Electronically Filed 10/24/2013 02:11:22 PM ET

RECEIVED, 10/24/2013 14:13:41, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC12-2468

TIMOTHY W. FLETCHER,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PUTNAM COUNTY

CRIMINAL DIVISION

****

REPLY BRIEF OF APPELLANT

J. RAFAEL RODRIGUEZ
Specially Appointed Public
Defender for Timothy W. Fletcher

LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, Florida 33155
(305) 667-4445
(305) 667-4118 (FAX)

Oral Argument Requested

Appellant, Timothy W. Fletcher, respectfully requests oral argument in this capital appeal.

TABLE OF CONTENTS

(V)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S OBJECTIONS TO CONSOLIDATION OF OFFENSES

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

(VII)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE ADMISSION OF IMPROPER NON-STATUTORY AGGRAVATING EVIDENCE AT THE PENALTY PHASE

(VIII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

(IX)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

(X)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

TABLE OF CITATION OF AUTHORITIES

Constitutions

Statutes

INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, the pre-trial transcripts, the trial transcripts and the sentencing transcripts and the symbol "AB" will designate Appellee's Brief.

ARGUMENT

(I)

DEFENDANT WAS DENIED A FAIR TRIAL WITH THE ADMISSION OF TESTIMONY THAT DEFENDANT WAS PREVIOUSLY SENTENCED IN ANOTHER CASE

In this case, exclusion of evidence pertaining to Defendant's prior offenses and prison sentence was a central concern of the defense. The defense filed motions *in limine* requesting that no mention be made of the offenses on which Defendant was serving jail time when he escaped. (R. 495-496; R. 569-571; R. 609; R. 700). The court entered an order *granting* Defendant's motion *in limine* concerning the crime for which Defendant was in custody at the time of his escape. (R. 692, ¶3). A stipulation was agreed to by both parties precisely to avoid this evidence. (R. 2675-2676; R. 2677; R. 3078; R. 708). Despite these careful steps, the prosecution elicited testimony and evidence which clearly revealed

Defendant's prison sentence to the jury.[1] Off. Faulkner testified that Defendant had told him he had been sentenced. (R. 2542-2543). Officer Charles Word had testified that B-pod, where Defendant was housed, was a felony area. (R. 2481). The State played Defendant's video statement in which Defendant stated he "*had just got sentenced to the ten years*," and that "*ten years is a long-ass time*." (R. 3073-3074).

The State argues that the foregoing testimony did not merit a mistrial. In particular, the State points out that Off. Faulkner did not mention the length of Defendant's sentence. Rather, his testimony was cut off. (AB-38). The State, however, fails to mention that previously, Officer Charles Word had testified that B-pod, where Defendant was housed, was a felony area. It cannot be seriously asserted that jurors were unaware that Defendant was serving a prison sentence *for a felony*. Moreover, the video recording plainly revealed the length of Defendant's sentence. As the trial judge herself stated: "[I]t doesn't take a rocket scientist to figure out that *you got to do something pretty bad to get ten years, I mean, quite frankly*." (R. 3078) (emphasis supplied).

[1] The State notes that, for purposes of this argument, the complained-of evidence is considered inadmissible. However, the State asserts that it is not clear whether the evidence would have been inadmissible or admissible to prove the escape charge. (AB-36, n. 23). In view of the parties' stipulation, the inadmissibility of this evidence is no longer subject to question. The State should not be allowed to take a contradictory position on appeal.

Based on the foregoing, the jurors in this case learned that Defendant was imprisoned for another felony for ten years. No amount of instructions by the trial court could "unring the bell." This Court has ruled that the erroneous admission of collateral crimes is *presumed harmful*. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Czubak v. State, 570 So.2d 925, 928 (Fla. 1990); Robertson v. State, 829 So.2d 901, 913-914 (Fla. 2002); Agatheas v. State, 77 So.3d 1232, 1240 (Fla. 2011). This Court has recognized that such evidence is presumptively harmful because of the danger that a jury will take the bad character or propensity to crime as evidence of guilt of the crime charged. Castro, supra.

The State cites to Ferguson v. State, 417 So.2d 639, 642 (Fla. 1982), Cox v. State, 819 So.2d 705 (Fla. 2002), and Ruger v. State, 941 So.2d 1182, 1185 (Fla. 4th DCA 2006), in support of its position that a passing reference to a defendant's prison sentence would not warrant a mistrial. These cases are clearly distinguishable. For example, in Ferguson, this Court considered a comment by the prosecutor that *an accomplice* had been found guilty. Defense counsel made a "general" objection. This Court questioned whether the objection and subsequent motion for mistrial properly preserved the point for appellate review. Id., 417 So.2d at 641. Nevertheless, this Court sustained the trial court's ruling denying the motion for mistrial because the prosecutor's comment was made in rebuttal *in response* to the defense theory and was a fair reply. Id., at 642. In contrast, the

evidence in this case did not concern an accomplice, but directly implicated Defendant himself. Defense counsel made specific objections. Moreover, the prosecution did not present the evidence as "fair reply," but through direct examination. In Cox, this Court reviewed a defendant's conviction for capital murder of a fellow inmate. The trial court entered an order precluding the state from introducing evidence of the defendant's statement that he was serving to life sentences. *The state's witnesses complied with this order*. During the defense case, the defendant's attorneys engaged in an openly hostile and argumentative examination of an inmate witness, who blurted out that the defendant was serving two life sentences. This Court upheld the trial court's denial of the defendant's motion for mistrial, noting that the crime occurred at a correctional institution and *defense counsel assumed the risks of argumentatively questioning an openly hostile witness in an extraordinarily combative manner*. Id., at 714. In contrast, in this case *the state's witnesses* violated the court's motion in limine. Moreover, defense counsel did not assume the risk of eliciting the prison testimony of Defendant's ten-year sentence for a felony through argumentative questioning. Lastly, in Ruger v. State, 941 So.2d 1182 (Fla. 4th DCA 2006), the Fourth District considered a comment by a witness that the defendant had just recently got out of prison. The appellate court noted that the comment was brief, isolated and inadvertent and, as such, did not merit a mistrial. The court also noted that the comment was

