

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1002

VICTOR GUZMAN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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

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INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable Dennis Murphy, 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.," the transcript of the proceedings as "T." All emphasis is supplied unless the contrary is indicated. This Reply Brief does not address all issues presented in the Initial and Answer briefs. This should not be construed as an abandonment of any issue.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE JURY LEARNED MR. GUZMAN MAY HAVE BEEN JAILED FOR OTHER CRIMES.

The fact that a defendant is in jail or has had prior contacts with the police is irrelevant and the jury's knowledge of these facts destroys the defendant's right to a fair trial. *See, e.g., Wilding v. State*, 427 So. 2d 1069, 1070 (Fla. 2d DCA 1983); *Chambers v. State*, 742 So. 2d 839 (Fla. 3d DCA 1999); *see also Estelle v. Williams*, 425 U.S. 501 (1976). Without addressing *any* of the cases relied on in the initial brief, the State denies that this evidence was prejudicial, and argues that the judge's instruction to disregard it necessarily cured any prejudice that may have occurred.

The State maintains that the testimony did not prejudice Mr. Guzman because it, "... did not implicate Defendant being involved in prior criminal activity bu was 'most likely be interpreted in context as referring to the facts of the crime that was being investigated.'" Answer Brief at 51 (quoting *Braddy v. State*, 111 So. 3d 810, 837 (Fla. 2012)). The circumstances in *Braddy* were very different. In that case, the arresting officer testified that Braddy's demeanor changed markedly when confronted by the police. The officer testified that he handcuffed him, "for

his safety and my safety dealing with the history that I had of him.” *Id.* at 837. The

Court explained:

Prior to the challenged testimony, Detective Milito had testified that he was dispatched to Braddy's home after learning that Braddy had been implicated in a violent kidnapping, attempted murder, and possible murder of a child. Given this information and the change in Braddy's demeanor upon being confronted, Detective Milito's reference to Braddy's history could most reasonably be interpreted in context as referring to the facts of the crime that was being investigated.

Id. There was no similar alternative explanation in Mr. Guzman’s case. There was no reason to think that Mr. Guzman’s DNA was available for comparison for any reason connected directly to the investigation of this case. The only implication was that his DNA was on file because of some prior contact with the justice system.

The State argues that testimony of this kind may, in some instances, not require reversal, particularly where there is an adequate curative instruction. Answer Brief at 48. This is certainly true, but it is far from a categorical rule. Florida’s courts recognize that allowing the jury to learn of a defendant’s unrelated contacts with law enforcement is highly prejudicial, and they have not hesitated to reverse. *See, e.g., Evans v. State*, 36 So. 3d 185, 186 (Fla. 4th DCA 2010); *Chambers v. State*, 742 So. 2d 839 (Fla. 3d DCA 1999); *Jackson v. State*, 729 So. 2d 947, 951 (Fla. 1st DCA 1998); *Willis v. State*, 669 So. 2d 1090, 1093-94 (Fla.

3d DCA 1996); *Richardson v. State*, 666 So.2d 223 (Fla. 2d DCA 1995); *Rimes v. State*, 645 So. 2d 1080 (Fla. 2d DCA 1994); *Wilding v. State*, 427 So. 2d 1069, 1070 (Fla. 2d DCA 1983). The risk of prejudice from juror knowledge of prior contacts with police is so great that, “[P]ermitting questions that elicit a witness’s position as a police officer when that witness is identifying a defendant’s voice or image has been held to be reversible error even when the identification itself was permissible.” *Evans v. State*, 177 So. 3d 1219, 1230 (Fla. 2015); *Day v. State*, 105 So. 3d 1284, 1286–87 (Fla. 2d DCA 2013); *State v. Price*, 701 So. 2d 1204, 1205–07 (Fla. 3d DCA 1997); *Edwards v. State*, 583 So. 2d 740, 741 (Fla. 1st DCA 1991); *Hardie v. State*, 513 So. 2d 791 (Fla. 4th DCA 1987).

Such errors are reversible under the abuse-of-discretion standard. In *Willis*, the trial court erred when it failed to grant a mistrial where an officer testified to several unspecified previous “contacts” with the defendant. *Willis*, 669 So. 2d 1092–94. In *Rimes*, the district court held it was error to deny a motion for mistrial where a deputy testified he obtained the defendant’s picture from “the vice and narcotics file.”¹ Like the denial of mistrial, the denial of a motion to strike the jury panel is subject to review for abuse of discretion. *Smith v. State*, 7 So. 3d 473, 494–

¹ In *Rimes* the court reversed “because the trial court erred in denying a motion for a mistrial after the state introduced evidence suggesting Rimes had previously been involved in similar criminal activity.” It also discussed the standard for harmless error, however.”

