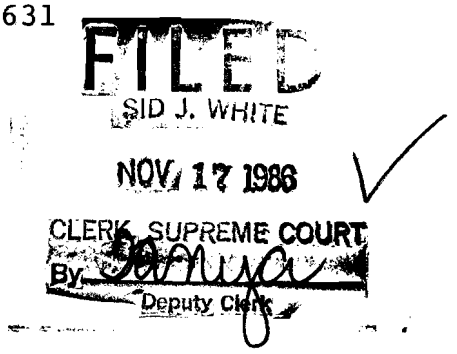
IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 65,631



DONALD ROBERT LLOYD

Appellant,

vs.

STATE OF FLORIDA

Appellee.

_____/

REPLY BRIEF OF APPELLANT DONALD R. LLOYD

(CAPITAL CASE)

DIRECT APPEAL FROM THE THIRTEENTH
JUDICIAL CIRCUIT COURT, IN AND FOR
HILLSBOROUGH COUNTY, FLORID

LAURA R. MORRISON,
Attorney at Law
633 South Andrews Avenue
Third floor
Fort Lauderdale, Florida 33301
(305) 525-1700

TABLE OF CITATIONS

TABLE OF CITATIONS

OTHER AUTHORITIES:

TABLE OF CONTENTS

STATEMENT OF THE CASE

Appellant will rely on the statement of the case as presented on pages 1 through 5 of the initial brief.

STATEMENT OF THE FACTS

Appellant will rely on the statement of the facts including all subsections as presented on pages 6 through 39 of his initial brief.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXPERT PSYCHOLOGIST SUFFICIENT TIME TO EVALUATE RYAN OSBORNE

In its answer brief, the State addresses only Dr. Lockey's examination and so-called therapy time with Ryan Osborne. Curiously, appellee does not even refer to their expert psychologist, Dr. Sidney Merin's time with Ryan.

The court's prejudice is reflected in the disparity of time each expert was permitted to spend with the child. Dr. Blau was permitted no more than one hour with Ryan. The state's psychologist (of whom appellant had no prior knowledge) and/or his staff spent an absolute minimum of four hours with Ryan. The state referred expert in child psychiatry spent at least sixteen (16) hours with Ryan. The difference in time allotment is overwhelming and reveals a fundamental lack of fairness.

The psychological evaluation of Ryan undertaken by Dr. Merin would take a minimum of four hours to complete. As referenced in appellant's initial brief, Ryan was administered six (6) tests. The Stanford-Binet-LM, alone, a test of general intelligence, takes a minimum of sixty minutes to an average of ninety minutes to administer. Terman & Merrill, Stanford-Binet Intelligence Scale, Form L-M Manual for Third Revision, 58 (1973). Thus the time claimed by the State would be used entirely on this one exam. The WISC-R (Wechsler Intelligence Scale for children)

which also measures general intelligence is based on ten subtests and gives information as to specific aptitudes and abilities takes an average of fifty to seventy-five minutes to complete. D. Wechsler, Manual-Wisc-R, 54 (1974)

There are six (6) possible sub-tests comprising the performance scale of the WISC-R. Since the specific scale given to Ryan is not indicated, it cannot be determined how long this test took but it is obvious that some time was used.id

Appellee would note that under ordinary circumstances no fewer than ten(10) of the twelve (12) subtests of the WISC-R are to be given when making an evaluation. It is thus rather curious that only one scale was used.id

The Peabody Picture Vocabulary Test designed primarily to measure a subject's receptive hearing vocabulary take approximately twenty minutes. II J.MitchellMental Measurements Yearbook, page 1123, (9th ed.1985).

The Draw A Person test takes approximately ten minutes id Vol I, page 515. It is apparent that a great deal more time than that to which the State admitted was utilized by the State's doctor, even if one makes the extraordinary assumption that the doctor did no personal interviewing of the child as is normal evaluative practice.

The State's consistent argument that testing and evaluation would be harmful to the child is not supported by the state's own actions in having the child evaluated by theirown experts.

