IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE, :

Appellant, :

vs. : Case No. 84,472

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
Assistant Public Defender
FLORIDA BAR NUMBER 350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(~~813~~) 534-4200
941

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal consists of four parts. The first contains 511 pages and consists of documents filed with the clerk. References to this portion of the record will designated "R", followed by the appropriate page number.

THe second part of the record consists of transcripts from the trial and sentencing. It contains 1962 pages. References to this portion of the record will be designated "T", followed by the appropriate page number.

The third part of the record consists of photocopied exhibits numbered 1-100. References to this portion of the record will be designated "E", followed by the appropriate page number.

The final portion of the record consists of a two-volume supplement, filed November 3, 1995 containing 236 pages. References to this part of the record will be designated "S", followed by the appropriate page number.

STATEMENT OF THE CASE

On September 21, 1988, a Hillsborough County grand jury returned a six-count indictment charging Terence Valentine, Appellant, with armed burglary, two counts of kidnapping, grand theft of a motor vehicle, first degree murder, and attempted first degree murder (R32-4). Valentine remained at large until his arrest by FBI agent Charles McGinty on February 26, 1989, in Kenner, Louisiana (T261-3).

Valentine's first trial on these charges in January 1990 resulted in a hung jury.[1] He was retried in March 1990 and convicted on all counts. A sentence of death was imposed. On appeal to this Court, his convictions and sentences were reversed and a new trial ordered (R38-48).

On May 26, 1993, Circuit Judge M. Wm. Graybill entered an order disqualifying himself from future proceedings in the case (S1). Before Circuit Judge Diana M. Allen on July 22, 1993, the Thirteenth Circuit Public Defender was permitted to withdraw and private attorneys appointed to represent Valentine in the retrial (S228-34).

At a pretrial hearing held June 30, 1994, Valentine's Motion Regarding Jury Selection was heard (R346-51, S131-50). Essentially, Appellant was requesting the services of an expert in jury selection to assist him in dealing with the myriad similari-

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[1]Appellant requests this Court to take judicial notice of the prior record on appeal in Case No. 75,985 which contains this proceeding.

ties between his case and the O. J. Simpson case which was receiving unprecedented publicity in the media (R346-51, S131-48). The court ruled that employing a jury consultant was not necessary for Appellant's defense and denied his request for funds (S2, 149-50). Other pretrial motions were heard on July 1, 1994, including Appelllant's Motion to Grant Defendant the Concluding Argument to the Jury (R79-82, S172-3, 160-213).

Trial commenced before Circuit Judge Diana M. Allen on July 11, 1994. After a jury had been sworn, Appellant's motion to suppress statements made to the F.B.I. upon his arrest was heard and granted (R352-71, T247-308).

During the trial, defense counsel argued that the spousal privilege should apply to exclude marital communications between Valentine and Livia Romero from being used as evidence to prove the charges where Ferdinand Porche was the victim (T469-72, 486). The prosecutor agreed that Valentine and Romero were still married to each other at the time of the trial, even though Livia Romero referred to Porche as her husband (T805). Defense counsel also tried to exclude the taped conversations between Valentine and Romero on marital privilege grounds (T808-10). The court ruled that the marital privilege did not apply when one of the spouses was a victim and that this ruling extended to all counts of the indictment (T811). Based on this ruling, defense counsel moved to sever the counts where Ferdinand Porche was alleged to be the victim (T811-2). The motion to sever was denied (T813).

Appellant further moved to suppress his statements to Detective Fernandez on the ground that they were fruit of his illegal arrest by the F.B.I. (S3-4, T1040-60). The court denied this motion to suppress (T1059). After footprint evidence had been received over Appellant's objection, counsel moved to strike these exhibits because they were in no way connected to Valentine (T1384-6). The trial judge denied this motion to strike and also Appellant's motion for judgment of acquittal (T1386).

During the jury charge conference, the parties agreed to accept the then-new standard jury instruction on attempted first-degree felony murder (T1637-8). Defense counsel's renewed request for a modified instruction on reasonable doubt was denied (R188-99, T1653-4). The jury returned verdicts of guilty as charged on all six counts of the indictment (S5-7, T1791-2).

When court reconvened on July 19, 1994 for the penalty phase, Appellant stated that he wanted to waive a jury penalty recommendation (T1801-2). After questioning by the court and the prosecutor, the court agreed to accept the waiver (T1803-15). Three penalty phase defense witnesses testified before the judge alone (T1821-44). Later, on August 17, 1994 further defense evidence was presented by stipulation (S217-9).

A sentencing hearing was held September 29, 1994 where arguments were presented by both the prosecutor and defense counsel (T1862-1917). Defense counsel noted that the presentence investigation contained inaccurate statements and newly discovered evidence (T1887). Based upon this, he took the deposition

of Larry Kampert, who had prepared the presentence investigation (T1890, S72-104). During the deposition, counsel learned for the first time of a victim impact statement given by Livia Romero forty-six days after the incident (T1890-1, S105-12). The version of the facts of the offense contained in this statement was inconsistent with Romero's trial testimony (T1890-2).

On September 30, 1994 Appellant's Motion for New Trial and Amendment to Motion for New Trial were heard (R437-8, 501-3, T1922-42). The "Amendment" set forth the inconsistent statements made by Romero in the victim impact statement and argued that the statement was Brady material which the prosecution had not disclosed (R501-2, T1922-7). Defense counsel charged that the State had violated the discovery rules (T1926-7). At a minimum, defense counsel would have been able to further impeach Romero during cross-examination at trial if he had been provided with the victim impact statement (T1927, 1934-6).

The prosecutor stated that her copy of the document had a handwritten notation "provided Myers 8/24/89" (T1931). She speculated that this notation had been made by the previous prosecutor and that it referred to prior defense counsel, Thomas Myers (T1931). The prosecutor also stated her memory of the circumstances surrounding the preparation of the presentence investigation (T1933-4). After testimony from Larry Kemper (who prepared the presentence investigation), the prosecutor retreated from her previous assertions and said "my memory is not real good about certain things" (T1938-40).

The court termed the situation "somewhat disturbing", but found reason to believe that the document had been disclosed to defense counsel at some point (T1941-2). The judge further found that Romero's inconsistent statements would not have made a difference in the verdict (T1942). The motion for new trial was denied (T1941-2).

After a recess, the judge proceeded to make oral findings regarding the sentence to be imposed (T1942-55). As aggravating circumstances, the court found 1) prior violent felony based upon the contemporaneous attempted first degree murder; 2) during the course of a burglary and kidnapping; 3) especially heinous, atrocious or cruel; and 4) cold, calculated and premeditated (T1944-50). As mitigating factors, the sentencing judge rejected the statutory mitigating circumstances of no significant criminal history, extreme mental or emotional disturbance, and age (T1951-2). All of the proposed nonstatutory mitigating factors were considered; the ones found were 1) no prior violent crimes, 2) a skilled worker (diesel mechanic), 3) family support, and 4) model prison inmate (T1952-5).

Finding that the aggravating circumstances outweighed the mitigating circumstances, the judge sentenced Valentine to death (T1955-6). On the non-capital felonies, consecutive sentences of life, life, life, five years and thirty years were imposed (T1956). The contemporaneous conviction of a capital felony was cited as the reason for departure from the sentencing guidelines on the non-capital felony counts (T1955-6). A written Sentencing

Order was filed contemporaneously with pronouncement of the sentences (R490-500, see Appendix).

Appellant filed his notice of appeal on September 30, 1994 (R504). Court-appointed counsel was permitted to withdraw and the Public Defender appointed as appellate counsel (R511). Jurisdiction lies in this Court pursuant to Article V, section 3 (b)(1) of the Florida Constitution and Fla. R. App. P. 9.030 (a)(1)(A)(i).

STATEMENT OF THE FACTS

A. STATE'S EVIDENCE

On September 9, 1988, shortly after 3:30 p.m., a neighbor answered his doorbell and found Giovanna Valentine, Appellant's eleven-year-old daughter, crying and holding a baby in her arms (T395-6). He saw blood on her (T396). The neighbor went across the street to the house where Giovanna lived and saw blood in the garage, family room and children's bedroom (T396-7).

Hillsborough County Deputy Sheriff Peter Maurer was dispatched to the residence at 2226 Lauren Circle in Brandon (T400-1). He saw bloodstains on the carpet and a sliding glass door, which appeared to have been kicked in (T402-3). He observed a footprint on the glass door and similar footprints inside and outside the garage (T403, 409). The deputy broadcast an alert for the two adult residents of the house (T409).

At 6:27 p.m., Deputy Ronald Harrison saw a Chevy Blazer in a large open field off Joe Ebert Road (T1006). As he approached the vehicle, he heard a woman crying for help (T1006). About six feet from the Blazer, he encountered a nude woman with her hands and feet bound (T1007). The left side of her face was covered with blood (T1007). Deputy Harrison radioed to Emergency Medical Services for assistance (T1012).

While waiting for EMS to arrive, the woman told the deputy that her ex-husband, Terence Valentine, had shot her (T1011, 1014). Deputy Harrison observed another victim in the Blazer, who the woman identified as her husband (T1016). As the woman

was being boarded into the medical services helicopter, she again accused Valentine of being responsible for the attack (T1017, 1019).

Corporal Arthur Picard, a supervisor in the crime scene section of the Hillsborough County Sheriff's Office, testified that the Chevy Blazer was towed from Joe Ebert Road to his office on Morgan Street in Tampa (T1126-7, 1133). He was directed to take photographs of the vehicle and the dead body inside it (T1126-8). The photographs showed a dead man, his ankles and wrists bound with wire, in the rear compartment of the Blazer (T1129-32). There was blood spatter throughout the vehicle (T1131-2).

The parties stipulated that Ferdinand Porche was the dead man found in the Blazer (T1137).

Associate Medical Examiner Lee Robert Miller performed an autopsy on Porche at the Medical Examiner's Office on September 11, 1988 (T1139-40). He testified that the victim suffered a single stab wound between five and six inches deep in the right buttock (T1143-4). A wound on his right cheek shattered his upper jaw and knocked many of his teeth loose (T1145). A separate wound to the right upper lip also shattered the jaw and knocked some teeth loose (T1146). The victim's lower lip was partially torn away from the jaw (T1147). Dr. Miller testified that the injuries to Porche's face could have been inflicted by being beaten with the butt of a gun (T1144-5, 1147).

Porche also suffered a bruise on the left side of his chest which could have been caused by someone kicking him (T1147-8). Scrapes on his body were probably caused by being dragged over a rough surface (T1148-9). There were gunshot wounds to his left elbow where the bullets may have passed through something else before striking the elbow (T1150-2). A gunshot wound in Porche's back went through the spinal cord and caused immediate paralysis from the waist down (T1171-2). Another gunshot wound went through Porche's jaw and came out the right ear (T1175). The final gunshot wound was a contact wound through the right eye and the brain (T1175-6).

Dr. Miller testified that the only fatal wound was the shot through the eye (T1175-6). He gave his opinion that the victim remained alive and conscious throughout the previous injuries (T1143-8, 1171-3, 1175).

The State's star witness at trial was Livia Maria Romero, who resided with Ferdinand Porche at the Brandon residence and was the wounded woman encountered by Deputy Harrison in the open field beside the Chevy Blazer containing Porche's body. Romero testified that she was a native of Costa Rica, where she married Terence Valentine in 1973 when she was nineteen (T465-6). The couple came to the United States in 1975, settling first in Miami and then New Orleans (T467). The witness said that the marriage was hampered by Appellant's anger at their inability to conceive any children (T468-9, 477). After a time they adopted a daughter and named her Giovanna (T468-9).

Romero further testified that Valentine abused her both verbally and physically during the marriage (T477). She never reported any of the abusive behavior; nor did she ever receive any medical treatment because of it (T927-8). Valentine's employment often took him away from home for periods of two to three months at a time (T478). She attended college and planned to terminate the marriage (T933-4).

In November 1985, Romero learned that Appellant had been arrested in Costa Rica and was being held there in jail (T934). She moved out of their New Orleans house in December 1985 (T935-6). Soon afterwards, she began a romantic relationship with Ferdinand Porche (T484, 934). Then, in June 1986, Romero was imprisoned on an immigration violation at the federal penitentiary in Alderson, West Virginia (T492, 934).

