IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO. 64,391

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JUL 23 1984
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

ARGUMENT

POINT I THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY RESTRICTING APPELLANT'S RIGHT OF CROSS-EXAMINATION. 1

POINT II THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, BY REFUSING TO ALLOW APPELLANT TO REOPEN HIS CASE IN ORDER TO PRESENT NEWLY DISCOVERED EXCULPATORY EVIDENCE, WHICH EVIDENCE WAS DISCOVERED AFTER THE "TECHNICAL" CLOSE OF ALL THE EVIDENCE BUT PRIOR TO ANY ARGUMENT OR INSTRUCTION OF LAW BEING GIVEN THE JURY. 3

POINT III THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY, OVER OBJECTION, THAT EVIDENCE OF A PRIOR CRIME COMMITTED BY APPELLANT "WILL BE CONSIDERED BY YOU FOR THE LIMITED PURPOSES OF PROVING...IDENTITY...ON THE PART OF THE DEFENDANT." 8

TABLE OF CONTENTS (CONTINUED)

PAGE NO.

ARGUMENT (continued)

POINT IX AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS. 11

CONCLUSION 14

CERTIFICATE OF SERVICE 15

NOTE: APPELLANT RELIES UPON THE ARGUMENT AND AUTHORITY SET FORTH IN THE INITIAL BRIEF OF APPELLANT IN REFERENCE TO THOSE POINTS NOT SPECIFICALLY ADDRESSED HERE.

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Alvord v. State 322 So.2d 533 (fla. 1975), cert. denied 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976)	11
Drake v. State 400 So.2d 1217 (Fla. 1981)	8
Dumas v. State 350 So.2d 464 (Fla. 1977)	6
Ernest v. State 351 So.2d 957 (Fla. 1977)	12
Hough v. State ___ So.2d ___, (Fla. 5th DCA, April 19, 1984) 9 FLW 902	12
Johnson v. State 393 So.2d 1069 (Fla. 1981)	12
Overfelt v. State 434 So.2d 945 (Fla. 4th DCA 1983)	12
Proffitt v. Florida 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976)	11
Smith v. State 445 So.2d 1050 (Fla. 1st DCA 1984)	12
Steffanos v. State 80 Fla. 309, 86 So. 204 (1920)	7
Streeter v. State 416 So.2d 1203 (Fla. 3d DCA 1982)	12
Tascano v. State 393 So.2d 540 (1981)	9
Waterhouse v. State 429 So.2d 301 (Fla. 1983)	9,10

TABLE OF CITATIONS (CONTINUED)

OTHER AUTHORITIES:	PAGE NO.
Sixth Amendment, United States Constitution	1,3,8,11,13
Eighth Amendment, United States Constitution	11
Fourteenth Amendment, United States Constitution	1,3,8,11
Article I, Section 16, Florida Constitution	1,3,8
Section 918.101, Florida Statutes (1981)	9
Section 921.141, Florida Statutes	11
Rule 3.390(a), Florida Rules of Criminal Procedure	9

IN THE SUPREME COURT OF FLORIDA

JOEL DALE WRIGHT,)
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vs.) CASE NO. 64,391
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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY RESTRICTING APPELLANT'S RIGHT OF CROSS-EXAMINATION.

The gist of the State's argument in reference to cross-examination of the pathologist, Kenneth Goodson, and Walter Perkins is that these were not key state witnesses, and accordingly any error that occurred was either waived or was harmless error. Appellant respectfully submits that the proscription against restricting cross-examination pertains to all State witnesses, be they key witnesses or otherwise.

The State's argument concerning the restrictions of cross-examination of the State's key witness, Charles Westberry, misses the point. Specifically, on cross-examination, defense

counsel asked Charles Westberry "Were you also advised by the prosecutor or anyone else that by having been charged with the crime of accessory after the fact, later reduced under your contract to compounding a felony, that you have in effect as a matter of law been immunized from ever being prosecuted yourself for the murder of Lima Paige Smith?" (R 2163). A hearsay objection by the State was sustained. (R 2164). The State's contention on appeal that the question could have been acceptably rephrased by defense counsel, as required by the Court, ignores that the question itself, as phrased, was entirely proper.

Defense counsel was also entitled to establish that Appellant and Charles Westberry were engaged in stealing scrap metals to sell for profit. To argue that the defendant was able to otherwise establish that he and Charles Westberry sold scrap metal (AB at 15)[1/] does not address the Court's limitation of cross-examination. The trial court's ruling prevented the defendant from accurately establishing the relationship between Charles Westberry and himself. Contrary to the State's assertion, the Appellant was not here attempting to show bad character, but rather to show a series of transactions that were an integral aspect of the relationship between Appellant and Charles Westberry.

