judge's findings "facts." It instructs the judge to "set forth in writing its findings upon which the sentence of death is based as to the facts …" and requires that a death sentence "be supported by specific written findings of fact …" § 921.141, Fla. Stat. (1999). As in *Cunningham*, the Court has determined that the findings that increase the sentence are factual ones.

The prior-conviction exception the Court has carved out does not render Victor Caraballo's sentence constitutional. The Court has held that there is no Sixth Amendment violation where one of the aggravating circumstances is a prior

violent felony. See, *e.g.*, *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) ("… the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional."), *cert. denied* 539 U.S. 962 (2003). Section 921.141 does not define death-eligibility by the existence of a single aggravator. [17]

VIII CUMULATIVE ERROR

The cumulative effect of the above errors deprived Victor Caraballo of due process of law, and a reliable sentencing process. The admission of evidence obtained in violation of the constitutions, compounded by egregiously improper arguments, the use of improper victim-impact evidence, as well as an unattainable standard for proving mental retardation combine to undermine any confidence in the conviction and sentence before the Court.

IX PROPORTIONALITY

Even in the face of weighty aggravation, extensive mental mitigation will render the death sentence disproportionate. *See Green v. State*, 975 So. 2d 1081 (Fla. 2008); *Offord v. State*, 959 So.2d 187, 191-92 (Fla. 2007). This is true even

[17] Should the Court hold that the jury *is* the factfinder under section 921.141, the non-unanimous verdict independently violated Victor Caraballo's right to a unanimous jury. *Bottoson*, 833 So. 2d at 714-15 (Shaw, J., concurring); *id*. at 709-10 (Anstead, C.J., concurring); *id*. at 723-24 & n.63 (Pariente, J., concurring).

among the "most aggravated" of murders. *Crook v. State*, 908 So. 2d 350 (Fla. 2005). Proportionality review requires a qualitative review of the aggravation and mitigation under the totality of the facts. *Crook*, 908 So. 2d at 356. The aggravating circumstances found by the trial court in this case are weighty ones. But they must be viewed in the context of substantial mitigation. The record established that Victor Caraballo's mental condition was rapidly deteriorating in the year before this crime. He was repeatedly hospitalized after attempted suicides and suicidal gestures, and he was plainly psychotic – facts found by the trial court. (R. 2751-52, 2759). Just 15 days before this crime he was released, unmedicated, with suicidal and homicidal ideation. *Compare Green*, *supra*, (defendant recently committed for treatment). The trial court found that Victor acted under the influence of extreme mental and emotional disturbance, observing that Victor remained actively psychotic and severely disturbed. (R. 2751). The trial judge additionally found the statutory mitigating factor of no significant history of prior criminal activity. (R. 2751-52). The judge moreover found that Victor's psychiatric problems went beyond the statutory mitigator to establish further non-statutory mitigation. (R. 2759-60). The court also found as mitigation Victor's horrendous childhood, characterized by neglect, beatings, and even sexual abuse. (R. 2755). While the Court may conclude that this case is greatly aggravated, it is not among the least mitigated.

CONCLUSION

For the foregoing reasons, the sentence of death and the plea of guilty must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:_____
ANDREW STANTON
Fla. Bar No. 0446779
Assistant Public Defender

CERTIFICATE OF SERVICE

I Andrew Stanton, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to counsel for the Appellee Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on _____.

_____
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