While she was serving her federal sentence, Romero received three letters from Valentine which were received into evidence over objection (T489, 500). The letters showed that Valentine was angry about the relationship between his wife and Porche (T501-3). Threats of violence were made (T501-2).

After Livia Romero was released from prison, she and Ferdinand Porche moved to Tampa in December 1986 (T486, 503). Romero testified that she married Porche that same month (T485). She said that Valentine was infuriated about the marriage[2](T485-6).

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[2]There was no legal marriage. Although Romero testified that she had filed divorce papers against Valentine in Jefferson Parish, Louisiana, a certificate from the clerk of court finding no record of such action was introduced into evidence (T966-8, E89-90). Neither was there any record of the purported marriage between her

She didn't want any further contact from Valentine unless it concerned their daughter Giovanna (T504).

In December 1987, Valentine was released from the Costa Rican jail and started making angry telephone calls to the witness at her home in Brandon (T506-8). The calls often threatened violence to her, Porche, and other members of her family (T507-8).

Romero testified that on September 9, 1988, she was in the family room of her home at 2226 Lauren Circle, Brandon, when she saw Valentine come through the screen door of her back porch around 2:30 p.m. (T509-11). He kicked in the sliding glass door to enter the house (T513). Romero testified that as she picked up the phone to call 911, she heard a gunshot (T514). She said that Valentine took the telephone out of her hand, hit her with his fist, and dragged her by the hair around the house (T514-5).

Livia Romero was bleeding from a head wound when the intruder allowed her to pick up her eleven-month-old baby Emily (T507, 516-7). After Emily was put in her crib, the assailant stuffed a diaper in Romero's mouth and tied her hands behind her back (T517-8). Romero heard another person's voice from the next room and saw Valentine return with what she described as an overnight bag (T519). He took a knife out of the bag and cut off her clothing (T519-20).

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and Porche (T968, E91).

Romero testified that the other person in the house was called "John" by Valentine (T524). John asked Valentine what he should do with the Bronco (T524). Romero described John as a skinny black man who wore a straw hat (T530, 920-1). She never got a look at John's face (T530, 922).

Romero next heard two shots and the voice of Ferdinand Porche yelling in pain, "I can't move my legs" (T525-6). She testified that Valentine was kicking Porche as he pulled himself by his arms into the bedroom (T526-7). Valentine allegedly struck Porche on the jaw with the butt of his pistol (T527-8). Porche's hands were bound behind him with wire (T528). According to Romero, Valentine exclaimed, "This is my revenge. You see what you did to me? I'm definitely going to kill you, but you are going to suffer before I [ ] kill you. This is not going to be easy." (T529).

About this time, Giovanna was coming home from school (T531-2). Romero testified that Valentine instructed John to wait for Giovanna at the door (T531). When Giovanna arrived, she was escorted to another part of the house (T531-2). Then, almost immediately, Valentine dragged Porche and Romero out of the room and into the garage (T532). With John's assistance, the two bound victims were loaded into the rear area of the Chevy Blazer owned by Romero (T532-3).

When Romero retook the stand, she added some additional details about what happened in her house (T556-72). She stated that the knife Valentine used was the type used by fisherman

(T557). It did not come from her house (T557). Valentine also brought the baling wire and wire cutters with him in the overnight bag (T557-8). When the incident began, there were two photographs on top of the television set; one taken of Romero's mother when she was young, the other of Porche and his older daughter (T558). Romero testified that Valentine took both photos out of their frames and ripped them into pieces[3] (T558). Photographs depicting the torn photos were admitted into evidence (T560-2).

Returning to the point where Romero and Porche had been placed in the rear compartment of the Chevy Blazer, Romero testified that Valentine covered them with two bedspreads and closed the tailgate (T573-4). Then he drove the vehicle while John occupied the passenger seat (T574). After driving for a short distance, Valentine noticed that there wasn't any gas in the tank (T575-6). The Blazer pulled into what Romero thought was the Circle K convenience store, about five minutes away from her house (T576-7). According to Romero, they remained there for five to ten minutes while Valentine got gas and beer (T578). Then the Blazer was driven for another fifteen or twenty minutes before it came to a stop (T578).

Romero testified that she saw Valentine come to the rear of the truck with his gun in his hand (T578). She said she watched Valentine shoot Ferdinand Porche twice in the side of the face

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[3]Romero had previously testified that Valentine didn't like her mother and wouldn't allow any pictures of her in the house during the time they were living together (T483).

before he ran out of bullets (T579). Valentine reloaded the pistol and shot Porche once in the eye while standing outside the truck (T580-1). Then he said to Romero, "Well, Livia, this is it. Now is your turn" (T581). She pleaded that she wouldn't go to the police, but he didn't believe her (T581). She pressed her chin next to her chest and was shot twice in the back of the neck (T581). Romero testified that she heard Valentine say, "That's it. Two shots did it" (T581).

While she pretended to be dead, the two men closed the doors to the truck and left on foot (T582-4). Because she was still bound, it was very difficult for her to crawl to the front seat of the Blazer (T585-6). Eventually, she was able to open the passenger side door and fall out onto the ground (T587). She screamed for help (T587-8). After about fifteen or twenty minutes, a deputy sheriff arrived (T588-9). A helicopter transported her to the hospital where she remained for five days (T589).

After Romero was released, she did not return to the Lauren Circle address to live, but resided with a friend (T760). One day, she and a friend went back to Lauren Circle where the friend discovered a Costa Rican banknote in the mailbox (T762). Written on the money was an instruction in Valentine's handwriting asking her to reconnect the telephone (T763-4). Romero gave the banknote to the prosecutor's office (T764).

The police requested Romero to allow her phone to be reconnected at the address where she was then residing (T764). She

was provided with a tape recorder and instructed to record any conversations she had with Valentine (T765). She agreed to follow the directions given her by the police (T765). Then she informed one of Valentine's sisters in Costa Rica and a friend of his in New Orleans that the phone was reconnected (T765-6).

Soon thereafter she began to receive telephone calls from Valentine which she recorded (T767). The tapes of these phone conversations were played for the jury (T796-801, 816-32, 841-6, 852-73, 875-90). Valentine made several demands during these taped phone conversations. First, he wanted Romero to tell the State Attorney's Office that she had lied about him being the person who shot her and Porche (T799-800, 844-6). He instructed her to draw up a notarized statement renouncing her parental rights to Giovanna and to mail it to Suzie Valentine in Costa Rica (T798-9, 817-8, 844-5, 854-5). Valentine wanted to have custody of Giovanna; either she should be sent to Costa Rica or he would arrange for someone to pick her up in the United States (T817, 844, 853-4, 863-6, 870).

Romero pretended to acquiesce to Valentine's demands until the final taped telephone conversation. Then, she told Valentine that she was not going to send him any papers (T875-6). She said that she would be moving soon and that he would have no further contact with Giovanna (T877). Valentine responded by threatening to kill one of Romero's family members (T877-8, 883, 887-8).

Throughout the tapes, Valentine denied that he was the one who shot Porche and Romero (T818, 828, 867, 876). However, he

was aware of the possibility that the conversations were being recorded (T800, 819, 843). Several of Valentine's statements on the tapes were possibly incriminating. For instance, when Romero told him that she had left all of her possessions behind in New Orleans, Valentine accused her of lying and pointed out that he had seen "his chair"[4], other furniture and clothing that she had when they lived together in New Orleans (T862). In the last telephone conversation, Valentine repeated that she still had the same furniture and clothing and only a "half pint of booze" (T889). He also accused her of "stealing"[5] the truck she was driving and speculated that his money had been used to purchase Porche's car as well (T889). Romero testified that she had never seen Valentine at her Brandon residence other than the day of the incident (T1002).

Other important state witnesses were Louise Soab and her daughter, Nancy Cioll, who operated a travel agency and restaurant in Gretna, Louisiana (T536-8, 1356-7). Both testified that Valentine appeared at their business about two weeks after the shootings (T539, 1359). Cioll said that Valentine arrived in a maroon and black Bronco driven by a tall skinny black male (T1361-2, 1374). She and Valentine walked from the travel agency to the restaurant, which was empty at the time (T1362). According to Cioll, once they were inside the restaurant, Valentine

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[4]A blue corduroy-covered recliner (T892).

[5]Romero purchased the Chevy Blazer in New Orleans at the end of 1985, after Valentine had been detained in Costa Rica but prior to her involvement with Porche (T891, 951).

admitted that he did the shootings (T1363). He demonstrated how he had shot Romero by placing his hand on the back of Cioll's neck (T1363).

Soab testified that Valentine made travel arrangements through her agency in the names of T.G. Harper, Luis Valentine, Terry Harper and Herbert Bush (T542-8). He picked up all of the airline tickets and paid for them in cash (T552-4).

Further testimony came from two neighbors of Porche on Lauren Circle. Thomas Cimino said that on the afternoon of the shootings, he saw a deep red or maroon Blazer parked in front of the Porche house (T1065-6). The witness was not positive about the make of the vehicle but was sure that it was not the Blazer owned by Porche (T1067-8). He observed a man wearing a yellow hard hat get out and walk toward the residence (T1066-7, 1069). Another neighbor, James Dillon, testified that he saw a red and white Ford Bronco stopped at three different locations on the street that afternoon (T1072-4). Two men wearing hardhats were inside the vehicle (T1073-4).

Detective Jorge Fernandez recounted his activities as lead detective in the investigation of the case (T1274-1336, 1294). He testified that when Livia Romero brought the handwritten message on the Costa Rican banknote to his office, he made arrangements with the telephone company to reactivate her phone and to trace incoming calls (T1279-80). When he was notified that Valentine had been apprehended in New Orleans, Fernandez went there and conducted a custodial interview (T1287-93).

In this interview, Valentine told him that he had been in Costa Rica on September 9, 1988, but did not give any names to verify his whereabouts (T1290). Valentine had knowledge of the homicide from newspapers and family members (T1291). Detective Fernandez testified that Valentine mentioned that a .22 caliber weapon had been used (T1292). However, at the time of Valentine's arrest, the bullets had not been tested and Fernandez didn't believe that this fact had been given to the media (T1292). Valentine also stated that he had never been inside the house where Porche and Romero resided (T1292-3).

On crossexamination, Detective Fernandez conceded that he "made a mistake" when he testified falsely at Valentine's prior trial that Valentine had claimed to be in a Costa Rican jail on the date of the shootings (T1312-5, 1319-20). He acknowledged that certain physical evidence which had been collected (such as vacuumings from the Chevy Blazer) was never submitted for analysis because he "had no reason to disbelieve what Livia was telling us" (T1310-1, 1317-9).

Casts were made of some footprints found outside the victims' residence (T1110-2). A cast was also made of a footprint found in the field near the abandoned Chevy Blazer (T1117-8). Over defense objection, Ed Guenther was qualified as an expert in shoe print comparison (T1192). He gave his opinion that the tread design from these casts and the print on the sliding glass door was similar (T1345). The size of the shoe that made the

impressions was in the range of ten to thirteen (T1343-5). The tread design, a lug pattern, was "fairly common" among athletic shoes manufactured in that time period (T1351).

B. DEFENSE EVIDENCE

The defense case consisted of challenges to the credibility of Livia Romero, inconsistencies between the physical evidence and state witness testimony, and alibi witnesses who placed Valentine at a party given in San Jose, Costa Rica on September 9, 1988.

Livia Romero admitted that she had been previously convicted of a crime involving the making of a false statement under oath (T993-4). She served a one year federal prison sentence (T905). She testified that she had filed a lawsuit for divorce from Valentine in Jefferson Parish, Louisiana (T957-8). She represented that her attorney gave her a paper indicating that a judgment of divorce had been entered in November 1986 (T961). However, certificates from the Clerk of Court in Jefferson Parish introduced into evidence showed no record of any divorce action involving her or Valentine (T966-8). Neither was there any record of her alleged marriage to Ferdinand Porche (T968).