After The state's expert evaluated Ryan, the court ruled that Dr. Blau could testify at trial, provided he did not voice an opinion as to the child's credibility. However this ruling was also undercut by the court's sanction of disproportionate access to the child. The court effectively denied appellant the option of using Dr. Blau's testimony at trial as it would have been most extraordinary for defense counsel to allow an expert witness who had examined the child for one hour to testify where the potentially opposing witnesses had seen the child for four to six hours and sixteen hours, respectively and where the witness could, due to court imposed limitations, testify in generalities only.

Developmentally, children are not simply little adults. One substantial difference between child and adult witnesses is the actual physical development of certain areas of the brain such as the terwary (sic) zone which is responsible for sequential thinking necessary to proper recall. The eighth circuit has noted that ordinary jurors may need help in assessing the credibility of adult witnesses and that an expert may aid jurors by testifying about such things as a child's ability to separate fact from fiction as long as the expert does not state his own opinion as to the witness's believability. United States v. Azure, 40 Cr.L.Rep. 2025 (8th Cir.1986).

Appellant does not contend, as the state claims, that all children who are victim or witness to a crime must undergo psychological evaluation prior to testifying as a

witness. (Parenthetically, Ryan was not, as was referenced by the State, the victim of this crime.) In support of appellee, appellant would point out that Ryan's testimony "as the sole eyewitness to the event" was so "important to the prosecution and highly detrimental to the defense" that its exclusion would necessarily result in an acquittal due to the insufficiency of the evidence. Tibbs v. State, 397 So.2d 1120 (Fla.1981). The failure to allow a full evaluation of Ryan cannot be harmless error. Nor can the court's action in permitting the state's expert witnesses multiples of the time allowed the defense recommended expert be harmless error.

Appellee notes appellant had sought to have Ryan evaluated "even though he had been examined by a child psychiatrist, Dr. Lockey". The very fact of Dr. Lockeys contact with Ryan was a strong contributing factor to seeking an independent evaluation of Ryan. See Motion for Psychological Evaluation of Ryan Osborne (Vol I, p.117-126). Assistant State Attorney Barbara Fleisher referred Ryan to Dr. Lockey for counseling and preparation for trial. Thus, Ryan was once again thrust into a situation with a party who if not biased at the outset clearly became so. Dr Lockey herself admitted that she did not possess the necessary qualifications to objectively evaluate Ryan , she admitted that she did no substantial evaluation of Ryan , she admitted she relied for certain key information on extremely biased people Ryan's grandmother and father) and

she admitted that with the exception of bare bones facts she did not learn the details of the case. Thus she had no frame of reference within which to judge Ryan's memory of the event, the accuracy of his recall or indeed his emotional handling of the events. Although Ryan allegedly refused to discuss the event with Dr. Lockey he was able to take great pride in telling the lawyers (obviously the State Attorneys) "the scary story" as it was so named by Dr Lockey. Given the access of the States's experts to the child, the courts limitation of Dr. Blau's examination of Ryan was most certainly not within the sound judicial discretion of the court. Having ruled that an examination could be made it was neither reasonable nor appropriate for the court to intrude upon the criteria and ethical considerations of another discipline in setting unreasonable limitations in the conduct the examination (see R-1343,2367-2401). The court's discretion may not be exercised in such a manner as to favor one party to the decided detriment of the other resulting in an essential lack of fairness in the litigation process.

The unfairness of this situation is further evidence by the fact that were the experts to be called at trial the state had access to two allegedly expert witnesses, Dr. Lockey & D.r Merin who had each spent multiple hours with Ryan against appellant's one witness who was limited to a one hour personal evaluation of Ryan.

Appellant reminds the court and appellee that

appellant was not seeking a private evaluation of Ryan for appellants private use. In the interests of justice and fairness appellant sought an evaluation by a qualified expert for presentation to the court and all parties. Therefore had the information acquired not been helpful to the defendant, the defendant would still have been bound by his previous request for the results.