It was reversible error for the trial court to restrict the cross-examination of Charles Westberry and the other State's witnesses. The matter must be reversed.

1/ (AB) refers to the Answer Brief of Appellee.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, BY REFUSING TO ALLOW APPELLANT TO REOPEN HIS CASE IN ORDER TO PRESENT NEWLY DISCOVERED EXCULPATORY EVIDENCE, WHICH EVIDENCE WAS DISCOVERED AFTER THE "TECHNICAL" CLOSE OF ALL THE EVIDENCE BUT PRIOR TO ANY ARGUMENT OR INSTRUCTION OF LAW BEING GIVEN THE JURY.

The State and Appellant agree that reopening a case to present additional testimony is discretionary with the trial court, even in a capital case. Appellant maintains, however, that a palpable abuse of discretion has occurred here, causing reversible error. Specifically, the State acknowledges that "[t]his testimony was corroborative of the testimony of Jackie Lee Bennett and the Appellant, and it left an inference that the Appellant may have been that lanky-skinny, white, young person wearing dark pants and may have been where he said he was at that time." (AB at page 17). The State then alleges that Mrs. Waters' testimony prejudiced it in three ways, to wit: surprise, delay, and lack of sequestration of the witnesses (AB at page 18).

SURPRISE/DELAY

Any "surprise" would inure to both the prosecution <u>and</u> the defense. Just as the State did not anticipate the introduction of this testimony and accordingly examine its witnesses in contemplation of subsequent admission of the testimony, neither

did defense counsel. Any "surprise" "prejudice" here is equally attributable to both the State and Appellant, minus one minute (R 2659).

Delay in the orderly process of the court is certainly a consideration of the court, and undue delay should be avoided. However, there is nothing in the record to suggest that an "undue" delay was necessary or would have occurred here. When asked by the court whether, as a matter of fairness, the State should have some time to investigate the matter, defense counsel stated, "By all means, your Honor, give the State the rest of the day. We'll come back in the morning, and by then with all of the facilities that the State has, its got the whole Sheriff's Department..." (R 2663). The court then noted that half of the sixty man Sheriff's Department was unavailable (R 2663). Appellant respectfully points out that this still left available thirty deputies of the Sheriff's Department, as well as the entire Police Department and the Highway Patrol Department.

The prosecutor asserted that "probably not more than two dozen people would require interviewing in order to counter the testimony of Mrs. Waters" (R 2673-2674). Assuming but not conceding that to be an accurate estimate,[2/] there is nothing to indicate that an undue delay would have occurred in getting those respective people interviewed. For the court, in its discretion,

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2/ Mrs. Waters specifically named only 4 people as being with her in the van that morning when she observed the pedestrian and commented, "We aren't the only ones out at this hour." (R 2628).

to provide one day for both sides to investigate the testimony of the surprise witness would certainly not constitute an undue delay in a capital trial, where literally a person's life is at stake. If, in its discretion, the trial court decided it would provide no opportunity for either the State or the defense to investigate the testimony of the surprise witness, the State and the defense would nonetheless stand upon equal footing in reference to the witness.

RULE OF SEQUESTRATION

Appellant vehemently disagrees with the State's contention that a violation of the rule sequestration occurred here. This Court's attention is respectfully drawn to the initial stages of the trial. The prosecutor gave his entire opening statement without having invoked the rule of sequestration (R 1520-1561), defense counsel reserved his right to present his opening statement at the close of the State's evidence (R 1561), and a recess was then had whereby certain housekeeping matters concerning the introduction of evidence could be taken care of (R 1561-1565). Thereafter the court sua sponte invoked the rule of sequestration (R 1565-1566). Thus, it is clear that the State did not invoke the rule of sequestration, and should not thereafter be heard to complain about a perceived violation of the rule.

Assuming but not conceding that the essence of the rule of sequestration was violated, the total exclusion of a witness' testimony is warranted only for the most intentional and flagrant

violation of the rule by a witness placed under the rule, if then. As stated by this Court in Dumas v. State, 350 So.2d 464 (Fla. 1977);

> Considering the respective reasons for the rule of sequestration and for the constitutional right to present witnesses, we have no difficulty in concluding that the latter overrides any mere violation of the former. The rule of sequestration is a procedural device available to purify trial testimony when counsel for either side believes it to be advantageous. The rule must be invoked in the first instance by counsel. In our Anglo-American system of jurisprudence, no trial is invalid simply because one or more potential witnesses hear the testimony of other witnesses. We no more automatically bar the testimony of witnesses who have not been placed "under the rule" than we prevent a defendant from testifying on his own behalf simply because he has heard all the testimony in his trial before he takes the stand. When confronted with the Sixth Amendment right, then, a mere violation of the rule must give way.