Romero was further impeached when she testified in this proceeding that she had never appeared before a judge in connection with a divorce suit against Valentine (T981-2). She was confronted with her prior testimony under oath in a 1989 deposition where she said that she told the judge that Valentine had

abused her (T982-5). She conceded that she "never told the judge anything" and never appeared before a judge (T985).

Romero was also crossexamined about Valentine's references on the tapes to $60,000 which he said she owed him (T949-51). She acknowledged that this was money which they had at the time that Valentine went to jail in Costa Rica (T950-1). She agreed that it would be difficult for Valentine to collect this money if he was imprisoned (T952-3).

Another financial motive for Romero to testify against Valentine was her pending divorce action in Costa Rica, filed after Valentine's prior conviction on these charges (T969-70). She claimed that she didn't know that Valentine owned real estate in San Jose, Costa Rica when she filed the divorce petition (T971). Yet she listed his assets (of which 1/2 would go to her) at $5 million CR (T971-5). She also represented that her attorney in this divorce action was going to receive the entire amount of her distribution (T978).

Regarding Romero's account of the shootings, defense counsel had her acknowledge that her testimony placed the two victims in the rear compartment of the Blazer on their left sides facing the rear seat (T946). The tailgate was closed during the shootings; only the rear glass area was open (T942). Romero saw the pistol and Valentine's hand reaching into the Blazer (T944-6). Three shots were fired into Porche while he was lying in the Blazer,

including the shot to the eye[6](T947-8). She was shot twice, with both bullets exiting from her body into the Blazer (T948-9).

The physical evidence did not support Romero's testimony. HCSO Detective Daniel McGill was assigned to process the Chevy Blazer at the vehicle impound center on September 11, 1988 (T1199-1201). Although he was specifically instructed to look for projectiles in the truck, he couldn't locate any (T1205, 1215). Neither did he find any powder burns, holes or dents which might support a conclusion that a firearm had been discharged in the cargo area of the Blazer (T1211). He lifted sixteen latent fingerprints from the rear window of the Blazer as well as several from other locations in the vehicle (T1201-2, 1204).

In total, the fingerprint examiner received fourteen lifts of comparison quality in the case (T1224-6). None of these matched Valentine's prints (T1226). Neither was the examiner able to find a match with the prints of Ferdinand Porche or Livia Romero (T1226-7). Notably, Livia Romero had testified that Valentine wore no gloves during the encounter, while his companion "John" did (T911-4). Of particular interest was a lift taken from a drinking glass found in the master bedroom of the Porche residence (T1230-2). Although the print did not match any of the above-mentioned people, no further steps were taken to find out

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[6]This scenario would indicate that the shooter was firing the pistol in his own direction when he shot Porche. See T1694-5.

the identity of the person who touched the glass (T1231-3, 1237-40).

Appellant presented live testimony from seven alibi witnesses and the depositions of two others were read into evidence. Walter Grant Samuels and his wife Anna Rosa Garcia Garcia testified that Valentine was a guest at their residence in Puerto Limon, Costa Rica on September 6 and 7, 1988 (T1405-6, 1421). Valentine departed on September 8, 1988 (T1409).

Floribeth Marin testified that she had been married to Appellant's brother Delano who died in 1990 (T1429-30). Appellant spent the night of September 8, 1988 at their residence in San Jose, Costa Rica (T1440, 1443). The next day, September 9 is celebrated in Costa Rica as a holiday called the "Day of the Child" (T1409, 1430, 1450). Typically, parties are given where families get together and give small gifts to the children (T1450-1). The witness testified that she and her husband gave a party in their house to celebrate the "Day of the Child" on September 9, 1988 (T1431). The party began around 2:00 in the afternoon and continued through dinner until about 10:00 p.m. (T1431, 1433). Appellant attended the party (T1431, 1433, 1443).

Several guests at the party confirmed that Valentine was there. Emigrey Zuniga Rodriguez testified that this was the only "Day of the Child" party that she had attended at Floribeth's home (T1451). Appellant and her husband, Luis Valentine, arrived at the party together (T1451-2). The deposition of Luis Valentine was read into evidence (T1514-49). He remembered that his

uncle, Appellant, showed up at his house while he and his family were preparing to go to the party at Floribeth's (T1524, 1528). Luis and Appellant went to a bar for a drink while Luis's wife took the children to the party (T1524). Luis and Appellant arrived while the party was in progress, about 5:00 p.m. (T1519). They also left together, around 10:00 or 11:00 p.m. (T1520). Appellant was dressed in shorts like a character named Chabelo from a Costa Rican children's television program (T1542).

Carlos Mora, who described himself as Appellant's good friend, testified that he arrived at the party with his girl-friend Mayra around 7:00 p.m. (T1465-6). At Appellant's request, Mayra left the party and returned with Pablo, their three-month-old son (T1465). Mora further testified that Valentine had been released from jail in Costa Rica on December 21, 1987 (T1467-8). At the party, Appellant was dressed in shorts with suspenders and he was wearing a hat (T1480).

The deposition of Mayra (full name Maria Mercedes Mesen Espinosa) was read into evidence (T1496-1514). Her testimony about the party essentially duplicated that of her boyfriend Carlos Mora (T1497-8, 1510, 1513).

Frances Valentine Pineda, Appellant's fifty-four year old sister, testified that she was at the party for about two hours (T1590). This was the only Children's Day party that had been held at Floribeth's house (T1589). She named Appellant as one of the people who were present at the party while she was there

(T1590). The party was the last time she saw him until 1991 when he was in prison in Florida (T1596).

The final alibi witness was Maritza Valverde (T1549-64). Unlike the other alibi witnesses, Valverde was neither related to Valentine; nor his friend. She met Appellant for the first time at the "Day of the Child" party given by her neighbor Floribeth (T1552-4). She remembered that he was wearing short pants and a hat (T1556-7).

SENTENCING

After Appellant waived a jury for penalty phase, the State announced that it would rely upon the evidence presented in the guilt or innocence phase (T1820). Three witnesses testified for the defense (T1821-44). They established that Valentine was a good student and basketball player in high school (T1824, 1830-1). He related well to children (T1824, 1826-7, 1843-4). None of the witnesses had ever seen Valentine be violent with Livia Romero (T1825-6, 1833). After the shootings, Livia Romero left Giovanna with Valentine's family in Costa Rica (T1835-8). At the time of trial, the rental income from Valentine's properties in Costa Rica provided the sole support for Giovanna (T1834-6, 1841).

At the August 17, 1994 hearing, it was stipulated that a court-appointed psychologist would testify that Valentine's good prison record showed that he could adjust to incarceration (S71, 217-8). It was also agreed that Appellant's courtroom behavior had been appropriate (S218-9).

The presentence investigation report disclosed that Valentine had been incarcerated for a passport violation (S116, T1911). It also set forth some other allegations of prior criminal activity which did not result in convictions (S116, T1911-3).

SUMMARY OF THE ARGUMENT

Valentine attempted to invoke the Husband/Wife privilege to prevent Livia Romero from testifying to marital communications. Romero and Valentine had never been legally divorced. While Appellant conceded that the communications were admissible as evidence in the counts charging crimes against Romero, he maintained that they were inadmissible as to crimes against Ferdinand Porche.

This view of section 90.504 of the Florida Evidence Code is supported by the legislative history and Professor Ehrhardt's treatise, Florida Evidence. The trial judge erred by ruling that the privilege does not apply when a spouse is one of the aggrieved parties in the criminal episode. Valentine's motion to sever the counts of the Indictment which charged offenses against Ferdinand Porche should have been granted.

Once the trial court ruled that Valentine's arrest by federal authorities in Louisiana was illegal, counsel moved to suppress Appellant's statement given during a subsequent custodial interrogation conducted by Hillsborough County detective Jorge Fernandez. The question was whether the statement was sufficiently attenuated from the chain of illegality. Although the trial judge was properly guided by the factors listed in Brown v. Illinois, 422 U.S. 590 (1975), her analysis of these factors was flawed. The statement should have been suppressed on another ground as well. Valentine's waiver of counsel during the custodial interrogation did not satisfy the requirements of Fla. R.

Crim. P. 3.111 or Article I, section 16 of the Florida Constitution.

Over Appellant's objection, the trial court admitted shoeprint evidence found at locations where the crimes took place. An expert was permitted to give his opinion to the jury about this evidence. However, there was no link beyond the purely speculative between the shoeprints and Valentine. Florida courts have reversed convictions where improperly speculative expert opinions such as the one at bar were allowed into evidence.

At the time of this trial, the media was saturated with publicity about the O. J. Simpson trial. There is an uncanny resemblance between the circumstances of Valentine's case and that of Simpson. Appellant's court-appointed counsel requested authorization to employ an expert jury consultant to help him select an impartial jury from a venire that had been exposed to potentially damaging publicity from the Simpson case. The court's denial of his motion was an abuse of discretion under this extraordinary factual situation. It was also a denial of equal protection since indigents represented by Florida public defenders have previously been allowed jury consultants where a strong need for one was shown.

Valentine filed a motion asking that he be allowed to open and close the arguments to the jury even if he presented testimony from alibi witnesses. The judge denied this request as contrary to Fla. R. Crim. P. 3.250. Although this Court previously held Rule 3.250 constitutional in Preston v. State, 260 So.

2d 501 (Fla. 1972), an analysis of intervening decisions in the past 24 years shows that the constitutionality of this rule can no longer be upheld.

The trial court denied Valentine's proposed modification of the standard jury instruction on reasonable doubt. Accordingly, the jury was instructed in the language of the standard which does not adequately inform the jury of the distinction between their ability to acquit the defendant contrary to the evidence (jury pardon) and their obligation to acquit the defendant if a reasonable doubt is found. This constitutional error is a structural defect which is per se reversal.

Valentine's conviction for attempted first degree murder must be stricken because the jury was instructed on attempted first degree felony murder as well as attempted premeditated murder. Since this trial, this Court has declared that attempted felony murder is a nonexistent offense. There was evidence to support both theories and we cannot speculate as to which one the jury actually considered in arriving at their verdict. This error also affects Valentine's death sentence since this conviction was the sole support for the prior violent felony aggravating circumstance found by the sentencing judge.

The cold, calculated and premeditated aggravating factor was improperly found under the circumstances of this case. Although the homicide showed prior planning, it was the product of inflamed emotions. In similar lover's triangle type cases, this Court has rejected application of the CCP aggravator.

The sentencing judge unreasonably rejected several mitigating circumstances which Valentine established. These were the statutory mitigating circumstance of "no significant history of prior criminal activity" and the nonstatutory factors of 1) potential for rehabilitation, 2) providing care and financial support for his daughter, and 3) prior domestic relationship between Livia Romero and Valentine.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED BY RULING THAT THE HUSBAND-WIFE PRIVILEGE OF SECTION 90.504, FLORIDA EVIDENCE CODE, WAS INAPPLICABLE WITH RESPECT TO THE COUNTS WHERE FERDINAND PORCHE WAS THE VICTIM.

Although the prosecutor often referred to Livia Romero as Livia Porche and to Ferdinand Porche as her "husband", the fact remains that the two were never married. Since Livia Romero had never been divorced from Terence Valentine, she was his legal wife both at the time of the shootings and at trial (T805).

At trial, Appellant first attempted to exclude marital communications from Livia Romero's testimony when he objected to the prosecutor's questions concerning abuse during the marriage (T469). At the bench conference, defense counsel agreed that the husband/wife privilege does not apply when one spouse is charged with a crime against the other (T470-1). However, he maintained that it was fully applicable as to the counts where the third person, Ferdinand Porche, was the victim[7] (T471). The judge ruled that the husband/wife privilege "does not apply in a criminal proceeding in which the spouse is a victim" (T472, 475).

The issue next cropped up when the prosecutor asked Livia Romero what Valentine said when he found out about her purported

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[7]Counsel also argued that the testimony should be excluded under section 90.403 of the Evidence Code because its probative value was outweighed by unfair prejudice (T473-5).

marriage to Porche (T486). Again Appellant's objection on spousal privilege grounds was overruled (T486). Appellant's objection to allowing into evidence his letters written to Romero while both were imprisoned was also overruled (T490-500).