95 (Fla. 2009); *Bauta v. State*, 698 So. 2d 860, 861-62 (Fla. 3d DCA 1997). In *Richardson*, the district court reversed the denial of a motion to strike the venire after potential juror who was a corrections officer revealed she knew Richardson, and questioning “suggested” that she knew him through her employment. 666 So. 2d at 203. In *Jackson* the judge inadvertently let jurors learn of the existence of other pending counts; the district court reversed the denial of the motion to dismiss the venire. 729 So. 2d 950-51. In *Evans*, the district court reversed the denial of a motion for mistrial where a juror who worked at the jail stated he knew the defendant “from work.” 36 So. 3d 185-86. The Second District has summarized: “When a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire.” *Reppert v. State*, 86 So. 3d 525, 526 (Fla. 2d DCA 2012).

The curative instruction to disregard the evidence was insufficient to eliminate the prejudice to Mr. Guzman. “The improper admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court. When any curative instruction would be insufficient, the trial court should grant a mistrial.” *Bienaime v. State*, 45 So. 3d 804, 808-09 (Fla. 4th DCA 2010) (quoting *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000)); accord *Jones v. State*, 128 So. 3d 199, 201 (Fla. 1st DCA 2013); *Morton v. State*, 972 So. 2d 1088

(Fla. 5th DCA 2008). In *Turner v. State*, 51 So. 3d 542 , 543 (Fla. 5th DCA 2010), for example, a juror stated she knew the defendant because she was formerly a corrections officer. The judge recognized the potential prejudice and gave a curative instruction, but denied a motion to strike the panel. The district court nevertheless reversed. The state relies on *Suggs v. State*, 644 So. 2d 64, 68 (Fla. 1994), and *Perez v. State*, 919 So. 2d 347, 364-65 (Fla. 2005). But these cases involved more extensive cures that objectively corrected the error.

In *Suggs* the prosecutor’s opening argument implied that Suggs had been in prison with one of the witnesses. As a cure, the judge had the prosecutor tell the jurors that this was not true:

In order to avoid any possible misunderstanding that may have been created yesterday, I would like to make a brief statement: I did not intend to imply that Mr. Taylor met Mr. Suggs in prison in Alabama. The evidence will show the first time they met was in the Walton County Jail after Mr. Suggs' arrest in this case.

Suggs at 68. In *Perez*, a detective misstated what the defendant had said during an interrogation, a videotape of which was in evidence. The judge instructed the jurors to rely on the videotape. Only *Johnston v. State*, 497 So. 2d 863, 869 (Fla. 1986) approaches the factst of this case. The Court’s opinion does not repeat the words the judge in that case used, but states that the judge did instruct the jury to disregard the remark. The Court concluded that “having fully reviewed the record,” the curative was sufficient.

II. PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE.

A. Burden-Shifting and Comments on Silence

Burden-Shifting

The prosecutor argued that the defense needed to explain why it had not produced evidence to undermine the State's case. It now maintains that this was an invited response to the defense opening statement, and that there was nothing wrong in calling the defense out for failing to introduce evidence. But there was nothing whatsoever to invite a reply, and the prosecutor's challenge to counsel could not have been a more direct criticism of Mr. Guzman's failure to introduce evidence to contradict the State's case.

Nothing in defense counsel's three-and-one-half page opening statement invited any reply at all, fair or otherwise. (T. 1632-36). Counsel predicted that the state would claim that Mr. Guzman's DNA matched what was found in the apartment. (T. 1633-34). He went on to say:

Now, there will be the presentation of DNA evidence, but keep in mind, as will be shown, is that the processing of evidence for DNA analysis is done by human beings. It's done by people and people who are not perfect. It will be up to you to decide whether or not something happened in this case or didn't happen as to whether or not that was truly Mr. Guzman's DNA in that apartment; whether the State has proven that it's his DNA in the apartment. And then you'll have to decide whether or not the evidence

says what Mr. Guzman or anybody else would have done.

(T. 1634-35). On the strength of this, the State argues that it was entitled – in its initial closing argument – to demand that the defense explain why it had not proven contamination.