cumulative of other un-objected to evidence that the defendant had just gotten out of jail. Id., at 1185. In contrast, the testimony and evidence was not limited to one witness, but was presented through Officers Word and Faulkner and the video statement.[2] The evidence was not cumulative of other un-objected to evidence. The State argues that evidence that Defendant was serving a sentence was cumulative to the fact that he was in lawful custody. However, this does not take into account the fact that jurors learned he was serving a felony sentence, which, as the trial judge herself noted, "does not take a rocket scientist to figure out that *you got to do something pretty bad to get ten years, I mean, quite frankly*." (R. 3078).

The State attempts to distinguish Brown v. State, 719 So.2d 882 (Fla. 1998), on grounds that the nature of Defendant's prior offense was never revealed to the jury. In fact, jurors were well aware that Defendant had been convicted of a felony for which he was serving ten years. The State argues that Sanders v. State, 517 So.2d 134 (Fla. 4th DCA 1987) is distinguishable because in Sanders the nature of the defendant's prior offense was revealed to the jury and the mention in this case was fleeting and inadvertent. As previously noted, the jurors were made aware that Defendant had been convicted of a felony for which he was serving ten years. The evidence was incrementally introduced to the jury through two witnesses and the video tape. The State acknowledges that the court in Cannon v. State, 529 So.2d

[2] This undermines the notion that the offending evidence was merely a "blip" in the proceedings. (AB-38).

814 (Fla. 1st DCA 1988), found that the trial court's act informing jurors that the defendant was serving a life sentence was error. However, the State maintains that, unlike Cannon, the trial court in this case did not allow evidence of Defendant's ten-year sentence. Defendant reiterates that Defendant's imprisonment for a felony and sentence for ten years was put forward and the curative actions taken by the court were insufficient to "unring" the bell. The test is *not* whether there was overwhelming evidence of guilt. See Gregory v. State, 118 So.3d 770, 782 (Fla. 2013). Rather, Defendant maintains there is a reasonable possibility that the presentation of the evidence and testimony affected the verdict. Surely, once this evidence came out jurors could rather easily conclude that Defendant, as a convicted felon serving a substantial amount of time for "*something pretty bad*," was likely guilty of the charged offense and merited death. The error mandates reversal in light of Defendant's continual objections and the highly prejudicial impact of evidence of Defendant's criminal background.

(II)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENT

The State argues that Defendant was not denied a fair trial when the prosecutor stated that Defendant did not want to talk during his post-arrest statement. In particular, the State points out that Defendant had waived his

Miranda rights and had never invoked his right to remain silent. The State relies on Valle v. State, 474 So.2d 796 (Fla. 1985), and Downs v. Moore, 801 So.2d 906, 910-912 (Fla. 2001). In Valle, this Court agreed that there should not be any comment on a defendant's right to remain silent, but noted that the defendant had not invoked Miranda by refusing to answer one question out of many. Id., at 801. Here, Defendant had invoked his right to silence at the very beginning of the recording by informing officers he did not want to talk to anyone. (R. 3813). In Downs, the prosecutor's *cross-examination* of the defendant on his failure to tell police about circumstances of crime proper impeachment was considered proper. Here, Defendant did not take the stand. Comments on a defendant's post-arrest silence are improper. See State v. Hoggins, 718 So.2d 761, 769 (Fla. 1998). The State argues that Hoggins involves an issue pertaining to a defendant's post-arrest, pre-Miranda silence. (AB-44). However, in Hoggins, this Court found that error occurred when the prosecutor commented on the defendant's pre-Miranda silence at the time of his arrest *and* when he commented on the defendant's post-Miranda silence. Id., at 772. See also Downs v. Moore, supra, at 910 (citing Hoggins).[3]

[3] As this Court recently observed: "`[C]ommenting on the silence of an accused is *not* a viable strategy for obtaining convictions, and any comment—direct or indirect—by *anyone at trial* on this right is constitutional error that should be avoided.'" Davis v. State, ___ So.3d ___, 38 Fla.L.Weekly S523, S530 (Fla., July 3, 2013)(quoting Ventura v. State, 29 So.3d 1086, 1088-89 (Fla. 2010)(original emphasis)).

The State argues that the comments asking jurors to "*send the message to this defendant* that his behavior is not acceptable," and "[*S]end the message to him* and tell him, it's not okay to kill people, and, "*You send that message* and you find him guilty as charged" (R. 3301)(emphasis supplied), were not improper. The State likens these remarks to grandiose arguments asking jurors to take action. (AB-47). The State cites to Zack v. State, 911 So.2d 1190 (Fla. 2005), where this Court found that a prosecutor's admonition to jurors to act on behalf of the community was not a "send a message" exhortation because he did not tell jurors to send a message to other defendants, but rather, to act on behalf of the community. Id., at 1206. In this case, however, the prosecutor specifically employed the oratorical devise "send a message." This violated this Court's ruling in Campbell v. State, 679 So.2d 720 (Fla. 1996).[4]

(III)

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO DEFENSE COUNSEL'S ADMISSIONS OF GUILT DURING OPENING STATEMENT

The State argues the record does not support the proposition that defense counsel's concession to the collateral offenses constituted ineffective assistance of