Id. at 466 (emphasis added) (footnote omitted).

The State argues that Mrs. Waters was able to "monitor" the trial (AB at page 17), but such argument rings hollow and displays basic distrust in the effectiveness of the adversarial system. Surely cross-examination of Mrs. Waters by the very able prosecutor would quickly ferret out any tailoring of testimony by Mrs. Waters. It is a basic premise of American justice that the introduction of relevant evidence is encouraged, whereas the exclusion of exculpatory evidence is denounced, especially in a capital case.

Moreover, it is respectfully submitted that the State has totally misrepresented Mrs. Waters' testimony by contending

that she later recanted her testimony (AB at page 18). Mrs. Waters has never contended that she recognized Appellant as the person she observed walking that night. The portion of the colloquy quoted by the State (AB at page 18) explains that had she recognized the person as Appellant, she would have given him a ride. To argue out of context that this means that Mrs. Waters was saying that the pedestrian she saw that morning was not Appellant is incorrect and grossly misleading. Mrs. Waters in fact saw someone whom she did not recognize, but whom she was able to describe as being consistent with Appellant's description. It was for the jury to determine the weight, if any, to be given this testimony.

The ramifications of the State's argument permit the State to exclude a witness' testimony where that witness comes forward upon hearing the testimony of the State's witnesses and only then realizes that he has totally exculpatory information that would otherwise would have gone undiscovered, even though the rule of sequestration was never requested by counsel. Appellant maintains that a tremendous injustice occurs, especially in a capital case, where a defendant cannot present a witness in his behalf simply because she did not learn that she possessed exculpatory information until after the trial had commenced. A public trial is but a safeguard to ensure that justice occurs, and the realization of a witness that he or she possesses relevant, exculpatory evidence is but one facet of this safeguard. Pursuant to Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920) the trial judge here abused his discretion, and the matter must be reversed and remanded for a new trial.

POINT III

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY, OVER OBJECTION, THAT EVIDENCE OF A PRIOR CRIME COMMITTED BY APPELLANT "WILL BE CONSIDERED BY YOU FOR THE LIMITED PURPOSES OF PROVING... IDENTITY ... ON THE PART OF THE DEFENDANT."

The State apparently concedes that the similar fact evidence was insufficient as a matter of law to prove identity, in that the State has not argued that sufficient unique similarities exist between the two offenses that would justify the instruction. Instead, the State argues that the testimony was relevant [ergo admissible] to show preparation or knowledge, and accordingly states "The sole issue, on appeal, then, is whether the above limiting instruction given by the trial court allowed the jury too much discretion in applying such testimony to categories enunciated in the limiting instruction." (AB at 23). In reply, Appellant submits that the jury instruction did not accurately state the law, that the instruction did not concern the law of the case as established by the facts adduced at trial, that a timely and specific objection was made, and that therefore NO DISCRETION to unlawfully consider the evidence in a capital case should have been afforded the jury.

The opinion of this Court in Drake v. State, 400 So.2d 1217 (Fla. 1981) establishes that the instruction given the jury over objection did not accurately state the law as applied to the facts of the instant case. Simply stated, the law of the case

should not have included an instruction that similar fact evidence could be used by the jury to prove identity.

Section 918.101, Fla.Stat. (1981), plainly states; "At the conclusion of argument of counsel, the Court shall charge the jury. The charge shall be only on the law of the case and must include the penalty for the offense for which the accused is being charged." This statute has been implemented through Florida Rule of Criminal Procedure 3.390(a). In this regard, the word "shall" is not merely a directory/discretionary term, but instead requires mandatory compliance. See Tascano v. State, 393 So.2d 540 (1981).

The State chides, "Moreover, the Appellant doth protest too much. * * * The Appellant did not call this witness himself, but in closing argument relied on this very evidence to show lack of identity i.e. that the Appellant's print had been left in the house not at the time of the murder, but when he had previously entered the house (citation omitted)." (AB at 25) In reply, Appellant submits that a distinction exists between defense counsel properly arguing a reasonable inference to be drawn from the proof at trial, and the trial court's improperly instructing the jury, over objection, that it may unlawfully consider the evidence of the other crime allegedly committed by Appellant to prove the identity of the perpetrator of the instant crime. The State's citation to Waterhouse v. State, 429 So.2d 301 (Fla. 1983) is totally inapposite, in that there the Supreme Court of Florida noted "The admission of relevant evidence tending to show commission of a dissimilar or much less serious

crime... <u>may</u> be harmless error." <u>Id.</u> at 306. <u>Waterhouse</u> does not address the point on appeal, in that <u>Waterhouse</u> concerns the admission of evidence, not an erroneous instruction that such evidence could be unlawfully considered by the jury over timely, specific objection.