The prosecution is not entitled make otherwise improper arguments in “fair reply” to an opening statement, in any event. “Comments made by defense counsel during opening statement do not “open the door” for rebuttal testimony by state witnesses on matters that have not been placed in issue by the evidence.” *Burns v. State*, 609 So. 2d 600, 605 (Fla. 1992). Opening statements are not evidence, so there is nothing to reply to. *Id*; see also *Jackson v. State*, 107 So. 3d 328, 340 n.14 (Fla. 2012); *Taylor v. State*, 855 So. 2d 1, 21 n.21 (Fla. 2003) (plurality opinion); *State v. Baird*, 572 So.2d 904, 907 (Fla. 1990). A comment on a lack of evidence supporting a defense is, moreover, appropriate only where the defendant has assumed the burden of an affirmative defense. *Warmington v. State*, 149 So. 3d 648, 652 (Fla. 2014).²

The burden-shifting in this case was blatant and direct. The State maintains that the prosecutor “simply pointed out that there was no evidence supporting the

² The State appears to argue that statements in the defense closing argument justify the prosecutor’s improper comments. Answer Brief, 55-56. This overlooks the fact that all of the arguments at issue *preceded* the defense closing.

theories promulgated by the defendant,” and that “there was no suggestion that that evidence could only have come from the defendant or even his counsel.” Answer Brief at 58. The state *told* the jury that defense counsel needed to explain “what evidence is there” of mistakes in the handling of the evidence, “what evidence in this case is there of contamination.” The prosecutor not only “pointed out that there was no evidence,” (though that in itself would be improper), it told the jury that the defense had the burden of explaining why. In *Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000), the Court found burden-shifting where the prosecutor argued: “[W]e still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been.” In this case the state said out loud what it had merely implied in *Rodriguez*.

The same is true of the prosecutor’s final challenge to the defense: “And then another question for Mr. White: Why did Defendant Guzman apologize to Detective Arostegui?” The State argues that, “where, as here, the defendant has made a statement, the State may comment on the content of the statement.” It would have been appropriate to argue that Mr. Guzman’s apologies showed he was guilty. It was, however, improper to insist that the defense should come forward with an explanation.

Comments on Silence

Detective Arostegui told the jury that Mr. Guzman invoked his right to counsel: "... I kept telling him that, basically, telling him that I knew that he was involved, **and he said he wanted a lawyer**. This was a direct comment on Mr. Guzman's exercise of his right to remain silent; this is black-letter law. *See, e.g., State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla. 1986); *Moss v. State*, 169 So. 3d 223, 229-30 (Fla. 1st DCA 2015); *Mack v. State*, 58 So. 3d 354 (Fla. 1st DCA 2011); *Jones v. State*, 748 So. 2d 1012 (Fla. 1999).

The State nonetheless cites *Rodriguez v. State*, 753 So. 2d 29, 36-40 (Fla. 2000). Answer Brief at 61. In that case, a detective testified that Rodriguez "refused to answer [any] more of my questions." *Id.* at 36. He did not testify that Rodriguez invoked his rights. In fact, the detective testified that he terminated the interrogation because Rodriguez said he was not well. *Id.*

The improper testimony in this case must be considered together with the prosecutor's suggestion that defense counsel must explain Mr. Guzman's apologies. In addition to shifting the burden the burden, this remark was a comment on Mr. Guzman's silence. "[W]here the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify." *Id.* at 38. Only Mr. Guzman could have explained his reasons for

apologizing. The State was free to draw an inference from Mr. Guzman's apologies. It was not at liberty to point out that the defense had failed to produce an explanation only Mr. Guzman could provide.

With regard to the prosecutor's "student who didn't say anything" argument, the State maintains that there was no error because in context it was a reference to the consistency of the witnesses concerning the DNA evidence. What the State cannot do is explain what the student hypothetical has to do with the consistency of prosecution witnesses. The student who didn't say anything came up in voir dire as part of an exploration of a juror's ability to honor the right to remain silent. (T. 1557-58). The hypothetical was used to discuss a juror's desire to hear from both sides. (T. 1557-59). It had nothing to do with the consistency of testimony or any other issue. The prosecutor's closing argument could only be understood to refer to the right to silence:

Defense counsel used the example of two kids in a classroom. One kid hits the other, the teacher asks the students, all right, did you hit him, and the student says no. And then he changes that example a little bit and he says, **then what do you do with the student who doesn't say anything? In this case, what you have are the DNA analysts, and they're not saying one thing.** I mean, their testimony doesn't conflict, it complements each other. It corroborates each other. There's no conflict in the testimony. This is not a case about credibility. This is not a case."