[4] It is undeniably improper to ask jurors to send a message to a defendant. For example, in Brown v. State, 754 So.2d 188 (Fla. 5th DCA 2000), the State apparently conceded that it was improper for the prosecutor to argue, among other things, that by the jury's verdict, it could send a message to the defendant (Brown) that trafficking in cocaine was unacceptable. Id., at 189.

counsel. The State points to the court's colloquy with Defendant. (AB-51). This argument fails to account for the prosecutor's references to defense counsel's concessions in his argument to the jury. (R. 3268; R. 3275). Also, this argument fails to address the fact that the trial court did *not* colloquy Defendant on the implications of such concessions in Defendant's penalty phase and did *not* plainly inform Defendant that counsel was *conceding* guilt, but *only not contesting* some of the counts.[5] Defendant suffered obvious prejudice as a result of his trial counsel's concessions. In fact, the State on appeal asserts that Defendant failed to prove harmful error when the trial court denied his motion to suppress his post-arrest statement because Defendant "did not contest the vast majority of the charges and evidence against him…" (AB-59). Moreover, the State argues that the prosecutor's comments asking jurors to send a message did not taint the jury's verdict, in light of the fact that "the defense had conceded that Fletcher had done everything charged except the actual killing of Helen Googe." (AB-48).

(IV)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENT

The State argues that where a defendant invokes his right to remain silent prior to Miranda, law enforcement have no duty to refrain from questioning the

[5] The trial court subsequently gave "great weight" to two of the three aggravating circumstances. (R. 935-937).

defendant. Rather, law enforcement may read the defendant his Miranda rights, which qualifies as an adequate clarification of the defendant's intent. (AB-57). In Miles v. State, 60 So.3d 447 (Fla. 1st DCA 2011), the First District dealt with this issue specifically. In Miles, the defendant told detectives that he did not want to talk. The detectives proceeded to question the defendant and read him his Miranda rights. The defendant ultimately gave incriminating statements. The appellate court ruled the trial court should have granted the motion to suppress. The First District made clear that law enforcement must not begin interrogation, or if it has already begun, must immediately cease, if the suspect indicates he or she does not want to be interrogated. Id., at 451 (quoting Cuervo v. State, 967 So.2d 155, 161 (Fla. 2007)). The Court in Miles also noted that statements obtained after a suspect has invoked his right to remain silent may only be admitted when the suspect's right was scrupulously honored. Id. (quoting Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)). In Miles, the police read the defendant his Miranda rights *after* his invocation of silence. The court, nonetheless, found that the defendant's statement was inadmissible. Id., at 452-453. As such, the State's claim that the decision in Miles did not clarify whether a subsequent Miranda waiver qualifies as adequate clarification of the defendant's intent is not supported by a careful reading of the decision itself.[6] In this case, Defendant

[6] The Miles decision is grounded on the concept that the Miranda warnings are

invoked his right to remain silent and law enforcement should not have interviewed him as they did not scrupulously honor his right to silence. Moreover, Defendant's statement was the cornerstone of the prosecution's case. The denial of Defendant's motion to suppress and the subsequent admission of Defendant's statement was undeniably harmful error. Introduction of Defendant's statement could have contributed to the jury's verdicts. See, e.g., Chavers v. State, 115 So.3d 1017, 1019-1020 (Fla. 1st DCA 2013)(improper admission of DVD of defendant's statement harmful error because DVD could have contributed to jury's verdicts).

(V)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S OBJECTIONS TO CONSOLIDATION OF OFFENSES

The State maintains that all of the crimes charged against Defendant had a sufficient causal link and demonstrated an uninterrupted crime spree. The State asserts that all the crimes occurred within ten miles of each other and within a few hours of each other. As such, the State concludes that Defendant's motions for severance were properly denied. (AB-63-64).

---

prophylactic in nature and safeguard Fifth Amendment rights. However, the Miranda rights are not the genesis of those rights. The right to remain silent derives from the Constitution and not from the Miranda warnings themselves. Consequently, a defendant's right to remain silent does not attach only upon the commencement of questioning.

In support of its argument, the State largely relies on Gudinas v. State, 693 So.2d 953 (Fla. 1997).[7] In Gudinas, this Court upheld joinder of two separate criminal episodes. The defendant attempted rape one woman in the same parking area where he subsequently murdered and raped another woman. This Court explained that the defendant's unsuccessful attempt to rape the first woman may have provided a causal link to his completed attack on the second woman. Id., at 960. Furthermore, the attacks were separated by less than one hour and constituted a crime spree. Id.

The decision in Gudinas is clearly distinguishable from this case. Defendant's crimes were separated by time and place. The victim's home was ten miles away (not in the same parking area as in Gudinas). Unlike Gudinas, the escape and the car thefts in this case occurred more than one hour before the entry into the victim's home. Notably, the State does not address the fact that joinder of the escape count necessitated proof that Defendant was incarcerated. At trial, unfortunately for Defendant, proof that Defendant was a felon and serving ten years was brought to the attention of the jury. Additionally, there was no need to allow consolidation of the two separate car burglaries. These offenses involved

[7] The State also relies on Lugo v. State, 845 So.2d 74 (Fla. 2003), for the proposition that criminal charges joined for trial must be considered in an episodic sense. (AB-62). However, Lugo is distinguishable from this case because Lugo involved an overarching racketeering charge which included two sets of criminal episodes as predicate acts. Id., at 93-94.

two other victims and had no connection to the crimes charged in the indictment. The State argues that severance was not necessary to achieve a fair determination of Defendant's guilt because the joined offenses would have been admissible as collateral evidence to the other charges to establish the context of the crime spree. (AB-64-65). The standard for determining admissibility for collateral crimes evidence is vastly different than the standard for consolidation. A defendant is entitled to a limiting instruction and such evidence must not become a feature of the trial. Also, a court must engage in §90.403, Florida Statutes, balancing analysis. See Roark v. State, 620 So.2d 237, 240 (Fla. 1st DCA 1993). Defendant was not afforded any of these protections. Moreover, there was no need to admit evidence of Defendant's escape, or his attempted burglaries in order to explain the subsequent homicide.