The State contents that Dr. Blau was apparently not able to present any problems concerning Ryan's competency as a witness. Appellant refers the State to Dr. Blau's statement that he could not within the time limitation perform a full evaluation and that to pretend to do so would be an abrogation of his professional and ethical obligations. Any omission is not due to an admission of Ryan's competency but is caused by the court imposed time limitations. Simply stated, Dr. Blau was not given the opportunity to evaluate whether there were specific problems with Ryan. He was able to testify to and cited support for the premise that the testimony of an average five or six year old witness cannot be presumed competent.

The ability to effectively cross-examine Ryan was perhaps the most important element of appellant's defense. The evidence of psychiatric problems or in this case the impact of psychotrauma on an infant witness or the mere fact of the witnesses infancy is not relevant only to an attack on the credibility of a witness as the State claims. The information also underlies the ability to determine the

witnesses legal competence. Appellant strongly denies that his reasoning would necessarily lead to the psychological examination of all victims and witnesses to traumatic events. Appellant has never suggested such a procedure. In the instant case appellant delineated specific reasons for the requested evaluation of Ryan. Appellant does not recall any indication given by Dr Merin were essential and for that matter if he did that Dr. Blau felt the tests administered by Dr. Merin and his staff were essential. But, even assuming arguendo that such a statement was made, it is not indicative of his acceptance of the test results obtained by others nor of a conclusion that the tests given comprised a full evaluative procedure. The deposition taken of Ryan prior to the state's full production of discovery materials and prior to the evaluation of Ryan was not a sufficient substitute for said evaluation. The defendant was severely prejudiced in obtaining an appropriate evaluation of the child and thus severely prejudiced in his ability to challenge the childs competency and of course ultimately prejudice to the defendant in his ability to effectively crossexamine the child.

The court's denial of a full evaluation of Ryan Osborne was an abuse of discretion resulting in a denial to appellant of his right to confront the witnesses against him. The Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution the right to cross-examine adverse witnesses. United States v. Domina, 784 F2d.

1361,1365 (9th Cir.1986) citing to Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 LEd. 2d 347 (1974).

The court's ruling effectively denied appellant the ability to evaluate andtest Ryan's susceptibilityto influence, pressure or intimidation, his ability to differentiate fact from fantasy, his ability to accurately perceive events or at least this event and his abilityto accurately relate the events.

That the court's discretion was not appropriately exercised is disclosed by the allowance of themore extensive state contact with the child.

The results of this abuse of discretion mandates the exclusion of Ryan's testimony and the reversal of appellant's conviction.

ARGUMENT II

THE TRIAL COURT ABUSED ITS DISCRETION IN RULING RYAN OSBORNE A COMPETENT WITNESS

Appellant has no argument with that part of the law which holds that a child who is able to obtain "just impressions" of the event and who is able to correctly relate that which he has observed is competent to testify.

The difficulty in determining an infant witness' competency to testify is not in the magic words or conclusory statements as to who is competent but is, rather, in the establishment of the specific criteria leading to the "magic words" and in the evaluation of the individual witness as to each of the relevant criteria.

As to the specific case before this court, appellant's argument is precisely that the varying versions of events related by Ryan cast grave doubt upon whether Ryan accurately perceived the events. Appellant contends that, at best, Ryans perceptions were faulty and/or he was unable to accurately recall and relate the event. Moreover, Appellant submits that the circumstances of this case indicate that inevitably, Ryan was subject to suggestion, statement and manipulation, intentional and unintentional, by others.

If Ryan's initial recitation of the events are accepted as wholly accurate then it is illogical & incongruous to believe that the only major error made was in his initial

description of the assailant. If it is believed that Ryan was inaccurate in his recollection and recitation then he obviouly cannot be a competent witness.

In Shuhler v. Wainwright, 491 F.2d 1213 (5th Cir.1974) the court stated that the trial court, "in its discretion, may hear evidence from doctors acquaintances or other sources calculated to lead to a correct appraisal of the competency of the witness." (emphasis added) Appellant draws attention to the use of the phrase " correct appraisal of the witness" If the court's appraisal is not correct a grave miscarriage of justice is likely to occur. It could cost a man his life.