(T. 2257-58).

B. Inflammatory Arguments

This Court has recently reaffirmed the gravity of arguments appealing to jurors' emotions and sympathy:

Yet, a bedrock principle of our criminal justice system is that every effort must be made in any trial – regardless of whether the case involves such heart-wrenching circumstances – to ensure that the jurors base their decision, not on sympathy for the victim or prejudice against the defendant, but solely on the facts elicited during trial and the law instructed by the trial court. The State's burden is to prove the elements of the crime beyond a reasonable doubt. When the State instead uses closing argument to appeal to the jury's sense of outrage at what happened to the victim and asks the jurors to return a verdict that brings "justice" to the victim, the State perverts the purpose of closing argument and engages in the very type of argument that has been repeatedly condemned as antithetical to the foundation of our criminal justice system that guarantees a fair trial to every accused.

Cardona v. State, 41 Fla. L. Weekly S45 (Fla. Feb. 18, 2016). In this case, the prosecutor unquestionably "used closing argument to appeal to the jury's sense of outrage."

The prosecutor's comments had nothing to do with the issues before the jury. The jurors needed only to decide whether Mr. Guzman had killed Severina Fernandez, and if he had done so with either premeditation or in the course of committing an enumerated felony. *See* §782.04(1)(a). This was the guilt phase, not the penalty phase, and the jurors were not deciding whether the murder was

heinous, atrocious, and cruel. They did not have to, and should never have been encouraged to, consider that the crime was “horrific, an atrocity, gruesome, ghastly, grizzly ... indescribable and unthinkable.” (T. 2251). They should not have based their decision on the belief that Mr. Guzman was the personification of “death, destruction, torture, and pain.” (T. 2273). The prosecutor did not use these words to explicate the evidence. He used them to incense the jury, beginning and ending his argument with words calculated to inflame and do nothing else. It is manifest that he intended to and did inflame the jurors and generated an emotional response.

The State relies on cases that do not support its position. It points to *Breedlove v. State*, 413 So. 2d 1, 8 n.10 (Fla. 1982). Breedlove challenged a number of comments, including one he said characterized him as an animal. The cited footnote points out that the prosecutor called the *attack* animalistic, not the defendant. Here, of course, the prosecutor did in fact directly name Mr. Guzman as the personification of “death, destruction, torture, and pain.” In any event, *Breedlove* did not sanction this argument, only observing that, “Some of the remarks may have been improper,” but they did not warrant a new trial. *Id.* at 8.

Gonzalez v. State, 136 So. 3d 1125, 1152-53 (Fla. 2014) involved *penalty phase* arguments. The prosecutor argued that this “wasn’t just any robbery” and, in the context of arguing the murder was heinous, atrocious, and cruel, pointed out

the anxiety he victims would have felt knowing their children were present. *Id.* at 1153. Citing *Merck v. State*, 975 So. 2d 1054, 1063 (Fla. 2007), the State claims that it was appropriate for the prosecutor to chastise the defense for calling the crime a “tragedy” in opening statement, rather than “the most vicious of vicious murders.” In *Merck*, during the penalty phase, the prosecutor pointed out that in opening defense counsel had said that the crime was not among the most aggravated murders. The prosecutor countered that this was in fact, “among the worst ways to die,” and “one of the worst most aggravated murders.” *Id.* at 1063. *Poole v. State*, 151 So. 3d 402, 416 (Fla. 2014), likewise involved penalty phase comments. It is unclear which argument on page 416 the State believes is comparable to those made here. Only *Davis v. State*, 698 So. 2d 1182, 1190-91 (Fla. 1997), approaches relevance. There the prosecutor characterized “the crime and its perpetrator as ‘vicious’ and ‘brutal.’” There is no indication that the prosecutor used the sort of repeated, calculated, and vituperative comments at issue here.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF MR. GUZMAN’S WILLINGNESS TO PLEAD GUILTY DURING THE PENALTY PHASE.