Before the jury heard the second of the taped conversations between Valentine and Romero, defense counsel clarified the facts surrounding his marital privilege objection (T804-6). The court reiterated her ruling (T806). Defense counsel then requested the court to give a cautionary instruction to the jury that the communications between Valentine and Romero should be considered only with regard to the counts of the indictment where Romero was the alleged victim (T809-10). When the court denied the request for instruction, she specifically ruled that the spousal privilege did not exist for "all crimes arising from the transaction which, in this case, is all counts of the indictment" (T811).

Based upon this ruling, defense counsel moved to sever the counts where Porche was the victim (T811). In a separate trial of only these counts, the husband/wife privilege would apply and bar Romero's testimony to marital communications (T811-2). The judge denied Appellant's motion to sever the offenses (T813).

A) <u>The Marital Communications Privilege and Its Exceptions</u>.

Section 90.504 (1) of the Florida Evidence Code (1993) sets forth the Husband-Wife privilege:

> A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

Since Terence Valentine and Livia Romero were husband and wife when the homicide occurred and were still married at the time of trial, the privilege applies unless otherwise restricted.

The Code provides one pertinent exception to the Husband-Wife privilege in section 90.504 (3):

> There is no privilege under this section:
> * * *
> (b) In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either.
> * * *

Under this subsection, Valentine agrees that he could not bar Livia Romero from disclosing marital communications in her testimony to convict him of the counts in the indictment where she was the victim.

The trial judge however, went beyond the text of section 90.504 (3) (b) to deny the privilege when a third person (Ferdinand Porche) was also a victim in the same episode. Such judicial widening of the exceptions to the marital privilege has previously been rejected in several Florida appellate decisions. For instance, in Smith v. State, 344 So. 2d 915 (Fla. 1st DCA 1977), the husband caught his wife entertaining another man in their home. He shot and killed the other man. Then, the husband and wife took elaborate measures to conceal the homicide. At the husband's trial, the wife was allowed over objection to testify to conversations between herself and her husband which took place after the homicide. The trial judge reasoned that the communica-

tions were not made as part of the marital relationship, but because the wife was an eyewitness to the homicide.

On appeal, the First District rejected this reasoning and noted the strong public policy supporting the protection of private communications within a marriage. The court also rejected the State's effort to exclude communications made in furtherance of a crime from the marital privilege. Accord, Johnson v. State, 451 So. 2d 1024 (Fla. 1st DCA 1984). Consequently, the Smith court ordered a new trial where the wife could testify to her observations of her husband's conduct during and after the homicide; but not his statements to her.

Another case for comparison is Jackson v. State, 603 So. 2d 670 (Fla. 4th DCA 1992), where an incarcerated defendant made threatening phone calls to his wife in an attempt to make her change the testimony she was expected to give at his trial on a murder charge. Over his assertion of the husband-wife privilege, she testified to these conversations because they amounted to "witness threats". The appellate court reversed the husband's conviction and noted that while threatening a witness was a crime, the husband had not been charged with that crime. Therefore, the marital privilege should have been recognized. The Jackson court concluded:

> As the statute specifically delineates those exceptions to the marital privilege, we are loathe to add additional exceptions.

603 So. 2d at 671.

Perhaps the strongest authority of all for rejection of the trial court's ruling comes from the legislative history of Florida's Evidence Code. In 1977, section 90.504 (3) (b) had an additional paragraph 2 which stated that there was no privilege:

> In a criminal proceeding in which one spouse is charged with:
>
> 1. A crime committed at any time against the person or property of the other spouse, or the person or property of a child of either; or
>
> 2. A crime committed at any time against the person or property of a third person, which crime was committed in the course of committing a crime against the person or property of the other spouse.

This, of course, is exactly the situation at bar where Valentine was charged with the murder and kidnapping of Ferdinand Porche in the course of committing crimes against his wife Livia Romero. The trial court's ruling would have been entirely correct under the 1977 Evidence Code.

However, the Legislature amended section 90.504 (3) (b) in chapter 78-361, Laws of Florida (1978) to delete paragraph 2 in its entirety. The effect of this amendment according to Professor Ehrhardt is to recognize the marital privilege in cases where the defendant is charged with a crime against someone who is not a spouse regardless of whether it occurred in conjunction with an offense against the spouse. Ehrhardt, Florida Evidence § 504.5 (1995).

Accordingly, the trial judge at bar erred when she ruled that the marital privilege did not apply with respect to the crimes Valentine was accused of committing against Ferdinand

Porche. In Koon v. State, 463 So. 2d 201 (Fla. 1985), this Court reversed the defendant's conviction and death sentence because the trial court erroneously overruled the defendant's timely assertion of the marital privilege and required his wife to testify to their private conversations. Similarly, in Bolin v. State, 642 So. 2d 540 (Fla. 1994); Bolin v. State, 650 So. 2d 19 (Fla. 1995); and Bolin v. State, 650 So. 2d 21 (Fla. 1995), errors in admitting testimony which contained marital communications from an ex-wife required reversal of three capital convictions and sentences. Appellant is therefore entitled to a new trial on Counts 3 and 5 of the indictment which charge the kidnapping and first degree murder of Ferdinand Porche.

B) Appellant's Motion to Sever the Counts Charging Crimes Against Ferdinand Porche .

When it became clear that Appellant would not be able to prevent the taped telephone conversations between Livia and himself from coming into evidence, he moved for severance of the counts to which the privilege would be applicable. In general, the trial judge has discretion whether to grant a requested severance of related offenses which have been joined in a single indictment or information. State v. Vazquez, 419 So. 2d 1088 (Fla. 1982); Crossley v. State, 596 So. 2d 447 (Fla. 1992). However, "severance should be granted liberally when prejudice is likely to flow from refusing the severance". Vazquez, 419 So. 2d at 1090. Accord, Crum v. State, 398 So. 2d 810 (Fla. 1981); Sosa v. State, 639 So. 2d 810 (Fla. 3d DCA 1994).

The applicable rule, Fla. R. Crim. P. 3.152 (a) (2), states:

> (2) In case 2 or more charges of related offenses are joined in a single indictment or information, the court nevertheless shall grant a severance of charges on motion of the state or the defendant:
>
> * * * * * * * *
>
> (B) during trial, only with the defendant's consent, on a showing that the severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

Since Valentine requested the severance, the question is whether he made a showing that the severance was necessary "to achieve a fair determination" of guilt or innocence on the counts charging crimes against Ferdinand Porche.

In State v. Vazquez, supra, this Court held that the trial court's refusal to sever a count charging possession of a firearm by a convicted felon unfairly prejudiced the defendant because the prior conviction would not otherwise have come into evidence. Similarly, in Hernandez v. State, 570 So. 2d 404 (Fla. 2d DCA 1990), where evidence admitted against a co-defendant was also prejudicial to the defendant, the court held that a severance should have been granted. At bar, Appellant was greatly prejudiced by the introduction into evidence of the letters which he wrote to his wife and tapes of their telephone conversations after the shootings. None of this evidence could have come in had his marital privilege been honored at a separate trial for the kidnapping and first degree murder of Ferdinand Porche. Accordingly, Valentine's request for severance of the offenses should have been granted.

C) Waiver.

The State may argue that Valentine waived his marital privilege because he previously went to trial on all counts of the indictment. The prior trial (and the earlier mistrial) had some of the tape recorded conversations with Livia Romero in evidence.

However, examination of the prior proceedings shows that Valentine filed pretrial motions to suppress his letters and the tape recordings of telephone calls to Livia (see Appendix). One of the grounds asserted in both motions was the Husband - Wife communications privilege (see Appendix). Predecessor judge Ward denied both motions on January 18, 1990 (see Appendix). Therefore, from the beginning Valentine has been aware of the spousal privilege and has claimed it. Prior to this current trial, defense counsel specifically renewed all prior motions which had been urged by previous counsel (S206). The trial court adopted the prior rulings for the record (S206-7).

D) Harmless Error Analysis.

Valentine was clearly prejudiced by the court's ruling allowing the jury to consider testimony by Livia Romero about spousal abuse, letters written to her while he was incarcerated in Costa Rica, and the taped telephone conversations after the homicide. These items were significant portions of the State's case on the charges of the kidnapping and first degree murder of Ferdinand Porche.

Particularly prejudicial were Valentine's promise in one letter that his "revenge will be better" (T501) and the marginal note "Dirty Harry is kindergarten stuf compare to what I have in mind" [sic] (E78). The tapes contained several comments by Valentine which could be construed as admissions that he had been at the Tampa residence and committed the shootings (T797, 819, 862, 879, 889). He called Porche derogatory names and showed no remorse for his death (T818, 882). Valentine threatened to kill several members of Romero's family if she refused to cooperate with his plan to gain custody of their daughter Giovanna (T824, 826, 877-8, 887-8).

All of the above were marital communications which would have been excluded from evidence if the trial court had recognized that the husband-wife privilege applied. The error in admitting them cannot be harmless. Black's Law Dictionary defines harmless error as "an error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it and in no way affected the final outcome of the case". 6th edition, 1990, p. 718. By contrast, the marital communications at bar were highly inflammatory in addition to providing corroboration for Livia Romero's testimony.

For an error to be harmful does not mean that the remaining evidence must be insufficient or even constitute a weak case. As this Court recognized in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), error may be harmful even in the face of overwhelming

evidence. Quoting former California Justice Traynor, the DiGuilio court wrote:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached ...

491 So. 2d at 1136. At bar, the evidence was much less than overwhelming - in fact, the first jury to hear the case was deadlocked on guilt or innocence. The portrait of Valentine as an abusive husband, the threatening letters written to his wife, and the long series of taped telephone conversations formed a major part of the State's evidence. Moreover, the prosecutor's closing argument to the jury featured this evidence. In the first part of her argument, the prosecutor quoted from Valentine's letters to Romero (T1665-6). Then, in her final argument, the prosecutor dwelt at length on Valentine's taped telephone conversations as evidence of guilt (T1718-22, 1727).

Accordingly, the jury must have considered this evidence in their deliberations and it undoubtedly contributed to the verdict. By the DiGuilio standard, the error is not harmless and Valentine should be granted a new trial on the counts charging him with the kidnapping and first degree murder of Ferdinand Porche.

ISSUE II

THE TRIAL JUDGE SHOULD HAVE GRANTED VALENTINE'S MOTION TO SUPPRESS STATEMENTS MADE SUBSEQUENT TO HIS ILLEGAL ARREST DURING INTERROGATION BY DETECTIVE FERNANDEZ.

After a jury had been selected, the court heard and granted Appellant's motion to suppress statements made to FBI agents during interrogation after his arrest in Kenner, Louisiana on February 26, 1989 (R352-71, T247-308). Defense counsel then proceeded to file a motion to suppress his subsequent statements made during a custodial interview with deputies from the Hillsborough County Sheriff's Office (S3-4). Appellant argued that the statements were the product of the illegal arrest because there was no attenuation of the chain of illegality between the arrest on February 26 and the interview held February 28 (S3-4, T1050-8). The trial judge ruled that the statement given to Detective Fernandez was "sufficiently attenuated from the original illegal arrest" (T1059). Consequently, Detective Fernandez was permitted to testify that during the interview, Valentine said that he had been in Costa Rica on the day of the shootings but gave no names of persons who could verify his alibi (T1290). Fernandez further testified that Valentine stated that he became aware of the shootings from newspapers, Costa Rican investigators, and family members (T1291). According to Detective Fernandez, Valentine said that he had learned that a .22 caliber weapon had been

used[8](T1292). However, the bullets had not been tested by the time of Valentine's arrest, nor had the media reported this fact (T1292). Valentine also denied that he had ever been to the Brandon residence of Ferdinand Porche and Livia Romero (T1292-3).

A) There was no Break in the Chain of Illegality Sufficient to Make Valentine's Statement a Product of Free Will.