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

The State maintains that the prosecutor's reference concerning the appropriate sentence for Defendant who labeled the victim a "bitch, ignorant dumb-ass" (R. 3651), was not a comment on lack of remorse. Rather, the State asserts that the prosecutor was just recounting what Defendant had said about the victim. (AB-67). On the contrary, the prosecutor was actively seeking a death

recommendation against Defendant because he held the victim in such low disregard and showed no remorse. This comment was a deliberate follow-up to Dr. Krop's cross-examination testimony and Dr. Prichard's direct examination testimony. Dr. Krop was questioned by the prosecutor on Defendant's post-arrest statement concerning the victim in the context of lack of remorse. (R. 3457-3458). Dr. Prichard testified that Defendant's lack of remorse was partly established in his post-arrest statement, when he labeled the victim "ignorant." (R. 3599-3600). The State claims that the prosecutor's litany of examples denigrating Defendant's mitigation by pointing out that other people do not murder just because they have the same background was just providing the jury a basis to give the mitigation less weight. (AB-67-68). On the contrary, the prosecutor purposefully and improperly compared whole groups of people to Defendant in a transparent effort to *wholly* undermine mitigation evidence of drug addiction, depression, physical abuse and artistic ability.

(VII)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE ADMISSION OF IMPROPER NON-STATUTORY AGGRAVATING EVIDENCE AT THE PENALTY PHASE

The State maintains that Dr. Pritchard's testimony concerning lack of remorse as part of the diagnostic criteria for a mental health diagnosis does not require reversal. In support of this position, the State cites to Silvia v. State, 60

So.3d 959 (Fla. 2011). The State's reliance on Silvia is wholly misplaced. In Silvia, the prosecutor asked its expert witness about the MMPI data. The expert mentioned that someone who lacks respect for authority shows lacks of remorse. After objection by the defense, the State argued that the testimony was not improper because the expert was talking generally about Silvia's MMPI score. The trial court directed the expert to clarify that just because an individual has a certain profile on the MMPI does not mean that they all have the characteristics of the profile. Id., at 975. Subsequently, when the expert on cross-examination mentioned lack of remorse as part of the criteria for antisocial personality disorders, the court struck the testimony and advised the jury to disregard the question and answer. Id. This Court emphasized that the prosecution did not attempt to introduce lack of remorse and made no argument concerning lack of remorse during closing argument. Id., at 976. Under these circumstances, this Court concluded the trial court did not abuse its discretion in denying the defense motion for mistrial. Id.

By contrast, in this case, Dr. Prichard testified that persons with antisocial personality disorders usually tend to have them for their entire life and do not respond to medications. (R. 3567). He pointed out that many people call this disorder *the criminal personality*. (R. 3567). Basically, the disorder is a pervasive pattern of the violation of the rights of others in societal norms. (R. 3567-3568).

Dr. Prichard explained that as such a person with this disorder continuously gets into trouble, breaks the rules, gets into *criminal trouble*, says he going to change things but does not, and gets into a lot of fights and steals things. (R. 3568). Such a person "engages in a lot of criminal conduct." (R. 3568). Dr. Pritchard's references to lack of remorse were not isolated and brief. Rather, he repeatedly labeled Defendant a "psychopath" (R. 3603; R. 3604; R. 3605), and explained that Defendant exhibited a kind of "turbocharged" antisocial personality disorder. (R. 3604). Dr. Pritchard did not testify "generally" (Silvia, supra at 975) about lack of remorse. In fact, Dr. Prichard testified that his "primary diagnosis" was that Defendant had an antisocial personality disorder. (R. 3559; R. 3566). Dr. Prichard specifically testified that Defendant *exhibited lack of remorse*. (R. 3598). Rather than striking this reference and instructing jurors to disregard it (Silvia, supra at 975), the trial court in this case overruled the defense objection. (R. 3598). Dr. Prichard testified that his lack of remorse was indicated when Defendant stole a vehicle when keys were left in it. (R. 3599). Additionally, Dr. Prichard noted this factor was established in Defendant's post-arrest statement, where Defendant said the victim was ignorant because she wanted to fight over 37 dollars and all she had to do was hand over the 37 dollars and her PIN number for her credit car and she would only have been tied up. According to Dr. Prichard, this was rationalization, in that if the victim had only behaved herself there would have been a different

outcome. (R. 3599-3600). During closing argument, the assistant state attorney drove the lack-of-remorse point home, noting:

> MR. JOHNSON:"What is the appropriate sentence for someone who, just *three days after her murder*, refers to her with – by terms such as bitch, ignorant, dumb-ass?" (emphasis supplied)(R. 3651).[8]

As such, unlike Silvia, the prosecutor in this case did raise the issue of lack of remorse in argument to the jury.

The State repeats its argument before the trial court (R. 3571) that Defendant had "opened the door" to all mental health evidence, including antisocial personality disorder. However, as the defense noted below Dr. Prichard's testimony was *not* in the nature of rebuttal. Defense counsel argued that the State just wanted to get much more detailed about the disorder in a prejudicial way. (R. 3574). The State made clear that Defendant's pervasive pattern of criminal conduct was not mitigation. (R. 3575). The defense countered that it was *not* arguing that the prior record was mitigation. (R. 3575).

[8] The prosecutor's reference to Defendant's attitude three days after the death of Ms. Googe was no accident. When the prosecutor questioned Dr. Krop during the penalty phase, he asked about one of the criteria for antisocial personality disorder which involved being indifferent to or rationalizing having hurt others. The prosecutor specifically asked: "A lack of remorse, correct?" (R. 3455). The prosecutor followed this question with explicit references to Defendant's comments in his post-arrest statement that Defendant called the victim a "dumb-ass" for not recognizing the gun used was hers (R. 3457) and was "ignorant" for fighting over 37 dollars. (R. 3458).