The trial court, upon the State’s motion in limine, excluded evidence that Mr. Guzman offered to plead guilty. The defense argued against the motion and

referred to a particular incident that should be admitted. (T. 2468-69). The State now argues that the defense failed to object, failed to make a proffer, and failed to attempt to introduce the excluded evidence. Answer Brief, 65-70. The evidence contradicts these claims, and the trial court erred in granting the motion in limine.

The State filed a motion in limine to exclude certain arguments. (R. 1092-94). Number ten on the State's list was "Plea negotiations. *Hitchcock v. State, supra; Happ v. State*, 596 So. 2d 991 (Fla. 1992); *Donaldson v. State*, 722 So. 2d 177 (Fla. 1998)." The judge addressed the motion immediately before the penalty phase. When he reached number ten, the following transpired:

[THE COURT]: Number 10: Plea negotiations.
Granted.

MR. FLEISHER: For the record there was an offer by Mr. Guzman in open court several years ago to enter a plea in this case to life without parole.

THE COURT: I remember that.

MR. WHITE: But I don't think it was –

THE COURT: \$150,000 ago or \$200,000 or whatever it was. Yes.

MR. WHITE: I don't think that was a plea negotiation.

MS. BRIL: Judge, we're going to withdraw Number 11 as well.

THE COURT: Okay. What do you mean, you don't think that was plea negotiations? Sure it was. It might have been one sided, but it was still plea negotiations.

MR. WHITE: Well, it took two to tango in those instances, Judge.

(T. 2468-69).

It is clear that the defense objected to the granting of the State's motion and argued against it. It argued that Mr. Guzman's personal offer to plead guilty was not in the nature of otherwise-excludable "plea negotiations" addressed by the State's motion. Despite this, the State argues that the defense "did not object to the granting of the motion in limine." Answer Brief at 66. "Under the contemporaneous objection rule, an issue is properly preserved if the trial court knows that an objection was made, clearly understands the nature of the objection, and denies that request." *Ferguson v. Secretary for Dep't. of Corrs.*, 580 F.3d 1183, 1212 (11th Cir.2009) (citing *Thomas v. State*, 419 So.2d 634, 636 (Fla.1982)). "[M]agic words are not needed to make a proper objection." *Williams v. State*, 414 So. 2d 509 (Fla. 1982). The Court knew the defense opposed the granting of the motion, discussed the matter with defense counsel, and granted the State's motion.

It is just as clear that the defense made a sufficient proffer. Counsel pointed to a specific incident he believed was admissible. The judge stated that he remembered this incident. The defense made it perfectly clear what it would have proved, and the court excluded it. The State suggests that the defense was required to set forth precisely how it would have proven facts the judge had ruled

inadmissible. Answer Brief at 67. The law does not require futile acts. *See, e.g., State v. Colbert*, 968 So. 2d 1043, 1047 (Fla. 5th DCA 2007).

The State also complains that the defense did not attempt to introduce evidence of the already-excluded offer to plead guilty. Answer Brief, 64, 67, 70. “If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” §90.104 (Fla. Stat. 2012).

On the merits, the State maintains that Mr. Guzman’s willingness to plead guilty is not mitigating. Yet the initial brief cites cases where it has been found as mitigation again and again. These cases include those where the defendant offered to plead guilty in exchange for a life sentence. *See Brown v. State*, 126 So. 3d 211, 220 (Fla. 2013); *Carter v. State*, 980 So. 2d 473, 479 (Fla. 2008); *Franklin v. State*, 965 So. 2d 79, 88 (Fla. 2007) (“(5) Franklin had offered to plead guilty in return for a life sentence without possibility of parole that would run consecutive to his other life sentences ...”); *Troy v. State*, 948 So. 2d 635, 654 (Fla. 2006); *Nelson v. State*, 850 So. 2d 514, 521 (Fla. 2003); *Jones v. State*, 705 So. 2d 1364, 1365 n.2 (Fla. 1998). Mr. Guzman’s willingness to plead guilty was relevant to his remorse. It is for the sentencer to determine the weight to be given this mitigation.

The State maintains that even if the evidence is mitigating, it could nevertheless be excluded in the basis of a rule of procedure. The right to introduce

mitigating evidence is founded in the Constitution. *See Hitchcock v. Dugger*, 481 U.S. 393, 398 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The rules of procedure must yield. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (state may not by statute preclude the sentencer from considering any relevant mitigating evidence); *cf. Holmes v. South Carolina*, 547 U.S. 319 (2006); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The judge precluded the jury from hearing this mitigating circumstance. The State contends that there was no error because the judge himself later considered it. Answer Brief, 69-70. The State offers no authority for this proposition. Moreover, the the judge did consider and give great weight to the jury's recommendation of death. The scales could have been tipped in favor of life had the jury heard additional mitigation.