In Brown v. Illinois, 422 U.S. 590 (1975), the Court held that when a defendant makes a statement following an illegal arrest, it must be suppressed unless the State can show the statement was an act of free will unaffected by the illegal arrest. The Brown court said that each case must be examined on its own facts:

> The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances [citation omitted], and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

422 U.S. at 603-4.

At bar, the trial court analyzed these factors in ruling that Valentine's statement to Detective Fernandez was admissible. The court observed that Valentine had been in custody for almost two days and had been advised three times of his Miranda rights (T1059). The judge further noted that Valentine had been before

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[8]At Valentine's previous trials, Detective Fernandez did not testify to this purported statement. See record in FSC Case No. 75,985.

two different judges during this time, although it was unclear whether he had been represented by counsel (T1059-60). The official misconduct was termed "minimal", because the arresting agent relied upon an arrest warrant which was later found invalid (T1060).

Appellant agrees that the official misconduct in his case was not egregious. However, the trial court's reliance on the fact that he had been in custody for almost two days was misplaced. As Justice Stevens later observed in his concurring opinion to Dunaway v. New York, 442 U.S. 200 (1979), "a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one". 442 U.S. at 220. In People v. White, 117 Ill. 2d 194, 512 N.E. 2d 677 (1987), the Illinois Supreme Court suppressed a confession which occurred over 24 hours following the illegal arrest. The White court wrote, "[W]here no intervening circumstances are present, a long and illegal detention may in itself impel the defendant to confess." 512 N. E. 2d at 688. Accord, State v. Weekes, 268 N.W. 2d 705 (Minn. 1978) (confession was the product of an illegal 34 hour confinement).

Accordingly, the length of Valentine's detention before being questioned by Detective Fernandez should not be viewed as a factor in favor of admitting his statement. If anything, the time factor should weigh against admissibility.

Another fact cited by the trial judge, being read Miranda warnings on three occasions, does not necessarily weigh in favor of admissibility. In Taylor v. Alabama, 457 U.S. 687 (1982), the

Court noted that the defendant was given Miranda warnings three times before his confession. Nonetheless, the Taylor court found the circumstances were not distinguished from Brown. What this Court should recognize is that when a defendant is continuously in custody and undergoing considerable interrogation, the taint of the illegal arrest is being exploited regardless of Miranda warnings. An important fact at bar is that Valentine did not initiate the contact with Detective Fernandez. This in itself should weigh heavily against admission of his statement. Compare, Wong Sun v. United States, 371 U.S. 471 (1963) (voluntary return to police station several days after release from custody made ensuing confession an act of free will, untainted by prior illegal arrest).

The final factor to analyze is whether there were intervening circumstances which dissipated the taint of the illegal arrest. The trial judge found that Valentine's appearance before two federal magistrates on successive days was an intervening circumstance (T1059-60). However, she acknowledged that the record was unclear as to whether counsel had been appointed for these hearings and whether any subject other than extradition had been discussed (T1049, 1060).

Ordinarily, a defendant's appearance before a magistrate would be a significant intervening circumstance. At bar, however, because of the sketchy record it should be given little weight. The circumstances should be compared to those in State v. Rogers, 427 So. 2d 286 (Fla. 1st DCA 1983). In Rogers, the

illegally arrested defendant talked briefly to a public defender on the telephone during the middle of the night. Later, he made an incriminating statement. The court ruled that general advice from counsel who knew no details of the case was not a sufficient break in the chain of illegality and suppressed the confession.

Similarly, this Court should hold that brief appearances before magistrates for waiver of extradition do not break the chain. A comparable case where absence of intervening circumstances between the illegal arrest and the confession resulted in suppression of the statements is Libby v. State, 561 So. 2d 1253 (Fla. 2d DCA 1990). The Libby court emphasized that the types of intervening circumstances sufficient to attenuate a confession were "consultation with counsel or release from custody". 561 So. 2d at 1254. Because the record does not reflect any consultation with counsel by Valentine, and we know that he wasn't released from custody, his statement should likewise be suppressed for lack of a sufficient intervening circumstance.

Finally, it cannot be overlooked that the burden of proving admissibility of a statement which follows an illegal arrest falls squarely on the prosecution. Brown, 422 U.S. at 604. At bar, the prosecution did not carry this burden. Consequently, the trial judge's ruling which allowed Detective Fernandez to testify to Valentine's custodial statements should now be reversed.

B) Valentine's Statement Was Taken in Violation of His Right to Counsel under the Florida Constitution, Article I, section 16.

In Traylor v. State, 596 So. 2d 957 (Fla. 1992), this Court thoroughly explained the interaction between the guarantees in the "Declaration of Rights" section of the State Constitution as applied to statements made in custody while under police interrogation. The court delineated the various safeguards and announced its purpose: "to maintain a bright-line standard for police interrogation; any statement obtained in contravention of these guidelines violates the Florida Constitution and may not be used by the State". 596 So. 2d at 966.

In its analysis of the right to counsel clause of Article I, section 16, the Traylor court declared that the right attaches as soon as formal charges are filed. In the case at bar, that would be when Valentine was indicted by the grand jury on September 21, 1988 (R32-5). Thus, when Valentine was arrested in Louisiana on February 26, 1989, his right to counsel had already attached.

The Traylor opinion then noted the importance of Fla. R. Crim. P. 3.111 in implementing the constitutional guarantees and observed:

> The rule is grounded in Sections 2 and 16 of our state Constitution.

596 So. 2d at 970. Proceeding to the facts of the case, the Traylor court stated:

> The question here is whether the police, prior to initiating questioning, adequately informed Traylor of his Section 16 rights and the consequences of waiver, and then obtained a valid waiver.

596 So. 2d at 972.

The question at bar is the same. Detective Fernandez testified only that he read Valentine his rights from a Miranda card and that Valentine was willing to talk (T1048-9). Without going into whether this was a sufficient advisement of "Section 16 rights and the consequences of waiver", the important fact is that Detective Fernandez never obtained a valid waiver as defined by Fla. R. Crim. P. 3.111. Section (d) (4) of that rule specifically provides:

> A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than 2 attesting witnesses. The witnesses shall attest the voluntary execution thereof.

State Exhibit #68 is a copy of the rights card used by Detective Fernandez (E65-7). Valentine's signature appears on the card along with that of Jorge Fernandez (the detective). Because Fla. R. Crim. P. 3.111 (d) (4) requires "not less than 2 attesting witnesses", the signature and testimony of only one (Detective Fernandez) was insufficient to establish a valid waiver.

Accordingly, Valentine's statement to Detective Fernandez was taken in violation of Article I, section 16 of the Florida Constitution and should be suppressed. Although this is the first time that Appellant has specifically invoked his state constitutional guarantee as ground to suppress his statement, the error is fundamental and can be determined from the face of the

record.[9] Valentine should be granted a new trial where Detective Fernandez is not allowed to testify to any statements made by Valentine during the custodial interrogation.

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[9]The distinction between the State Constitutional right under Art. I, § 16 and the federal right under the Sixth Amendment was not clarified until Traylor, which issued in 1992. Valentine's original motion to suppress statements was heard prior to his original trials in 1990. In the current proceeding, counsel evidently felt that he was bound by the earlier ruling because he inquired of the court:

> If the Court please, just so I am sure I don't waste the Court's time, I assume the purpose of the testimony is to attenuate the taint. That is the only issue we are dealing with.
>
> Is that correct, Mrs. Cox?

(T1049).

ISSUE III

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO STRIKE THE FOOTPRINT EXHIBITS BECAUSE THE EXPERT'S OPINION WAS SO SPECULATIVE THAT IT COULD NOT REASONABLY LINK THE PRINTS TO VALENTINE.

The State made footprint evidence a feature of their case. First, a deputy identified a photograph as depicting a footprint found on the outside of the sliding glass door that was kicked in at the residence of Ferdinand Porche and Livia Romero (T403). The deputy testified that he saw similar footprints in the garage and on the ground outside the garage (T409).

Next, Sharon Sullivan, a crime scene detective, testified that she took photographs at the residence and at the field off Joe Ebert Road on the afternoon of the shootings (T1082, 1091). One of the exhibits was photographs of a shoeprint on a sliding glass door (T1092-4). Other photographs were taken of footprints at the rear and side of the residence (T1110). Three moldings were made of shoe impressions found outside the house (T1111-2). There were also a photograph and a plaster molding made of a shoe impression found a few feet from the abandoned Blazer in the open field (T1117-8).

F.D.L.E. employee, Ed Guenther was qualified as an expert in shoe print comparison over defense objection (T1188-92). He was permitted to testify that he measured the shoe impression on the sliding glass door and the casts of shoe impressions (T1343-4). All three fell within the range of size 10 to 13 (T1344-5). The

tread design in all three exhibits was similar; it was a lug type pattern typically found in athletic shoes (T1345).

On crossexamination, the witness said he didn't know how many people in the world wore shoes that were between size 10 and size 13 (T1349-50). He did not know what percentage of athletic shoes were manufactured with a lug pattern, but said it was "fairly common" (T1350-1).

At the close of the State's case, defense counsel moved to strike the shoeprint exhibits because no connection was shown between Valentine and the exhibits (T1384-5). There wasn't even any evidence of Valentine's shoe size, or that it fell within the range of 10 to 13 (T1386). The State argued that the exhibits were relevant because they showed similar foot prints at the two locations where the crimes were carried out (T1385). Also, Livia Romero had testified that Valentine was wearing tennis shoes during the incident (T1385). The judge denied the motion to strike (T1386).

The Florida Evidence Code § 90.401 defines relevant evidence as "evidence tending to prove or disprove a material fact". Even where evidence is relevant, it is still inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury ...". § 90.403, Florida Evidence Code (1993).

At bar, the shoeprint evidence was probably not relevant because there was no showing that Valentine was even wearing a shoe that had a lug type tread pattern, let alone one of the same

size as the impressions. At most, the State evidence tended to show that the person who kicked in the sliding glass door of the residence could have been the same person who left a shoe impression in the field beside the vehicle where the shootings took place. The only reason to think that Valentine made the shoe impressions is that Romero testified that he kicked the door and that he did the shootings. Thus, what the State offered is essentially an exercise in circular reasoning.

The issue at trial was whether Livia Romero was telling the truth when she identified her husband, Valentine, as the perpetrator of the crimes. The shoeprint evidence may corroborate her version of what events took place because the prints might have been left by the perpetrator. However, the shoeprint evidence in no way tends to show that Valentine was the perpetrator. Yet that was the purpose for its coming into evidence.

Accordingly, there is a good chance that the jury was confused or misled into thinking that the shoeprint evidence pointed to Valentine's guilt. In fact the shoeprint evidence was as worthless as fingerprints of no comparison value which a defendant (or virtually anyone else) might have left.

This Court has recognized that expert opinion "must not be based on speculation, but on reliable scientific principles". Gilliam v. State, 514 So. 2d 1098 at 1100 (Fla. 1987). The fact that a witness is qualified to give an expert opinion does not mean that opinion evidence should necessarily be admitted. The other requirements are:

> the opinion evidence should be helpful to the trier of fact, the opinion evidence should be applicable to evidence offered at trial, and any prejudicial effect of the evidence must not outweigh its probative value.

Gulley v. Pierce, 625 So. 2d 45 at 50 (Fla. 1st DCA 1993); § 90.702, Fla. Evidence Code (1993).

At bar, the shoeprint expert's opinion was not helpful to the jury because there are probably millions of athletic shoes in the world within the range of size 10 to 13, a large number of them with a lug design. It was not shown that Valentine possessed a pair of shoes with these characteristics. Therefore, identification of the type of shoe which left the prints is immaterial to the case.

An appropriate case for comparison is People v. Roff, 413 N.Y.S. 2d 43 (N.Y. App. 4th Dist. 1979). There, an expert testified that hair found at the scene of the crime was similar to hair seized from a hairbrush at the residence shared by the defendant, her sister and another person. There was evidence that it was the sister's hairbrush that provided the similar hair. The appellate court held that it was error to receive the evidence and the testimony of the expert, stating:

> Expert opinion evidence lacks probative force where the conclusions are contingent, speculative or merely possible.

413 N.Y.S. 2d at 44.

Florida courts have followed a similar standard. In Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991), the court found reversible error in an expert's opinion that people with cash in

their pockets (like the defendant) were probably selling drugs. Another case where admission of an expert opinion based on pure speculation caused reversible error is Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992). In Ruth, the expert's opinion that an airplane had been modified for the purpose of transporting drugs was not linked with any evidence of drugs ever being in the aircraft. Clearly, such testimony may have little or no probative value, yet be extremely prejudicial.