Although, it is within the court's discretion to determine whether an infant witness is competent to testify, appellant asserts that such discretion is abused where the court makes such a decision in a void, i.e. where the court fails to obtain the appropriate information upon which to base its decision. Where indication is made, a psychological examination of the witness and report to the court should be made.

In the case at hand, the court exercised a form of semi-discretion. The court granted appellant's Motion for Psychological Evaluation of the Eyewitness Ryan Osborne, but then effectively traversed its own decision by severely limiting the examination to the point where a comprehensive professional examination of the witness could not be made. Dr. Theodore Blau, appellant's suggested expert witness,

advised the court that the limitation would inhibit his ability to thoroughly evaluate the child thereby preventing him from offering a professionally ethical opinion. The time limitation imposed by the court was tantamount to a denial of access.

In order to properly determine whether a child is competent to testify, the impact of the events in question, the circumstances of the child's environment, including the people around him, and the child's emotional status well as the standard criteria of age, intelligence and the ability to accurately communicate accurate perceptions need to be evaluated.

A state of the art psychological evaluation should be relied upon for guidance in determining whether a child of questionable competency is actually competent to testify. The child's age alone or even raw intelligence are not sufficient in themselves to lead to an appropriate evaluative conclusion about a child's competency to testify. While extremely low intelligence might disqualify anyone as a witness, average or above average intelligence reflects nothing more than a potential to be a competent witness.

Additionally the definitions attached to certain of the criteria need to be more adequately defined. For example the "sense of moral obligation" required of a competent witness may not for, a child, be a simple discernment of right from wrong. For a child, attuned to meeting a parent's expectations rather than those of society in

general, the moral obligation understood by the child may be an obligation to please his parents. A child's sense of right or wrong is, after all, determined in most instances, by what their parents (or authority figures expect). The best example of this is Dr. Lockey's revelation that Ryan took pride in telling the "scary story". Only the knowledge that he was effectively meeting someone's expectations could have given Ryan that sense of pride.

The essential prejudice to appellant caused by the court's ruling is further reflected in the disparity of time each expert was permitted to spend with the child. Dr. Blau was permitted no more than one hour with Ryan. The state's psychologist (of whom appellant had no prior knowledge) and/or his staff spent a minimum of hours with Ryan. The state referred expert in child psychiatry spent at least sixteen (16) hours with Ryan. The difference in time allotment is overwhelming and reveals a fundamental lack of fairness.

Appellee notes the court did hear testimony from Dr. Blau, however, the court's information was limited by the fact that the testimony was incomplete because Dr. Blau had not been permitted to make a full evaluation of the witness.

Appellant respectfully suggests that the better practice would be for the trial judge to become acquainted with the appropriate psychological, as well as legal criteria by which to judge the competency of an infant witness. As in

other medical or technical evaluations, the legal criteria for determining the competency of a witness should utilize the best state of the art evaluations and conclusions the field of psychology can offer.

While testifying that Ryan did appear to be an average child for his age, Dr. Blau pointed out that an average child five to six years of age cannot be presumed to be a competent witness. As pointed out in Appellant's initial brief, no opposing expert testimony was presented by the state yet the court chose to ignore Dr. Blau's expert testimony in deference to the outdated and inadequate questions which have traditionally been used.

Ryan's overwhelmingly inconsistent statements do not, as the State suggests, bear only on his credibility. They also bear on his competency. It is ludicrous to suggest that the multiple inconsistent statements do not cast doubt on Ryan's ability to testify accurately and/or his ability to accurately recall and recite the events in question. Because the inconsistent statements are germane to an issue of credibility does not detract from (their) relevance in judging the threshold level of competency. Nor does the issue of credibility take on less importance because a witness has been ruled competent.

The threshold level of determination as to competency must precede the witness' testimony before the jury and therefore precede the jury's determination as to credibility.