The State argues that mental health experts can testify about a defendant's criminal past during a penalty phase. The State cites to Hilton v. State, 117 So.3d 742 (Fla. 2013), in support of its position. The State's reliance on Hilton is totally misplaced. In Hilton, this Court found that Dr. Prichard's testimony about the defendant's past criminal conduct was proper. In Hilton, the *defense had claimed that he had done nothing wrong prior to this crime and that the change in his character was created by Ritalin*. In fact, the defendant's penalty phase defense "relied heavily on the assertion that he was law-abiding citizen prior to his exposure to Ritalin." Id., at 751. This Court concluded that Prichard's testimony was provided in rebuttal to that assertion. Id. The circumstances in this case are completely different. Dr. Krop, the defense expert, mentioned Defendant's criminal history past. The defense expert *did not in any way, shape or form claim* that Defendant was a law-abiding citizen prior to the charged crime. Also, the defense made clear that evidence of Defendant' s criminal past was not being offered in mitigation whatsoever. (R. 3575). Dr. Prichard testified that he reviewed Defendant's prison records and police reports (R. 3554-3556; R. 3559); that Defendant got into *criminal trouble* (R. 3568); that Defendant began *criminally offending* at age 13 or 14 (R. 3570-3571), stealing cars and had *ten juvenile arrests*, ten school suspensions before finally being expelled in the 9th grade and was *sent to prison* as a *youthful offender* in 2000 (R. 3570-3571); that

Defendant was a "psychopath" (R. 3603; R. 3604; R. 3605); and that Defendant exhibited a kind of "turbocharged" antisocial personality disorder. (R. 3604). The foregoing testimony cannot in any way be considered proper rebuttal testimony.

The State argues that the prosecution did not ask Dr. Pritchard about future dangerousness. The record shows, however, that Dr. Prichard testified that antisocial personality disorder is chronic, beginning at age 13 until 28. (R. 3601). Dr. Prichard addressed the psychopathy checklist (R. 3602-3603), which consists of 20 items which can score up to 40. (R. 3604).[9] As the trial court recognized, Dr. Prichard's testimony about the psychopathy checklist was brought up exclusively by the State, not the defense. (R. 3607-3608).[10] As such, it cannot be stated that this testimony was offered as rebuttal. It cannot be ignored that Dr. Prichard repeatedly labeled Defendant a "psychopath." (R. 3603; R. 3604; R. 3605). It cannot be seriously suggested that Dr. Prichard's testimony was a result of isolated questioning.[11]

---

[9] Dr. Prichard *conceded* that the psychopathy checklist is partly used to determine future dangerousness. (R. 3606-3607).

[10] During Dr. Krop's cross-examination, the prosecutor asked about the psychopathy scale. (R. 3459). Specifically, the prosecutor asked Dr. Krop if the scale helped determine whether someone was a *psychopath*. (R. 3460). The prosecutor asked Dr. Krop if a person who is a *psychopath* would be a level above a person with antisocial personality disorder. (R. 3462). He asked about traits Defendant shared with a *psychopath*. (R. 3463).

[11] The trial judge accurately observed: "I'm a juror, I'm sitting there listening and I'm hearing this guy's a psychopath, it tends to be aggravating." (R. 3608).

Dr. Prichard's testimony was highly prejudicial and constituted nonstatutory aggravating evidence. Dr. Prichard made repeated comments as to Defendant's lack of remorse, Defendant's past criminal history and the prospect of Defendant's future dangerousness. The egregiousness of this testimony was compounded by the prosecutor's closing remarks on lack of remorse and his questioning of Dr. Krop on Defendant being a psychopath. This error cannot be considered harmless. As this Court ruled in Poole v. State, 997 So.2d 382, 392 (Fla. 2008):

> "We have consistently held that where the State presents evidence that constitutes inadmissible nonstatutory aggravation, the error is not harmless. See, e.g., Perry v. State, 801 So.2d 78, 89 (Fla. 2001)(holding that the introduction of evidence that constituted nonstatutory aggravation was not harmless because the evidence was highly inflammatory and could have unduly influenced the penalty phase jury); see also Kormondy v. State, 703 So.2d 454, 463 (Fla. 1997)(concluding that the admission of impermissible evidence of nonstatutory aggravation not harmless error and stating that `[t]he jury is charged with formulating a recommendation as to whether [the defendant] should live or die [and] turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute'); Geralds v. State, 601 So.2d 1157, 1162-63 (Fla. 1992); Maggard v. State, 399 So.2d 973 (Fla. 1981)."[12]

(VIII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

The State maintains that life sentence imposed on Donni Brown, the co-defendant, did not amount to disparate treatment. Specifically, the State argues

[12] It bears repeating that in this case, there was a *non- unanimous*, 8 to 4 vote jury penalty verdict. (R. 813).

that Defendant was the main actor and, consequently, co-defendant Brown's life sentence did not warrant a life sentence for Defendant. The State asserts that the record supports the finding that Defendant was the person who actually strangled the victim, noting that he had scratches on his arm and the DNA recovered under the victim's fingernails was consistent with Defendant's DNA. Additionally, the State points out that Defendant planned the escape and subsequent burglary of the victim's house. Lastly, the State notes that Defendant hated the victim and knew she had a safe in her home.