At bar, the prejudicial effect of the shoeprint evidence should not be discounted. Expert opinion can be very persuasive to a jury. As the California court stated in People v. Kelly, 17 Cal. 3d 24, 549 P. 2d 1240 at 1245, 130 Cal. Rptr. 144 (1976):

> Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials.

For this reason, the jury at bar may well have considered the misleading shoeprint evidence in arriving at their verdict. Accordingly, the error is not harmless. State v. DiGuilio, supra.

ISSUE IV

THE TRIAL COURT'S REFUSAL TO APPOINT AN EXPERT IN JURY SELECTION WAS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.

In a motion heard about two weeks prior to trial, Appellant requested that the court allow him to hire an expert consultant to assist with jury selection. His "Motion Regarding Jury Selection" detailed numerous similarities between the case at bar and that of O.J. Simpson, which was saturating the media (R346-51). These included the homicide or attempted homicide of an ex-wife and her present lover, prior incidents of physical abuse, and even use of a Ford Bronco vehicle (R346-7, S131-3, 143-4). A further similarity was that both Simpson and Valentine (basketball) had been prominent athletes. Both Simpson and Valentine were of negroid racial heritage while their victims were caucasoid (S211, T228).

Appellant requested authorization to hire a local recognized expert in jury selection, Rebecca Lynn, to assist him in devising methods to prevent juror attitudes about the O.J. Simpson case from prejudicing Appellant's trial (R348-51, S139-41). At the hearing, he stated that the publicity in the Simpson case was unprecedented and that he felt incompetent to select a jury without some expert advice on how to approach the subject with prospective jurors (S139-41). An assistant county attorney from Hillsborough County opposed the motion (S141-2, 147-9). The

prosecutor also opposed appointment of a jury consultant, stating that it would set "a dangerous precedent" (S145). The court ruled:

> a jury selection expert would be of assistance and probably a comfort to the trial counsel, but there comes a time when you have to decide where your money is going to go, and I don't believe that it's the type of expenditure that is necessary to give Mr. Valentine competent and effective counsel.

(S150).

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that an indigent defendant in a capital case is entitled to appointment of a competent psychiatrist when the defendant's mental condition is a significant factor at trial. The Ake decision, which rests on the Due Process Clause of the Fourteenth Amendment, was based upon the recognition that an individual's interest in life or liberty outweighs the State's financial interest in not spending money on indigents. Above all is the "compelling interest of both the State and the individual in accurate dispositions". 470 U.S. at 79. Consequently, when an indigent shows that appointment of an expert would advance the likelihood of an accurate result in his trial, the State's financial interest must yield.

In Florida, section 914.06, Florida Statutes (1993) allows compensation to expert witnesses for the State or an indigent defendant "whose opinion is relevant to the issues of the case". Under section 27.54 (3), Florida Statutes (1993), the Public Defender is provided by the counties with "pretrial consultation

fees for expert or other potential witnesses" and has broad authority to incur "useful and necessary" costs in preparation of a criminal defense. It is noteworthy that the affidavit of Appellant's proposed jury consultant, Ms. Lynn, lists the State of Florida among the jurisdictions where she has "received public funds" (R351).

In opposing Appellant's motion, the assistant county attorney cited authority pertaining to a wholly different statute, section 939.06, Florida Statutes (1993). This statute governs reimbursement of taxable costs paid by defendants who have been acquitted of criminal charges; an entirely different concern than provision of services "useful and necessary" to an indigent defendant who may or may not be acquitted. Moreover, the authority cited, Short v. State, 579 So. 2d 163 (Fla. 2d DCA 1991), does not stand for the proposition that the counties should not pay costs for experts in jury selection. Rather, the Second District wrote that "such expenses could be taxable costs that a county might agree to pay, in whole or in part". 579 So. 2d at 164. The actual holding of Short is that since neither party complained about failure to follow the correct procedure for certification of costs, the issue was not preserved for appellate review. Cf., Sawyer v. State, 570 So. 2d 410 (Fla, 2d DCA 1990). But see, Goldberg v. County of Dade, 378 So. 2d 1242 (Fla. 3d DCA 1979) (costs of a forensic psychologist who assisted in jury selection are not costs "allowed by law").

In evaluating the potential financial impact on the county if Appellant's motion were granted, defense counsel explained that his request for a $10,000 authorization was an upper limit of 100 hours at a $100 hourly fee. He actually expected to employ the jury selection expert for between 50 and 100 hours (S141). In addition, he indicated that she could possibly be hired at less than her standard fee of $100 hour (S140). Therefore, the actual cost of providing Appellant with assistance in jury selection could have been kept well under $10,000.

The trial judge should have employed the balancing test outlined in Ake, rather than simply deciding that the expenditure for a jury consultant was unnecessary to assure effective counsel. Under an Ake analysis, three factors are relevant:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

470 U. S. at 77.

Applying these factors to the case at bar, the private interest is Mr. Valentine's liberty and life as well. The Ake court termed this interest "almost uniquely compelling". 470 U.S. at 78. The governmental interest affected is the expenditure of public funds. Because Appellant makes no claim that all capital defendants are entitled to a jury selection consultant, this would simply be a one-time expense for the county. The other

governmental interest is the same as the defendant's - an accurate disposition of the charges against him.

The final factor, probable value of the services of a jury consultant, is more speculative. Decisions have hinged on the effect of pervasive pretrial publicity concerning the facts of a defendant's own case - e.g., Rideau v. Louisiana, 373 U.S. 723 (1963) - however, massive publicity about an unrelated defendant's case with similar facts has not been evaluated. Certainly the usual remedy for overly prejudicial pretrial publicity - a change of venue - would have been ineffective in the case at bar because the Simpson trial had unprecedented national coverage at the time of Appellant's trial. The only way that a fair and impartial jury could be selected was to discover which potential jurors had formed opinions about the Simpson case and then determine whether this opinion could spill over into Appellant's case. While all experienced trial attorneys have some ability to select a jury, their level of expertise is comparable to a Jack-of-all-trades. The unique circumstance of a defendant being tried for a capital crime when another defendant had received extraordinary media coverage concerning a similar crime demanded greater expertise.

Balancing the three Ake factors, the risk of selecting one or more jurors who would be biased because of the Simpson publicity was unacceptably high. The cost of providing an expert jury consultant for Appellant was simply not that great. Appellant's convictions and death sentence may have been the product of a

jury which was not impartial. Consequently he was denied the fundamental fairness guaranteed by Fourteenth Amendment due process as well as the Florida Constitution, Article I, sections 9 and 16.

Denying Valentine the services of an expert jury consultant also implicates the Equal Protection Clause of the Fourteenth Amendment, United States Constitution and the corresponding guarantee of Article I, section 2, Florida Constitution. Certainly a defendant who could have afforded to pay a jury consultant would have done so under the circumstances of the case at bar. Even more offensive is the fact that if Valentine had been represented by the Public Defender, he would probably have had a jury consultant. Unlike court-appointed counsel, the Public Defender does not have to receive permission from a judge before employing an outside consultant. If a Public Defender believes the services of an outside consultant are "useful and necessary" in preparation of a defense, the consultant may be hired. §27.54 (3), Fla. Stat. (1993).

Indeed, the affidavit of Rebecca Lynn, the proposed jury consultant, lists Florida as one of the states where she had received public funds (R351). She had also received funds from two of the federal district courts in Florida (R351). Given the fact that Valentine was facing a death sentence if convicted and the undeniable exposure of probably all of his jurors to the O.J. Simpson publicity, it is hard to imagine any more appropriate case for expenditure of public funds on a jury consultant.

Because other indigent defendants have been provided with Rebecca Lynn's services as a jury consultant, Valentine was denied equal protection when the trial judge refused to authorize an expenditure of public funds in his case.

Accordingly, Valentine's conviction should be reversed and a new trial ordered. Alternatively, this Court could order an evidentiary hearing where the circumstances of Rebecca Lynn's prior employment as a jury consultant on behalf of indigent criminal defendants are explored and supplemented to this record on appeal.

ISSUE V

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO GRANT DEFENDANT THE CONCLUDING ARGUMENT TO THE JURY BECAUSE HIS PRESENTATION OF ALIBI WITNESSES CAUSED HIM TO LOSE THIS VALUABLE PROCEDURAL RIGHT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Prior to trial, Appellant filed a "Motion to Grant Defendant the Concluding Argument to the Jury", in which he asserted that Florida Rule of Criminal Procedure 3.250 was constitutionally defective insofar as it deprives Appellant of the concluding argument to the jury if he presents testimony of witnesses other than himself (R79-82). At the pretrial hearing held July 1, 1994, the court ruled that Appellant would not get the concluding argument unless he was entitled to it under the rules of procedure (S172-3). Consequently, when the testimony of several defense alibi witnesses was presented at trial, the State was allowed to present the final argument to the jury (T1706-27).

At the outset, Appellant acknowledges that this Court rejected a similar constitutional attack against Rule 3.250 grounded on the Sixth and Fourteenth Amendments in Preston v. State, 260 So. 2d 501 (Fla. 1972). We are essentially arguing that this Court should recede from Preston based upon more recent United States Supreme Court decisions which cast the validity of Justice McCain's reasoning into doubt.

In its entirety, Fla. R. Crim. P. 3.250 provides:

> In all criminal prosecutions the accused may choose to be sworn as a witness in the accused's own behalf and shall in that case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself or herself, nor shall any prosecuting attorney be permitted before the jury or the court to comment on the failure of the accused to testify in his or her own behalf, and a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury.

Florida courts have held that denying the defendant his procedural right to the final argument when he presents no testimony other than his own is reversible error per se. E.g., Wilson v. State, 284 So. 2d 24 (Fla. 2d DCA 1973). As the Fourth District wrote in Raysor v. State, 272 So. 2d 867 (Fla. 4th DCA 1973), "the right to address the jury finally is a fundamental advantage which simply speaks for itself". 272 So. 2d at 869.

When a defendant chooses to present the testimony of other witnesses, as Valentine did, Rule 3.250 requires him to forfeit this "fundamental advantage" and give his closing argument between the State's opening and final arguments. This penalty requires a defendant to weigh the possible advantages of presenting favorable witnesses against loss of the concluding argument to the jury. The right to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 at 19 (1967). Consequently, a procedural rule which "cuts down on [a constitutional] privilege by

making its assertion costly" may violate due process. Griffin v. California, 380 U.S. 609 at 614 (1965).

Recent decisions of the United States Supreme Court have established that the defendant's right to present favorable testimony is not absolute. The appropriate inquiry is the balancing test described in Rock v. Arkansas, 483 U.S. 44 at 56 (1987):

> In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's right to testify.

Applying this test to Fla. R. Crim. P. 3.250, we must ask ourselves what state interest is promoted by a rule which encourages a defendant to forego presenting a defense which depends upon testimony other than his own? The major interest promoted seems to be one of economy; fewer witnesses mean shorter trials and less of a monetary outlay for witness expenses. As argued supra in Issue IV, a state's financial interest cannot outweigh the interest in accurate dispositions of criminal cases. In general, the more witnesses with relevant information who testify at trial, the more likely the jury will return an accurate verdict. As the United States Supreme Court wrote in United States v. Nixon, 418 U.S. at 709 (1974):

> the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

The issue at bar should be compared with that in Brooks v. Tennessee, 406 U.S. 605 (1972). In Brooks, a state procedural rule requiring the defendant testify prior to any other defense witnesses or else forfeit his right to take the stand was challenged under the Fifth and Fourteenth Amendments. The Court acknowledged the state's interest in preventing a defendant from being able to tailor his testimony to conform to that of prior witnesses. However, the Brooks court concluded that this interest could not outweigh the defendant's right to remain silent:

> Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty.

406 U.S. at 611.

Fla. R. Crim. P. 3.250 exerts a similar pressure on the defendant to take the stand rather than call defense witnesses and lose the right to open and close argument. Because it impacts on the Fifth Amendment right against self-incrimination without promoting a significant state interest, Fla. R. Crim. P. 3.250 is as constitutionally defective as the Tennessee procedural rule struck down in Brooks.