Unlike the case of Williams v. State, Ryan's various

statements were not the minor type of semantic inconsistencies that might be expected where a witness is required to repeat statements. Ryans's statements were substantively inconsistent.

Given the (inconsistencies) of Ryan's testimony and the very unusual circumstances of this case, it is impossible to avoid the conclusion that at best Ryan was confused and at worst was coerced.

The state claims appellant caused the state to insist on using Ryan as a witness contrary to the state's assertion, it was the state's choice to put Ryan on the stand. Appellant did not make the strategic choices for the state.

It cannot be seriously contended that a witness who told conflicting versions at nearly every opportunity, was "remarkably accurate" (state's answer brief, p.).

In response to the state's assertion on page 18 of its brief that Ryan accurately testified and was corroborated by other witnesses as to the (following facts), appellant specifically replies:

No one knows whether Ryan "accurately testified that the man ordered them into the bathroom." There was no corroboration. It is known only that the victim was shot in the bathroom and that Ryan was allegedly present.

Other than Ryan's inconsistent testimony there was no corroboration and no proof that the man demanded money. What evidence exists is to the contrary.

Cheryl Osborne took out her wallet to show the man.

There is no proof nor corroboration thereof, that Ryan's mother took off her ring on the assailants demand. The proof is to the contrary. The ring was found in the house.

Ryan's assertion that he saw the man get into red and white van was contradicted by the evidence and not corroborated by anyone. No one, including James Thornton saw Ryan in a position to have seen anyone get into the van. Moreover, Ryan's description of the location, position and color scheme of the van was contradicted not corroborated by other witnesses. Thus only one of the state's "important facts" was corraborated.

Only the uncontested physical fact that Cheryl Osborne was shot twice was corroborated by other witnesses.

There was nothing in the manner or phrasing of the questions addressed to Ryan which caused the questions to be "undeniably frightening" as the state contends. The questions addressed to Ryan were neither frightening nor confusing.

The statement from Harrold v. Schleup, 264 so2d 931 (Fla. 4thDCA 1972) quoted by Appellee on page 18 of his brief is inapplicable to the instant case. According to the State's own doctor, Ann Lockey, Ryan was not brought into the "unfamiliar environment of the courtroom" nor was he faced with so called adult terminology (to which he had previously been unexposed) nor was there any evidence the

child was faced with a crowd of strangers which might be intimidating. Dr Lockey had testified that the very purpose of her work with Ryan was to familiarize him with courtroom and put him at ease.

Appellant replies to appellee's comments to the listed 17 points reflecting Ryan's inconsistencies:

(1) Appellant apologizes if the citation to Ryan's testimony inadvertently picked up testimony from Ryan's deposition that his mother told the man to "come in" (page 7). In any event, the point of the comparison in item one is that Ryan had testified that the assailant knocked on the door to gain entrance whereas he had initially told James Thornton the assailant shot the door off. (XIV, p2112)., Of course, it is uncontroverted that the door was not shot off.

(2) Appellant relies on item #2 as presented in his initial brief.

It is difficult to understand how the state believes the statement there was no fighting at the door is consistent with there having been fighting at the front door. Moreover, Ryan's testimony as to the fighting is belied by Ryan's own testimony that there was conversation as the man being a guitar player. Further Ryan's testimony as to the fighting is inherently incredible in view of his own unsupportive answers to the questions which followed (Vol.XIV p. 1938-40).

(3) Appellant relies on item #3 as previously presented.

A witness' comment "that is what he said" does not in a any manner indicate uncertainty.

The statements by Ryan reflect a conflict in evidence given by one witness (Ryan) and as such are inconsistent statements by the witness.

(4) Appellant relies on item #3 as previously presented.

Ryan did not necessarily have to have seen the man at the door to be ordered into the bathroom. Appellant does not concede that Ryan or his mother were ordered into the bathroom by the assailant or that Ryan was an eyewitness to the entire event.

(5) Appellant relies on item #5 as previously presented.

The question as to what the man said in the house was not vague, it was an ordinary non-leading question. A witness who can only provide "acceptable" answers in responseto leading questions evidences a certain lack of competence.