First, the fact that the DNA found under the victim's fingernails was consistent with Defendant's DNA suggests, at most, that Defendant, at some point, participated in the attack on the victim. It does not establish that Defendant actually strangled the victim.[13] Second, the State has never disputed that *both* defendants escaped from the jail, *both* defendants participated in the break-ins to the vehicles near the jail, *both* defendants burglarized the victim's home, *both* defendants joined in the attack on the victim, *both* defendants took the victim's

[13] Specifically, Maria Lam, the forensic technologist with FDLE, analyzed fingernail scrapings taken from the autopsy of Helen Googe. Lam found a partial DNA profile from the left nail scrapings which matched Defendant's profile. (R. 3240-3241). Her population frequency calculation was one in 260 million Caucasians. (R. 3245). Lam explained that Defendant matched at two of 13 loci and was included in the remaining areas of the DNA. (R. 3247). Lam did not analyze another item of evidence labeled fingernail clippings from Helen Googe. Lam assumed that if the clippings were scrapped first, then they would be in the scrapings which were submitted. She did not do any DNA analysis on the clippings. (R. 3249-3250).

vehicle and fled to Kentucky,[14] *both* defendants returned to Florida, and *both* defendants attempted to evade the police. Under these circumstances, while it can be argued that both defendants committed the crimes charged in this case, it cannot be definitively concluded that Defendant was more culpable.

In support of its position, the State cites to Hernandez v. State, 4 So.3d 642 (Fla. 2009), and Brooks v. State, 918 So.2d 181 (Fla. 2005). In Hernandez, this Court reiterated the standard when evaluating disparate sentences in capital cases:

> "`When a codefendant is equally as culpable or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate.' Sexton v. State, 775 So.2d 923, 935 (Fla. 2000). If, however, `the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact that the codefendant received a lighter sentence for his participation in the same crime.' Brown v. State, 721 So.2d at 282. A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence.' Puccio v. State, 701 So.2d 858, 860 (Fla. 1997)." 4 So.3d at 671.

In Hernandez, this Court upheld the defendant's death sentence even though the co-defendant had received a life sentence. This Court noted the record showed that the defendant inflicted the fatal injuries by breaking the victim's neck and stashing her throat. Moreover, the co-defendant expressed reluctance to complete the attack and gave the victim a bag to breathe in to calm her down. The defendant pushed the co-defendant aside and broke the victim's neck and cut her throat. Id.,

[14] In fact, it was Brown who stopped by her aunt's home and used MapQuest as the defendants fled north. (R. 2702-2704).

at 671. This Court cited to a series of cases where it was established that the defendant had delivered the fatal injuries. Id., at 672. In Brooks, this Court upheld the defendant's death sentence even though the co-defendant had received a life sentence because the evidence supported the conclusion that the defendant inflicted the fatal blows on each of the victims. Id., at 209. This Court placed great emphasis on the fact that the co-defendant was not even present at the time the lethal stab wounds were delivered. Id., at 210.

In this case, it was not clearly established that Defendant was the person who actually killed the victim. As such, neither Hernandez nor Brooks support the State's argument that the disparate treatment of the defendants was permissible.[15]

The State argues that Defendant's sentence was proportionate. In particular, the State cites to Baker v. State, 71 So.3d 802 (Fla. 2011), and Gamble v. State, 659 So.2d 242 (Fla. 1995), in support of its position. In Baker, this Court upheld the defendant's death sentence as proportionate. The Court engaged in a qualitative review of the underlying basis for each aggravating and mitigating circumstance. The Court outlined the facts in Baker as follows:

---

[15] While the trial court addressed the disparate sentences in its sentencing order (R. 950-951), the jury was never instructed to make findings satisfying the Enmund/Tison culpability requirement (Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). See Diaz v. State, 513 So.2d 1045, 1048 n.2 (Fla. 1987); Perez v. State, 919 So.2d 347, 365-366 (Fla. 2005).

> "Here, we are confronted with a case in which appellant forced his way into the victim's home, shot the victim in the head, assaulted the victim's mother and son, and then held the family at gunpoint for several hours while he and his girlfriend searched the house for valuables. The appellant next kidnapped the victim, stealing her car and holding her against her will for several more hours while he attempted to purchase drugs and steal money from her bank account. Finally, he drove the victim to a wooded area where, the evidence demonstrated, he killed her execution-style by shooting her in the forehead at close range." Id., at 823.

Under these circumstances, this Court found the defendant's death sentence proportionate. The trial court in Baker found three aggravating circumstances, including CCP (which along with EHAC are "two of the most serious aggravators"). Id., at 823. The trial court found only six mitigating circumstances. Clearly, the circumstances in this case are quite different. Defendant was not engaged in holding other individuals hostage for several hours. Defendant did not take the victim with him while he attempted to purchase drugs and steal money from her account. He did not take her to a secluded wooded area where he killed her execution-style. More importantly, the trial court found three aggravating circumstances (after merger of two factors). The court did *not* find Defendant committed the crime in a cold, calculated or premeditated manner. The court also found one statutory mitigating circumstance, and sixteen non-statutory mitigating circumstances.

In Gamble, this Court found that the defendant's death sentence was proportionate. The trial court found that the killing was done for pecuniary gain

and qualified under CCP. The court found one statutory mitigating circumstance and several non-statutory mitigating factors. The trial court gave the co-defendant's life sentence some weight. On appeal, the defendant argued that his penalty phase jury should have been made aware of the co-defendant's sentence. The co-defendant had pled guilty *after* Gamble's penalty phase proceedings. This Court ruled that the trial court was not required to postpone Gamble's sentencing and await the co-defendant's plea and sentence. Id. at 245. This Court found the death sentence proportionate "in light of our previous opinions, our review of the sentencing order and the instant facts." Id. at 245. Due to the limited consideration of the proportionality issue in Gamble, Defendant submits that the case does not support a proportionality analysis in this case. Moreover, there was some question as to which defendant was responsible for the actual killing.