IV. PROSECUTORIAL MISCONDUCT IN PENALTY-PHASE CLOSING ARGUMENT

“A criminal trial is a neutral arena wherein both sides place evidence for the jury’s consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence ...” *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999). “[T]he prosecutor has a duty to seek justice—not merely ‘win’ a death recommendation.” *Fletcher v. State*, 168 So. 3d 186 (Fla. 2015). The prosecutor’s

closing argument in this case undermined the fairness of the penalty phase proceedings by repeatedly misrepresenting the law and the facts with respect to mitigating and aggravating factors before the jury, in violation of his right to due process, fair trial, and a reliable sentencing process. *See* Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

A. Misrepresenting the Law and Denigrating Mental Health Mitigation

The State is free to argue that the evidence established aggravating factors, the weight that should be given to them, and that mitigation should be given little weight. *See Merck v. State*, 975 So. 2d 1054, 1063 (Fla. 2007); *Cox v. State*, 819 So. 2d 705, 718 (Fla. 2002). What it *cannot* do is misstate the law, or “characterize the mitigation in a negative way.” *See Henyard v. State*; 689 So. 2d 239 (Fla. 1996); *Fletcher v. State*, 168 So. 3d 186, 215 (Fla. 2015).

The State did not argue the weight that should be given to mitigation testimony from Drs. Haber and Quiroga. The prosecutor told jurors that it had “no role in this case.” He told them that this was because, “It’s not going to explain why he murdered Lola. It’s not going to explain that this was not heinous, atrocious, and cruel.” The mitigating testimony did not, however, have to explain the murder. It did not have to disprove the HAC aggravator to, “have a role in this case.” The prosecutor may have been permitted to argue what “heinous, atrocious,

and cruel looks like in real life.” But he could not continue, “Not in the mind of someone who’s got their head buried in some book,” or that the testimony was just “some stuff.” The expert testimony had nothing to do with the HAC aggravator. As the Court explained in *Fletcher*, the prosecutor crosses the line when he or she, “specifically characterize[es] mitigation evidence with negative terms, and by doing so, [seeks] to demean the mitigation.” *Id.* at 215.

The State relies on cases saying that there is no error where a prosecutor is, “Merely arguing a conclusion that can be drawn from the evidence ...” *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003); *see Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). The characterization of the experts “as someone who’s got their head in a book and tells you some stuff,” is denigration, not a conclusion that can be drawn from the evidence.

B. Misrepresentation of the facts as to the mitigator of remorse.

The State also misstated the evidence in order to dispute another mitigator, Mr. Guzman’s remorse. The prosecutor argued that Mr. Guzman did not confess his crimes to his family, the ministers, or prisoners while he awaited trial. (T. 3145). He pointed to the testimony of Bryan Ansley, who housed with Mr. Guzman at the jail:

He had a conversation with the convict Ansley, and there’s no jailhouse recordings where someone might overhear him, he told him he committed this murder. He

didn't express an iota of remorse to the convict, Ansley, and there was nothing preventing him from doing it.

(T. 3145). The claim that there are “no jailhouse recordings” and detainees cannot be overheard has no basis in the record.

Moreover, the evidence did show that Mr. Guzman expressed remorse to Ansley:

Q. Did he express to you remorse about his crimes?

A. Yes. He does. I mean, I know you hear people say the burden is his. I know for a fact and I don't know how to convey to you-all how I know this, you know, besides him saying it. Between, you know, I have not literally seen him cry, but you can hear it in his voice and the shake in his voice, you know, I know that he's remorseful for what he's done. To only turn back the hands of time, which we all know it's impossible.

(T. 2382). This testimony was not undermined during cross-examination. The prosecutor asked what Mr. Guzman said when he admitted his crimes to Ansley, and Ansley explained. The prosecutor then asked:

Q. What did he say to you other than describing what you said? Did he say, I'm sorry I did that, or anything like that?

A. **At that time**, no, he just – I think he just wanted me to know what he was convicted of or accused of or what he did actually. He told me, you know, he did it. He said he had taken a life.

(T. 2840-41).