Given the several comments Ryan has claimed the assailant made while in the house, it would seem reasonable to expect that Ryan should be capable of providing answers other than that he did not recall what was said.

(6) Appellant relies on item #6 as previously presented as it reflects Ryan's suggestibility and incorporation of facts not connected to appellant. It was

Ryan's father James Leon Osborne, who was a guitar player (and singer) trying to build a recording career.

(7) Appellant relies on item 7 as previously presented as a clear reflection of the inconsistencies of Ryan's statements.

Ryan's statement regarding his mother's ring were absolutely inconsistent.

The state's position that one cannot use inconsistent statements to question a child's competency or his credibility is not reasonable. It does however, highlight the very serious problems which occur when trying to cross examine a child witness and the difficulties that arise because the state is intent upon preventing effective cross examination of the child in violation of the accused's rights to confront the witnesses against him. A child witness is not, for variety of practical legal and sociological reasons as subject to cross examination as is an adult witness.

(8) Appellant relies on item #8 as previously presented.

Detective Goethe's testimony was that Ryan told her the man had hair on his face. Thus Ryan's later claim that the man was bearded and mustached is a conflict with his own prior statement.

Quite obviously, Detective Goethe was not a witness to the offense itself and therefore could not offer her personal view as to the assailant's identity. Perhaps the State is

really contending that the officers were inept in obtaining information, writing their reports and later testifying as to the contents contained therein. Perhaps all of the testimony from all the officers should be stricken.

(9) Appellant relies on item #9 as previously presented.

Detective McAllister confirmed that Ryan's father, James Leon Osborne, had a beard and mustache at the time of the offense (Vol.XIII p.2021).

Even assuming arguendo, that appellee's point is correct, the state has failed to explain how Ryan"forgot" the man's appearance between the time of the event and his identification of appellant the following day.

(10) Appellant relies on item #10 as previously presented.

Again, Ryan's statements are not inconsistent with the personal statements of detective Goethe, but are inconsistent with his own statements previously made to Detective Goethe.

(11) Appellant relies on item #11 as previously presented.

Again, the conflict is not between two witnesses but between two statements of the same witness.

Ryan did not actually disagree with Detective McAllister's recitation of what he (Ryan) said Ryan denied making the statement at all.

Detective McAllister's transparent attempt to interpret

Ryan's statement to conform to Ryan's testimony at trial is, perhaps, understandable but inappropriate.
Learning by what exit the assailant left would ordinarily be deemed of some importance. One would think that the officer would have clarified any confusion as to what the witness was saying at the time he took the statement.

Since Ryan and Detective McAllister were talking about the assailant, it is not reasonable to assume that Ryan without notice immediately began talking of himself.

Ryan's testimony concerning the van have been adequately discussed elsewhere.

Interestingly, regardless of who was to have gone out the garage and over fence, the testimony was inconsistent with Ryan's statements that both the intruder and Ryan left the house by the front door.

(12) Appellant relies on item# 12 as previously presented.

The state's view of consistency is incomprehensible. A man holding a suitcase and a man not holding a suitcase are not consistent Nor does the alleged context of Detective Goethe's question affect that inconsistency. Ryan was asked what the man was carrying when he left the house. Presumably anything visible would have been mentioned. Ryan responded in the negative when asked if the man was carrying anything else. (Vol XIII P. 2113-2114).

(13-16) The State did not address items 13 through 16 and appellant continues to rely on those items as previously presented

(17) appellant relies on item 17 as previously presented.

No confusion between the counsel and the witness was evident. Ryan twice said he did not see the man pass the tree stump. If this statement is true, Ryan could not have seen the assailant enter the van. It is not obvious that Ryan did not mean the man stopped at the stump or went in a different direction because he "never deviated from the position that he saw appellant enter the van. that conclusion begs the question. The testimony given by thornton and Ryan as well as other information in the record as to the location etc. of the van is inconsistent with Ryan having seen the van at all.