The State argues that the cases cited by the defense are distinguishable, primarily relying on the fact that the defendants in Cooper v. State, 739 So.2d 82 (Fla. 1999), Urbin v. State, 714 So.2d 411 (Fla. 1998), Curtis v. State, 685 So.2d 1234 (Fla. 1996), Morgan v. State, 639 So.2d 6 (Fla. 1994), and Livingston v. State, 565 So.2d 1288 (Fla. 1988), were all 18 years or younger. The State maintains that Defendant's age was not mitigating, pointing out he was 25 years old at the time of the murder, had above average intelligence, experienced in life and had a significant criminal record. The State repeats the assertion that

Defendant was the mastermind of the criminal episode and that he was the killer rather than his co-defendant. (AB- 80-82).

The State never disputed that *both* defendants escaped from the jail, *both* defendants participated in the break-ins to the vehicles near the jail, *both* defendants burglarized the victim's home, *both* defendants joined in the attack on the victim, *both* defendants took the victim's vehicle and fled to Kentucky, *both* defendants returned to Florida, and *both* defendants attempted to evade the police. Moreover, there was no definitive evidence that Defendant was the actual killer rather than the co-defendant. Also, the fact that Defendant was 25 years old does not disqualify him from a proper proportionality analysis. In this respect, Defendant rejects the State's claim that after Roper v. Simmons, 543 U.S. 551 (2005), this Court's opinions in Cooper, Urbin, Curtis, Morgan and Livingston are inapplicable because the age of the defendants in those cases presently makes them ineligible for the death penalty. The fact that the foregoing cases dealt with defendants of a certain age does not render the cases legally inapplicable when doing a proportionality analysis for older individuals. In this respect, the defense presented undisputed testimony that Defendant suffered from polysubstance dependence from an early age and suffered from a depressive disorder. There was also a 2007 notation in his records which indicated he suffered from bipolar disorder. The records also showed Defendant had attention deficit disorder

(hyperactivity disorder) and attention deficit disorder as a child. The age analysis now exclusively considers defendants who are 18 years or older. See Sanchez-Torres v. State, __ So.3d __, 38 Fla.L.Weekly S539 (Fla., July 3, 2013) (defendant 19 years old); Baker v. State, 71 So.3d 802 (Fla. 2011) (defendant 20 years old); Lebron v. State, 982 So.2d 649 (Fla. 2008) (defendant 20 years old). More importantly, this Court's opinions in Cooper, Urbin, Curtis, Morgan and Livingston are relevant to this Court's obligation to abide by the fundamental precept that the death penalty applies only for the *most* aggravated and *least* mitigated murders. See Gregory v. State, 118 So.3d 770, 785 (Fla. 2013)(citing Silvia v. State, 60 So.3d 959, 973 (Fla. 2011)).

(IX)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

Mitigation

The State argues that the trial court considered each of the mitigating circumstances presented by Defendant and provided detailed factual findings as to the reasons or circumstances upon which it based its evaluation of each mitigating circumstance. The State maintains the trial court identified each mitigating circumstance presented by Defendant and stated its conclusions as to each

mitigator. Moreover, the State asserts the trial court adequately reviewed each of the aggravators and mitigators and applied the relevant facts of the case to each. (AB-88).

The State sets forth the general law applicable to the weighing of mitigating circumstances. (AB-84; AB-86-87). However, the State does not specifically address each of Defendant's arguments. For example, the defense established the *existence* of bipolar disorder, which was documented in Defendant's medical records. However, the trial court gave it no weight. (R. 945). The defense clearly established Defendant's addiction to drugs, but the trial court dismissed it as a "disease of choice." (R. 943). The defense established Defendant's depression, but the trial court gave this *undisputed* diagnosis little weight, noting that such a diagnosis was of Defendant's "own making." (R. 943). The court gave slight weight to Defendant's post-traumatic stress disorder, noting he "does not currently suffer from PTSD," and "most significantly, did not suffer from PTSD at the time of the offense." (R. 944). Moreover, the trial court gave little weight to Defendant's attempted suicides, finding them of little significance "as it relates to the murder of Helen Googe." (R. 945). The court also found that the death of Defendant's mother seven years before the crime could have little, if any, significance as a mitigator. (R. 948). In these instances, the trial court clearly

imposed a "nexus" requirement.[16] The trial court found that Defendant had obtained his GED while in jail, but then improperly proceeded to convert this mitigator into an aggravator by noting that it showed that Defendant was capable of focusing on a task and that the sophistication of the crime charged showed that he had the ability to focus and achieve a goal. (R. 947). The trial court improperly downplayed the significance of Defendant's dysfunctional family, noting that many people grow up in such families and manage to become lawful citizens. (R. 948). This finding was irrelevant to *Defendant's* background.[17] The trial court did

---

[16] In its brief, the State's only reference to this nexus issue is to point out that having a nexus to the murder certainly could make the mitigation more persuasive, thus deserving of more weight. (AB-87). However, that is not what the trial court did in this case. Rather, the court viewed these very serious items of mitigation through the prism of how they related to the charged offense. For instance, the fact that PTSD and Defendant's attempted suicides were no longer current concerns should not have diminished their weight as mitigators. See, e.g., Nibert v. State, 574 So.2d 1059 (Fla. 1990)(trial court's refusal to consider the defendant's psychological and physical abuse during adolescence was improper as this mitigation was in no way diminished simply because it "finally came to an end"). Id., at 1062.