Specifically, the prejudice <u>sub judice</u> is that the jury was thrice instructed (once in writing) that it could unlawfully apply a premise of law that was not justified by the facts of the case, all over timely, specific objection. It is respectfully submitted that the Court's improper ruling and instruction constitutes reversible error.

POINT IX

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

Citing Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), the State argues that "It is not necessary that the jury make written findings nor constitutionally required. It is sufficient that the trial court make such findings." (AB at 47). Appellant respectfully maintains that the Florida and Federal Constitution require that such findings be made by the jury. Alvord is inapposite, in that this precise question was not addressed. The Court in Alvord held that §921.141 Fla.Stat. was constitutional against attacks asserting that the sentencing procedure was unconstitutionally discretionary; that the statutory distinction between a first and second degree felony murder was unconstitutionally vague; and that the death sentence was per se cruel and unusual punishment. Id at 535. Such are not the issues presented here.

Neither can the State find solace in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976). The United States Supreme Court in Proffitt held that the imposition of the death penalty for the crime of murder under the Florida Statutes did not violated the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments. Appellant is not here maintaining that the Florida death

penalty is unconstitutional because it constitutes cruel and unusual punishment. Rather, Appellant submits that the procedure of imposing the death penalty without having the jury make requisite findings of fact denies Appellant procedural due process of a jury by his peers.

The State's reliance on Johnson v. State, 393 So.2d 1069 (Fla. 1981) is misplaced. The defendant in Johnson contended that the trial court could not impose the death sentence after a jury recommendation of life imprisonment, because that act denied him the right to trial by a jury. The Supreme Court noted "Johnson's arguments that the court's override of the jury recommendation amounts to cruel and unusual punishment and violates his right to due process of law are likewise without merit. These arguments are based on the same faulty premise as Johnson's double jeopardy argument that the jury's role is more than advisory - that it binds the trial court and this court." Id. at 1074. Again, this language does not address the point presented in this appeal.

Specifically, and simply, the establishment of aggravating and/or mitigating circumstances involves the meeting of a burden of proof through presentation of evidence. Accordingly, it is for the jury and not the judge to find the existence of facts/circumstances that would enhance the penalty received by the defendant. Hough v. State, ___ So.2d ___, (Fla. 5th DCA, April 19, 1984) 9 FLW 902; Ernest v. State, 351 So.2d 957 (Fla. 1977); Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984); Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983); Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982).

Appellant agrees that in the sentencing process the role of the jury is merely advisory. However, in the guilt determination phase, the jury's role as fact finder requires that they find the existence vel non of the aggravating and/or mitigating circumstances that are to be used by the trial court to enhance Appellant's sentence to that of death. Appellant's sentence of death was imposed here in violation of his right to a trial by jury guaranteed by the Sixth Amendment to the United States Constitution, and accordingly the sentence must be vacated.

CONCLUSION

BASED UPON the argument and authority contained in this brief and in the initial brief of Appellant, this Court is asked to grant the following relief:

POINTS I, II, III, IV, and VI - Reversal of Appellant's conviction and remand for a retrial.

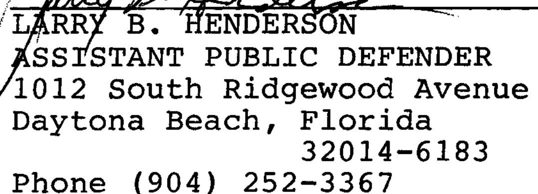
POINT V - Reversal of the conviction for Grand Theft - Second Degree.

POINTS VII and VIII - Reduction of the death sentence to a sentence of life imprisonment, with imposition of a twenty-five year minimum mandatory.

POINTS IX and X - Declaration that §921.141, Fla.Stat., as applied, is unconstitutional, and reduction of the death sentence to a sentence of life imprisonment, with imposition of a twenty-five year minimum mandatory.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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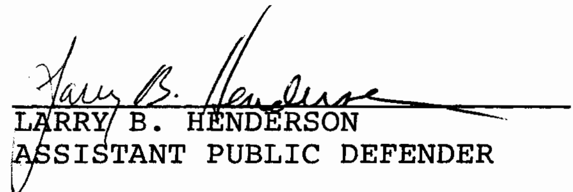
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Joel Dale Wright, Inmate No. 749768, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 19th day of July, 1984.



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