C. Misrepresentation of the law and facts with regard to prior felony aggravator

While improperly urging the jury to discount relevant mitigating factors, the prosecution also misstated both the facts and the law in order to increase the weight given to the prior violent felony aggravator. During the penalty phase, the State introduced copies of the amended information and record of conviction in case number F04-7903. (T. 2514-15, 2765-66; R. 1156-64). These reflected that Mr. Guzman had been convicted of attempted felony murder pursuant to section 782.051, lewd and lascivious battery, and aggravated battery. It also introduced a photograph of the victim in that case, C.C. (R. 1154). The State did not call C.C. to testify or present any other evidence concerning F04-7903.

In closing argument, the prosecutor told jurors that these convictions meant that Victor Guzman “tried to kill C.C., a child,” and that, “he was convicted of lewd and lascivious battery, meaning without consent.” (T. 3137). Neither statement is true. Intent to kill is specifically excluded from the crime of attempted felony murder under section 785.051. *See Fla. Std. Jury Instr. (Crim.) 6.3* (“In order to convict the defendant of Attempted Felony Murder, it is not necessary for the State to prove that he had an intent to kill.”). Lack of consent is not an element of lewd and lascivious battery. *See § 800.04(2) (2000)*.

V. THE PRIOR CONVICTION AGGRAVATOR.

The State maintains that it is not appropriate for the Court to consider matters related to case number F04-7903 beyond what was formally introduced into the record in this case. It took a different position in the trial court. The State specifically asked the court to rely on his personal awareness of what happened in that case:

By the way, just while I'm up here, Judge, the reason why we're asking the Court to take – to accept as evidence the transcript of her trial testimony in the case is because you were the trier of fact. We wouldn't be asking this if it was another judge, because you had a unique opportunity to see her and to judge her credibility, and that's the only reason we're doing that. If it was another judge and if it was just a cold transcript, we wouldn't be asking it, but you saw that case and they knew this would be used as an aggravator if the defendant was found guilty. So their motives for cross-examination and everything was the same and that's why we're going to be asking you to accept that as part of the Spencer hearing evidence.

(T. 3273). Moreover, while neither party introduced the original information or discussed the issue of the statute of limitations, the defense and court did reference the original information. ([Defense]: There was a sexual battery on a minor charge that was included in the original information ... THE COURT: That was nolle prosequed [sic].” (T. 3258-59).

The Initial Brief conceded that this Court has held that there is no error in finding the prior conviction aggravator based on a conviction not yet final on

appeal. Initial Brief at 45. The Appellant nevertheless argues that the Court may address prior conviction aggravator where the underlying convictions are facially invalid.³ As to harm, the jury recommended death by a bare minimum of seven to five. Given this fact, and the fact that the prior violent aggravator, is “among the weightiest aggravating circumstances,” it cannot be said that the jury’s recommendation would not have changed if it had not considered it. *Marquardt v. State*, 156 So. 3d 464, 492 (Fla. 2015).

VI. ERRORS IN THE SENTENCING ORDER

A. The trial Court failed to expressly evaluate mitigation

The State argues that the defense “abandoned” the argument that the sentencing order failed to consider Dr. Quiroga’s testimony when it failed to specifically argue it. Answer Brief, 86-87. For this proposition, it cites *Ellerbee v. State*, 87 So. 3d 730, 745-46 (Fla. 2012); *see also Lucas v. State*, 568 So. 2d 18, 23-24 (Fla. 1990). In *Ellerbee*, the defendant abandoned the argument that the mitigator existed by not proposing it to the court. *Id.* Here, the defense did argue

³ The cases relied upon by the State add little to the discussion of this issue. *See* Answer Brief at 82, citing *Johnson v. State*, 104 So. 3d at 1025; *Lukehart v. State*, 70 So. 3d at 513; *Taylor v. State*, 3 So. 3d 986, 999-1000 (Fla. 2009); *Nixon v. State*, 932 So. 2d 1009, 1023 (Fla. 2006); *Buenoano v. State*, 708 So. 2d 941, 951-52 (Fla. 1998). Each is a postconviction case dealing with counsel’s ineffectiveness in failing to litigate the prior conviction.

the extreme emotional disturbance mitigator, though it did not specifically cite Dr. Quiroga's testimony. (R. 1998). Asked for her opinion, Dr. Quiroga stated: "Well, he suffered from extreme emotional distress ..." (T. 2880). The court did not evaluate this testimony.