[17] The trial court's finding was apparently premised on the same theme advanced by the prosecutor during closing argument:

> MR. JOHNSON: "Number three, the defendant has suffered from a chronic addiction to drugs in the past. *I submit to you a lot of people have drug addictions. Most of them do not murder other people*.")(emphasis supplied)(R. 3663).
>
> MR. JOHNSON: "Number four, the defendant is depressed. *A lot of people are depressed, but they don't go and murder other people*.")(emphasis supplied)(R. 3663).

not even mention, let alone making any findings regarding, whether Defendant had ADD and ADHD, or a mood disorder, even though those matters were presented below. (R. 3432-3433; R. 3623-3624; R. 3449). A trial court has an obligation to consider and weigh mitigation found anywhere in the record. Spann v. State, 857 So.2d 845, 857 (Fla. 2003). See also Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993)(court must consider mitigating evidence even where a defendant asks the court not to consider it). The trial court did not fulfill this obligation in this case.

Aggravation

The State argues that competent substantial evidence supported the trial court's finding that the EHAC aggravating circumstance was established. In particular, the State relies on the testimony of the medical examiner, who stated that the victim was conscious when she was strangled and had experienced anxiety, apprehension, pain and a sense of impending doom before losing consciousness. Additionally, the State asserts the victim was tormented by Defendant and the co-

---

> MR. JOHNSON: "The defendant – number six, the defendant has witnessed his mother being physically abused by his father. Now, *there's a lot of people who come from tough circumstances, abusive families, but they, too, most of them, do not go and murder other people*.") (emphasis supplied)(R. 3664).
>
> MR. JOHNSON: "You will also hear the mitigation that will be presented to you that the defendant has artistic ability. *A lot of people have artistic ability.* You could ask why wasn't he putting it to good use? *A lot of people have artistic ability, but they don't murder other people*.")(emphasis supplied)(R. 3669).

defendant prior to the murder. (AB-89). However, Dr. Bulic, the medical examiner, had stated on deposition that he could not rule out that the victim was unconscious at the time of the strangulation. (R. 2784-2785). He opined that she may have been conscious for about 10 seconds during the strangulation. (R. 2771-2772; R. 2786). The original medical examiner had, in fact, stated on deposition that he could not rule out the possibility that the victim was unconscious at the time of the strangulation. (R. 2782-2783). While there was evidence presented that the victim initially struggled, the time factor remained at issue.[18]

(X)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Defendant argued the unconstitutionality of Florida's death penalty statute in the trial court and on appeal. Defendant maintained that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Defendant argued that the law allows a *non-unanimous* jury (as in this case) to render an advisory *recommendation*, and not a binding decision; that the law permits the judge, not the jury, to make the findings necessary to impose the death sentence; that the indictment, in this case,

[18] The State repeats the argument that Defendant strangled the victim. (AB-89). However, Defendant made clear in his statement that Doni Brown strangled Ms. Googe and he explained exactly how his DNA may have been found under her fingernails. This version of events was not clearly disproven by the prosecution.

improperly failed to allege any of the aggravating circumstances; that the jury was not required to render a specific verdict stating forth its findings as to aggravating circumstances; that no meaningful appellate review is possible without these specific findings by a jury; that the jury was not given proper guidance on how the jury is to go about determining the existence of the sentencing factors or how to weigh them; that the felony-murder aggravating circumstance amounts to an "automatic" aggravating factor creating a presumption for a death sentence; that the jury was permitted to consider victim impact evidence, which is not relevant to any aggravating circumstance; and that the EHAC factor is vague and overbroad because the jury was not properly instructed on the precise meaning and application of EHAC. References to the record were made. As such, the claim that the Ring issue has not been preserved and argued is meritless. This Court has rejected constitutional challenges to Florida's capital statute, however, the issue continues to be litigated in this Court and in the United States Supreme Court.[19]

(XI)

DEFENDANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE AND PENALTY PHASE ERRORS

Defendant maintains that, should the issues raised be considered harmless error, the cumulative effect of the guilt phase errors (Issues I through V) and the

[19] See, e.g., Peterson v. State, 94 So.3d 514 (Fla. 2012)(Pariente, J., concurring).

penalty phase errors (Issues VI through X) renders Defendant's convictions and sentence fundamentally unfair. It is proper for this Court to consider cumulative error. Delhall v. State, 95 So.3d 134 (Fla. 2012). In Delhall, this Court stated:

> "`Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because `even though there was competent substantial evidence to support a verdict… and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'" Id., at 166 (quoting McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007)).

In addition, this Court may consider the guilt phase errors when considered cumulatively with error committed in the penalty phase of the trial. Delhall, supra, at 167. The cumulative error analysis may also consider the non-unanimous vote of the jury as a significant factor in determining whether the errors influenced the jury in reaching a more severe penalty recommendation than it would have otherwise. Id., at 170 (finding cumulative error fundamentally tainted guilt phase and influenced jury, which recommended death by a vote of 8 to 4, a recommendation that was "far from unanimous"). Here, the guilt phase errors involved various aspects of the guilt phase pertaining to improper consolidation of offenses, improper admission of evidence, and improper argument, and the penalty phase errors involved improper arguments, improper admission of evidence and specific sentencing order errors. In this case, as in Delhall, the jury made a death penalty recommendation by 8 to 4. (R. 813).

CONCLUSION

Timothy W. Fletcher respectfully requests that this Honorable Court reverse his convictions and corresponding sentences, or alternatively, requests that this Court vacate his death sentence and remand for resentencing.

Respectfully submitted,

J. RAFAEL RODRÍGUEZ
Specially Appointed Public
Defender for Timothy W. Fletcher
LAW OFFICES OF
J. RAFAEL RODRIGUEZ
6367 Bird Road
Miami, FL 33155
(305) 667-4445
(305) 667-4118 (FAX)

By: s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ
FLA. BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Mitchell D. Bishop, Esq., Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, and sent to e-mail addresses Mitchell.Bishop@myfloridalegal.com, CapApp@myfloridalegal.com, on this 24th day of October, 2013.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is 14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