Analysis under the Compulsory Process Clause of the Sixth Amendment displays another unconstitutional aspect of the rule. The defendant has a fundamental right to offer testimony of witnesses in his favor. Of course, this right is not absolute. In Taylor v. Illinois, 484 U.S. 400 (1988), the Court recognized that the integrity of the adversary process is an important

public policy which can outweigh the defendant's compulsory process right if he violates discovery rules.

However, Fla. R. Crim. P. 3.250 has the effect of providing a sanction for every defendant who asserts his right to compulsory process; he loses the preferential order of argument. Exercise of the Sixth Amendment right cannot constitutionally be burdened with a penalty for every defendant who, like Valentine, complies with all procedural obligations. Accordingly, the rule should be struck down insofar as it impacts on the Compulsory Process Clause.

Because Valentine had to give up his right to open and close the arguments to the jury when he presented a defense consisting of testimony other than his own, his trial lacked the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. There was also a violation of the Equal Protection provisions of the Florida and U. S. Constitutions because treating defendants differently based upon whether they present witnesses on their behalf cannot be justified. Valentine's convictions and sentences should now be vacated and a new trial ordered where he is permitted the advantage of opening and closing the arguments to the jury, regardless of whether he presents an alibi defense with testimony from other witnesses.

ISSUE VI

THE TRIAL COURT ERRED BY GIVING THE STANDARD REASONABLE DOUBT INSTRUCTION RATHER THAN THE ONE PROPOSED BY APPELLANT BECAUSE THE LANGUAGE OF THE STANDARD INSTRUCTION ALLOWS THE JURY TO CONVICT A CRIMINAL DEFENDANT WHERE A REASONABLE DOUBT EXISTS, CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Prior to trial, Appellant submitted a "Written Objection to Standard Jury Instruction on Reasonable Doubt/ Written Proposed Jury Instruction" (R332-43). At the motion hearing held July 1, 1994, the court denied the proposed instruction without prejudice to resubmit it at the charge conference (S181). During trial, when the charge conference was held, defense counsel submitted a different proposed instruction on reasonable doubt (R433-4, T1653). The court noted the language "Defendant's presumption of not guilty" (as opposed to the standard language "defendant's presumption of innocence") and rejected the proposed instruction, calling it a "misstatement" (T1654).

For the purposes of this appeal, Appellant is limiting his argument to the proposed instruction which the trial judge had before her at the charge conference. The constitutionally deficient language of the standard instruction involves the final paragraph:

> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

Std. Jury Inst. in Crim. Cases, § 2.03. This paragraph, as proposed by Appellant, reads:

> If you have a reasonable doubt as to Defendant's guilt of a crime charged in the indictment, then, as to it, you must find Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty. (e.s.)

The important difference between the two versions is the use of "should" in the standard instruction as opposed to "must" in the proposed instruction to define the jury's obligation to return a not guilty verdict when a reasonable doubt exists. The use of "must" in the proposed instruction is in accord with the similar language in the first paragraph of the standard instruction (..."then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable"). Also, the word "must" has a mandatory character to it which is lacking in the word "should".[10]

By contrast, the word "should" in the standard instruction is in accord with the direction to the jury in the final sentence (If you have no reasonable doubt, you should find the defendant guilty). There is a good reason for using the word "should" with reference to the jury's obligation to convict upon a finding of no reasonable doubt; that is the jury's inherent power of pardon. As this Court recognized in State v. Wimberly, 498 So. 2d 929 (Fla. 1986), the jury has a right to exercise its "pardon power"

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[10]The entry in Black's Law Dictionary for "should" says in part: "ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency". 6th edition, p. 1379.

even where proof beyond a reasonable doubt is clear. 498 So. 2d at 932. See also, Justice Shaw's dissenting opinion to Wimberly, which recounts the history of the jury pardon concept.

For this reason, Appellant's proposed instruction correctly stated the law because it effectively informed the jury that while it could legally return a verdict of not guilty contrary to the evidence, it could not legally return a verdict of guilty in absence of proof beyond a reasonable doubt. To the extent that the standard jury instruction on reasonable doubt implies that the jury has equal powers to convict or acquit contrary to the evidence, it is unconstitutional.

The Due Process Clause of the Fourteenth Amendment requires a state to prove guilt beyond a reasonable doubt; and the jury must not be instructed with a definition of reasonable doubt which might lead them to convict upon a lesser standard. Cage v. Louisiana, 498 U.S. 39 (1990); Victor v. Nebraska, 127 L. Ed. 2d 583 (1994). A constitutionally defective instruction on reasonable doubt can never be held harmless error. Sullivan v. Louisiana, 508 U.S. __, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Appellant is aware that this Court found the Florida standard jury instruction on reasonable doubt to be constitutional in Brown v. State, 565 So. 2d 304 (Fla. 1990). However, the claim in the case at bar is based upon a different aspect of the standard instruction than what was considered in Brown.

Accordingly, Valentine's convictions and sentences should be reversed and a new trial held where the jury is properly in-

structed upon their duty to acquit the defendant if the evidence does not prove guilt beyond a reasonable doubt.

ISSUE VII

APPELLANT'S CONVICTION FOR ATTEMPTED MURDER IN THE FIRST DEGREE SHOULD BE VACATED BECAUSE IT MAY REST ON A THEORY OF ATTEMPTED FELONY MURDER - A NONEXISTENT OFFENSE.

After Valentine had been convicted and sentenced, this Court decided in State v. Gray, 654 So. 2d 553 (Fla. 1995) that there was no longer a crime of attempted felony murder in Florida. The holding of Gray is applicable to all pending cases on direct appeal. State v. Grinage, 656 So. 2d 457 (Fla. 1995).

At trial, defense counsel did not object to instructing the jury on attempted felony murder (T1637-8). The court instructed the jury on attempted first degree felony murder in the language of the then approved standard instruction (T1741-2). Nonetheless, this Court has held that failure to object to instructing the jury on a nonexistent crime does not act as a procedural bar. State v. Sykes, 434 So. 2d 325 (Fla. 1983). The overriding principle is that due process forbids conviction of a nonexistent crime. Achin v. State, 436 So. 2d 30 (Fla. 1982).

The jury's verdict of "guilty of attempted first degree murder as charged" (T1792, S7) is ambiguous because it does not specify whether the jury relied upon a theory of attempted premeditated murder or attempted first degree felony murder. Appellant concedes that there was sufficient evidence from which the jury could conclude that the shooter intended to kill Livia Romero when he shot her twice in the back of the neck. On the

other hand, there is incontestable evidence of attempted first degree felony murder as instructed upon by the court. The jury only needed to find "some overt act which could have caused the death of Livia Romero but did not" and that there was a kidnapping (T1742). A verdict of guilt was returned on the separate Count II of the Indictment (kidnapping the victim Livia Romero) (T1791, S5). Shooting her twice in the back of the neck was clearly an overt act which could have caused her death. Thus, even if a juror decided that the shooter intended to scare the victim rather than kill her, the elements of attempted first degree felony murder were proved.

For this reason, it is quite possible that the jury never considered whether the element of premeditation had been proved beyond a reasonable doubt. It simply wasn't necessary to make this finding in order to return a verdict of guilt to the charge of attempted first degree murder.

A criminal jury verdict must be set aside when there are two possible grounds, only one of which is legally supportable unless the reviewing court can determine which of the two grounds the jury necessarily relied upon. Yates v. United States, 354 U.S. 298 at 311 (1957). Accord, Stromberg v. California, 283 U.S. 359 (1931) (verdict which might be based on unconstitutional ground cannot stand, even if there are alternative theories to support the verdict); Bachellar v. Maryland, 397 U.S. 564 (1970); Leary v. United States, 395 U.S. 6 at 31-2 (1969). The Court more recently wrote in Griffin v. United States, 502 U.S. 46 (1991):

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law - whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. (e.s.)

502 U.S. at 59.

Accordingly, this Court should conclude that the possibility that Valentine's conviction for attempted first degree murder rests upon jury acceptance of the theory of attempted first degree felony murder means that it must be vacated. Basic principles of due process in the federal and Florida constitutions bar a conviction and sentence for a nonexistent offense. Sykes, supra at 328. Accord, Upshaw v. State, 20 Fla. L. Weekly D2750 (Fla. 2d DCA December 13, 1995).

Since this Court's decision in Gray, several district courts have had occasion to consider claims identical to Appellant's. In Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995), the court held that instructing the jury that it could convict the defendant on the basis of the nonexistent offense was not harmless error. Again in Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995), the Fourth District sua sponte vacated a conviction for attempted first degree murder where it was not possible to determine whether the jury had relied upon the premeditated or felony murder evidence in reaching their verdict. A majority of the Fifth District panel in Humphries v. State, 20 Fla. L. Weekly

D2634 (Fla. 5th DCA December 1, 1995) agreed that a jury verdict of guilty "as charged" to an attempted first degree murder count required reversal because the court could not determine which theory the jury accepted. Judge Dauksch's dissent from this holding because there was sufficient evidence of attempted premeditated murder simply does not square with the United States Supreme Court precedents above. Neither is it consistent with this Court's harmless error analysis. See, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The Third District agreed with the Humphries majority in Thompson v. State, 21 Fla. L. Weekly D286 (Fla. 3d DCA January 31, 1996). The Thompson court also clarified that a defendant may be retried for attempted premeditated murder when there is sufficient evidence of that offense.

Accordingly, Valentine's conviction for attempted first degree murder (Count VI) should now be vacated. This affects the penalty calculation also as the sentencing judge used Valentine's conviction for attempted first degree murder to establish the prior violent felony aggravating circumstance (R491, see Appendix). This aggravating factor must now be stricken. When a death sentence is imposed with consideration of an invalid prior violent felony conviction as an aggravating circumstance, the Eighth Amendment requires that the sentence be vacated. Johnson v. Mississippi, 486 U.S. 578 (1988); Duest v. Singletary, 967 F. 2d 472 (11th Cir. 1992), remanded, 507 U.S. __, 113 S. Ct. 1940,

123 L. Ed. 2d 647 (1993), affirmed, 997 F. 2d 1336 (11th Cir. 1993).

ISSUE VIII

THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this Court set forth the definitive commentary on the §921.141 (5) (i), Fla. Stat. (1993) (CCP) aggravating circumstance. The Jackson court wrote:

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold) ...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated) ...; and that the defendant exhibited heightened premeditation (premeditated) ...; and that the defendant had no pretense of moral or legal justification.

648 So. 2d at 89 (citations omitted). Each of the three prongs (cold, calculated, and premeditated) must be proved beyond a reasonable doubt as well as absence of any pretense of justification. In the case at bar, there was undoubted proof of calculation and heightened premeditation. However, there was insufficient proof of the cool and calm reflection necessary to satisfy the coldness prong of the aggravating circumstance.

The prior decision of this Court where the facts most closely resemble those at bar is Douglas v. State, 575 So. 2d 165 (Fla. 1991). In Douglas, the defendant's girlfriend had married another man while he was in prison. When Douglas was released, the woman returned to him for awhile; but then rejoined her

husband. Eleven days later, the defendant, armed with a rifle, stopped the couple while they were driving and forced his way into their car. He said that he "felt like blowing our [the couple's] ... brains out". 575 So. 2d at 166.

Having commandeered their vehicle, Douglas directed the driver along a lengthy route of dirt roads. At one point, the car became stuck and assistance was solicited from workers at a nearby phosphate mine. Finally, they arrived at a remote location where Douglas ordered the couple to undress. In an analogy to giving the condemned man a last meal, Douglas forced the couple to have sex at gunpoint. At the conclusion, Douglas shattered the man's skull with the stock of his rifle. He then fired several shots into the victim's head. The woman remained with Douglas after the homicide until her husband's body was found and the police questioned her.

The sentencing judge in Douglas found that the CCP aggravating circumstance was applicable. On appeal, a majority of this Court disagreed and wrote:

> The passion evidenced in this case, the relationship between the parties, and the circumstances leading up to the murder negate the trial court's finding that this murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'

575 So. 2d at 167.

At bar, there were underlying circumstances similar to those in Douglas. Valentine's wife deserted him after he was detained in a Costa Rican jail. Before he was released, she had commenced

a new domestic relationship with Ferdinand Porche and even had a child with him. The extent of Valentine's emotional distress is evident in the letters he sent to her from prison. He was also understandably upset about the financial aspects of the breakup; Livia Romero simply used all of the money and possessions belonging to both of them to start her new life with Porche. The fact that photos of Romero's mother and Porche were taken from their frames and mutilated is telling evidence of the inflamed emotions surrounding this homicide.