The sentencing order frequently offers scant (e.g. "Defendant also expressed remorse at the *Spencer* hearing. The court gives this little weight.") or no (e.g. "The Court gives this little weight.") explanation of its evaluation and weighing of nonstatutory mitigation. (R. 2079). The State seeks to recast this issue as an attempt to dispute the weight given to each mitigator. Answer Brief, 88-89, 90-91. This is a nonsequitor. The issue before this Court is the judge's failure to "expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence presented ..." *Oyola v. State*, 99 So. 3d 431, 447 (Fla. 2012). To the extent it engages the real argument, the State says the judge "set out the evidence, determined that the circumstances were both proved by the evidence and mitigating, and assigned weight." Answer Brief at 90 (quoting *Ault v. State*, 53 So. 3d 175, 186 (Fla. 2010)). Here, though, the judge went as far as merely stating the name of the mitigator and the weight.

B. The Trial Court Imposed a "Nexus" Requirement

The judge placed based the mitigating weight of Mr. Guzman's low IQ on whether that limitation caused the murder. (R. 2075). It can be said of *any*

mitigation that not everyone it might apply to commits murder. The judge did not merely place the mitigation in context, he conditioned its weight on a nexus to the crime.

C. The trial court relied on facts not supported by the record.

The sentencing order contains facts not supported by the record. The State's response primarily requotes the inadequate support in the record and asserts that it is enough. There was evidence of blood on Ms. Fernandez's thighs consistent with someone moving them apart. (T. 2104). Explaining the absence of fingerprints, the medical examiner explained there were blood smears all over the body and that the killer could have been wearing gloves. (T. 2137-39). She agreed with the prosecutor that, "it could have been anything." This does not support an inference that "Defendant rubbed his hands against her wounds, for his own satisfaction." (R. 2072). The judge plainly misstated the law and facts concerning the age of the victim of the prior violent felony conviction. The Answer Brief, like the Initial Brief, notes Dr. Lew's testimony that matching blood smears indicated Ms. Fernandez's thigh had been pressed against her abdomen. Answer Brief at 93. The State claims that this is proof of the "blood handprint[s]" described in the sentencing order. The judge rejected potential mitigation concerning Mr. Guzman's drinking at the time of the murder. He based this decision on the

unsupported conclusion that Mr. Guzman was working and therefore could not be drinking. (T. 2618-19).

VII. THE COURT MUST APPLY *STRICKLAND*'S "REASONABLE PROBABILITY" TEST IN DETERMINING FUNDAMENTAL ERROR.

The State points out that this Court has only expressly equated fundamental error with *Strickland*⁴ error in postconviction cases. Answer Brief, 95-96. This is both true and meaningless. The point is that the Court has taken the standard for fundamental error on direct appeal, and said that *Strickland* prejudice can never be shown where there was no fundamental error *on direct appeal*. Either the Court is ignoring the standard for prejudice under *Strickland*, or "fundamental error" cannot require a greater showing than *Strickland*'s "reasonable probability" test.

VIII. THE IMPOSITION OF THE DEATH SENTENCE BASED ON 7 TO 5 VERDICT AND JUDICIAL FACT-FINDING DENIED VICTOR GUZMAN THE RIGHT TO TRIAL BY JURY.

This issue has been addressed in the supplemental briefs. The Appellant would only note that, contrary to the State's suggestion, this issue was preserved. Answer Brief at 97. In its "Motion to Declare Section 921.141, Florida Statutes

⁴ *Strickland v. Washington*, 466 U.S. 668 (1983).

Unconstitutional in Violation of *Ring v. Arizona* and of Sixth Amendment Right to Jury Trial,” the defense argued:

The "hybrid" nature of Florida's death penalty procedure does not satisfy the Sixth Amendment jury-trial requirement. In essence, a Florida jury's recommendation is not a verdict for Sixth Amendment purposes: the jury's recommendation is not binding; the advisory jury does not make findings of fact; the jury's recommendation need not be unanimous; and the jury's recommendation need not be made beyond a reasonable doubt. Moreover, the Florida jury's diminished role during sentencing violates the evolving standards of decency doctrine under the Eighth Amendment.

(R. 301-02).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Blair Dickert, Assistant Attorney General, Dept. of Legal Affairs, 444 Brickell Ave, Suite #650, Miami, FL 33131 via the Court's e-filing portal on April 21, 2016.

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CERTIFICATE OF FONT

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

/s/ Andrew Stanton
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