The similarities between Douglas and the case at bar extend to the circumstances of the homicides. Both were clearly preplanned in a methodical and elaborate manner. Douglas accosted the couple when they were in their car; Valentine allegedly broke into the residence. Valentine's exclamation as reported by Livia Romero, "This is my revenge. You see what you did to me." (T529), is not much different from Douglas's expressed desire to "blow out the brains" of his former lover and her husband. The victims in both cases were degraded and tortured. The major difference between the cases is that Romero was shot whereas Douglas evidently believed that his girlfriend would not talk to the police. The myriad similarities between the circumstances of Douglas and those of the case at bar mandate that the CCP aggravating circumstance be struck here as well.

This Court later explained the Douglas court's reasoning in Maulden v. State, 617 So. 2d 298 (Fla. 1993):

> In another context, these facts might have led to a finding of cold, calculated premedi-

> tation. In a domestic setting, however, where the circumstances evidenced heated passion and violent emotions arising from hatred and jealousy associated with the relationships between the parties, we could not characterize the murder as cold even though it may have appeared to be calculated.

617 So. 2d at 302-3. The Maulden court then applied this proposition to a factual scenario where the killer broke into an apartment in the early morning and shot his ex-wife and new boyfriend to death while they were sleeping in their bedroom. It should be noted that Maulden had telephoned the boyfriend's father on the day before the homicide and made veiled threats. Observing that Maulden suffered emotional stress from the breakup of his marriage and having his children regard a different man as the "father figure", this Court concluded that the murders were not "cold" and struck the trial court's finding of CCP as an aggravating factor.

Turning to the "Sentencing Order" filed by the judge at bar, there is a lengthy recitation of facts purportedly supporting the CCP aggravating circumstance (R494-5, see appendix). First, the judge's order states that the shooting of Porche was "an execution" (R494, see appendix). However, an execution-style killing in a domestic context has been found insufficient to establish the CCP aggravating factor. See, Santos v. State, 591 So. 2d 160 (Fla. 1991); Maulden, supra. Next, the sentencing judge speculates that Valentine's "sole reason to come to Tampa" was to commit murder and notes the advance planning which included bringing weapons and wire to bind the victims (R494-5, see

appendix). However, this Court has previously disapproved findings of the CCP aggravator based upon procuring a weapon and hunting down the victim. See, White v. State, 616 So. 2d 21 (Fla. 1993) (defendant redeemed a pawned shotgun and drove to the victim's workplace); Douglas, supra. Cf., Richardson v. State, 604 So. 2d 1107 (Fla. 1992) (shotgun previously hidden under the front steps of the victim's trailer).

Thirdly, the sentencing judge focused upon the length of time involved and the fact that the victims were driven to a remote area. Douglas is directly on point here. The entire series of events took about four hours in Douglas[11]; at bar it was about the same between the time Romero was first attacked in her house and when the deputy found her in the field. See also, Farinas v. State, 569 So. 2d 425 (Fla. 1990) (kidnapping of victim insufficient to prove CCP).

Finally, the sentencing judge wrote:

> His acts were not prompted by 'emotional frenzy, panic, or a fit of rage'. These were the actions of a man who had a goal, prepared for it, enlisted the aid of an accomplice, and accomplished the goal....

(R495, see Appendix). Certainly the shootings were not the product of a sudden fit. However, Valentine's emotional frenzy and deep-seated rage were evidenced in the prior threats, during the incident itself, and in the tape-recorded conversations after the shootings. Although "enlisting the aid of an accomplice" demonstrates a significant degree of planning and calculation, it

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[11]See 575 So. 2d at 169.

does not diminish the jealousy and anger which motivated the killings. The circumstances at bar are (as previously mentioned) very similar to those of Douglas. Moreover, they are quite comparable to those in Irizarry v. State, 496 So. 2d 822 (Fla. 1986) where the ex-wife was killed and her new lover critically injured in a machete attack by the defendant who had a prearranged alibi.[12] The Irizarry court concluded that the crimes resulted from passionate obsession and that "life imprisonment is consistent with cases involving similar circumstances". 496 So. 2d at 825.

In Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court summed up its analysis of the circumstances:

> it is equally reasonable to conclude that Santos' acts constituted a crime of heated passion as it is to conclude that they exhibited cold, calculated premeditation. Accordingly, the State has failed to prove this aggravating factor beyond a reasonable doubt, as it must under Florida law.

591 So. 2d at 163. The same conclusion is equally appropriate at bar. The State did not prove beyond a reasonable doubt that the homicide of Porche was cold, calculated and premeditated.

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[12]This Court's opinion did not directly address whether the aggravating factors were improperly found; it simply reversed the death sentence.

ISSUE IX

THE SENTENCING JUDGE FAILED TO FIND SEVERAL MITIGATING CIRCUMSTANCES WHICH APPELLANT HAD ESTABLISHED BY A REASONABLE QUANTUM OF EVIDENCE.

In her sentencing order, the trial judge considered each of the mitigating circumstances proposed by Appellant. However, she unreasonably failed to find factors which had been established by the evidence and should have been weighed.

A) Statutory Mitigating Circumstance of "No Significant History of Prior Criminal Activity".

The sentencing judge rejected this statutory mitigating circumstance based upon evidence that Valentine was incarcerated for two years in Costa Rica, his federal prison sentence for an immigration violation, and several arrests reported in the presentence investigation (R496, see Appendix). Of these, only the federal sentence for an immigration violation should have been considered and it did not amount to significant criminal activity.

With regard to his incarceration in Costa Rica on drug charges, the record indicates that Valentine's conviction and sentence was vacated by the Costa Rican court (T1467-71, S116). With regard to the arrests reported on the PSI, none of them resulted in more than suspended sentences or fines (S116). Moreover, it is questionable whether a capital sentencing judge should rely on hearsay from the PSI in rejecting the no signifi-

cant prior history statutory mitigating circumstance. In Walton v. State, 547 So. 2d 622 (Fla. 1989), this Court wrote:

> Once a defendant claims that this mitigating circumstance is applicable, the state may rebut this claim with direct evidence of criminal activity. (e.o.)

547 So. 2d at 625. Because the prosecutor at bar did not present judgments or testimony establishing the offenses listed in the PSI, the court should have ignored them in deciding whether Valentine was entitled to the benefit of the no significant prior criminal history mitigating circumstance.

This Court should also recognize that a defendant does not need to have a perfectly clean record in order to establish this statutory mitigating circumstance. For instance, in Blakely v. State, 561 So. 2d 560 (Fla. 1990), a prior driving while intoxicated conviction did not rebut the no significant prior criminal history mitigating factor. In Salvatore v. State, 366 So. 2d 745 (Fla. 1978), the defendant had a prior conviction for burglary which resulted in a term of probation. He also admitted to the theft of a boat. This history of prior criminal activity was termed "not significant" by the sentencing judge. See also, Combs v. State, 403 So. 2d 418 (Fla. 1981) (prior plea to burglary with term of probation not a significant criminal history).

One further item should be taken into account - Valentine's age of 39 at the time of the homicide. The sentencing judge considered age as a separate mitigating circumstance and rejected it (R496-7, see Appendix). However, it would certainly be proper to weigh the significance of a criminal record according to the

age of a defendant. A young defendant with a nonviolent offense might not qualify for the no significant history of prior criminal activity mitigating factor, while an older one like Valentine, should.

B) Nonstatutory Mitigating Factor of Potential for Rehabilitation.

In the section of her sentencing order pertaining to nonstatutory mitigating factors, the trial judge wrote:

> 2. The Defendant is rehabilitable. There is no evidence to support this mitigating factor.

(R497, see Appendix). There was a stipulation agreed to by both counsel that a court-appointed psychologist, Dr. Michael Gamache, would testify that Valentine had "established a good prison record and is capable of adjusting to incarceration and to prison life" (S71, 217-8). Good behavior during incarceration has been recognized as evidence showing capacity for rehabilitation. Holsworth v. State, 522 So. 2d 348 at 353 (Fla. 1988); Torres-Arboleda v. Dugger, 636 So. 2d 1321 at 1325 (Fla. 1994); Skipper v. South Carolina, 476 U.S. 1 (1986).

It has also been recognized that "employment history and positive character traits ... may show potential for rehabilitation". Stevens v. State, 552 So. 2d 1082 at 1086 (Fla. 1989). At bar, there was evidence of Valentine's employment as a port engineer and diesel mechanic (T1892). Witnesses Iris Sterling and Frances Valentine Pineda testified to positive character traits and accomplishments including Valentine's financial

assistance to his family while he was growing up (T1833), his good grades in high school (T1824, 1830), and his good treatment of children (T1824, 1826-7, 1831, 1843-4).

Accordingly, there was ample evidence to support the proposed nonstatutory mitigating factor that Valentine showed potential for rehabilitation. The sentencing judge erred by failing to find it and give it some weight.

C) Nonstatutory Mitigating Factor of Being a Caring Parent and Financial Support of His Daughter Giovanna.

The sentencing judge acknowledged that the rental income from property Valentine owns in Costa Rica provides financial support for his daughter. However, she rejected this as a nonstatutory mitigating circumstance because:

> there is no evidence to suggest that she would be deprived of that income in the event of Mr. Valentine's death nor does the evidence show that Mr. Valentine has had a good or caring relationship with his daughter.

(R498, see Appendix). This is unreasonable speculation on the part of the judge. Without any knowledge of Costa Rican law on distribution of estates, it is simply a wild guess to think that Giovanna would continue to receive income from Appellant's real estate if he were put to death. Moreover, the judge's comments ignore the fact that Valentine chose to have this income go to her. By contrast, Livia Romero, the adoptive mother, simply abandoned Giovanna when she was eleven years old (T1834-6).

With regard to whether Valentine has had a good or caring relationship with Giovanna, it must be recognized that when a

father has been in prison for so many years; there are extreme limitations on what type of relationship is possible. Providing financially is evidence of caring. Frances Valentine Pineda testified that Appellant loves his daughter, that she has not seen him mistreat her, and that they had "a very nice relationship" (T1834-7). This testimony was unrebutted and should have been accepted by the judge as proof of the proposed nonstatutory mitigating factor.

D) Nonstatutory Mitigating Factor of Prior Domestic Relationship.

Although this nonstatutory mitigating factor was neither proposed by defense counsel nor considered by the court, Valentine's prior domestic relationship with Livia Romero was the catalyst for the homicide. This Court has recognized a prior domestic relationship as an important nonstatutory mitigating factor. Herzog v. State, 439 So. 2d 1372 (Fla. 1983). This is equally true when the victim is the new paramour. Douglas v. State, 575 So. 2d 165 at 167 (Fla. 1991).

E) Conclusion.

In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), this Court stated:

> when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.

574 So. 2d at 1062. This Court has also stated that the sentencing judge's findings should be rejected when "they are based on

misconstruction of undisputed facts and a misapprehension of law". Pardo v. State, 563 So. 2d 77 at 80 (Fla. 1990).

Applying these principles to the sentencing order at bar, the court should have found and weighed additional statutory and nonstatutory mitigating circumstances. When viewed in combination with the aggravating circumstances which were erroneously found and weighed (see Issues VII and VIII supra), it is clear that Valentine's sentence of death should be vacated and this case remanded to the trial judge to reweigh the properly established factors in aggravation and mitigation.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Terence Valentine, Appellant, respectfully requests this Court to grant him relief as follows:

As to Issues I through VI - reversal of his convictions and sentences, with remand for a new trial.

As to Issue VII - reversal of his conviction for attempted first degree murder, with remand for a new trial on this count. His sentence of death should also be vacated and resentencing ordered.

As to Issues VIII and IX - vacation of death sentence, with remand for resentencing.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of February, 1996.

Respectfully submitted,

Douglas S. Connor

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/dsc