ARGUMENT III

THE TRIAL COURT ERRED DENYING APPELLANT'S MOTION TO SUPPRESS THE PRE-TRIAL PHOTOGRAPHIC IDENTIFICATION OF APPELLANT BY RYAN OSBORNE

Appellee misapprehends appellant's complaint. Appellant's complaint is not at all that the photographs shown to Ryan were inappropriate because they "did not exactly fit the description give by Ryan".(Appellee's brief at p.29). The basis for that particular aspect of the complaint is that the photographs were not in any manner similar to the description provided by Ryan. For their own reasons the officers displaying the photographs chose to entirely ignore the description of the assailant provided by Ryan - the only eyewitness to the crime.

Had photographs of appellant and other bearded, mustached men been placed in a line-up along with photographs of several clean-shaven men fitting the description provided by Ryan, a procedure analogous to that used in United States v. Ayendes, 451 F.2d 601 (6th Cir. 1976), cited by appellee, perhaps Appellant would have no complaint.

yendes, in which a suggestive line-up containing color photographs of the defendants intermixed with black and white photographs of other persons was utilized, did not involve a situation like the instant case where none of the photographs matched the description provided by the witness and where the layout of the photographs was such as to

enhance the chance of selection of a particular picture. Also differentiating Ayendes,id. from the instant case are the facts that the witnesses made in court identifications of the defendants, testified that their memories were based on the actual event and not the intervening line-up and were reasonablyconsistent in their description of the defendants from the giving of the description through the out-of-court and in court identifications. Finally, the witnesses were subject to extensive cross-examination both as to the out-of-court and in-court identifications. The court in Ayendes, id at 605 specifically noted that the defendants chose not to cross-examine the identification witnesses on certain aspects of the line up which were alleged to be prejudicial. The appellate court complained that it was "asked to assume, without any testing of the witnesses' reaction to this issue, that these factors led to misidentification. Similarly this court is asked to assume, without any testing of the witness's reaction to this issue, that the photographic line up was fairly comprised, that it was not shown in an impermissibly suggestive manner and that no undue or inappropriate influences affected the witness's choice.

The witness in the instant case was not examined or cross-examined as to the specifics of the photographic line-up. As noted in the initial brief, the court at the State's behest did not allow such examination. Appellant was unable to locate another case where the court did not permit

questioning of the identifying witness.

However, in United States v. Owens, 789 F2d 750 (9th Cir.1986) the court reversed a conviction where the identifying witness was present but not effectively subject to cross-examination due to memory loss from injuries suffered in an attack and where the admission of the testimony could not, in the circumstanaces of the case be deemed harmless. The court noted that the accused was prevented from explaining the facts and circumstances underlying the identification. And that the type and extent of cross-examination towhichthe witness could be subjected could not expose or significantly test the witness' misperception or failure of memory.

The rationale of Owens ,id mandates a reversal in the instant case.

United States v. Snow, 552 F.2d 165 (6th Cir.1977), cited by Appellee, is also not applicable to the instant case. It was pointed out in Snow that the photographs were all in color, that all of them were taken at the same place, that a photograph in addition to the appellant's contained two views and that eight pictures (rather than the more undesirable five pictures used in this case) were shown to the witness. The picture of the defendant in Snow was only slightly smaller than the other photographs and that small difference was not noticed by the identifying witness. Moreover, as in Ayendes, the witness was able to make a separate in-court identification of the accused.

Robert Howell, who chose two photographs did testify that he wasn't sure of appellant's picture because appellant had red eyes in the photograph. Appellant believes that Mr. Howell was either incorrect or lying because Lloyd did not have red eyes in the photograph.

The answer to the State's question on page 29 of its brief is No: First, appellee's premises are incorrect. James Thornton did not, as alleged by the state, see one person leaving the scene of the crime. Thornton was careful to point out that he saw someone in the field, a distance from the house, moving basically away from the direction of the Osborne home. The tag number Thornton got was the tag number of the vehicle seen in the church parking lot. Thornton did not see anyone get in the van. Thornton never saw the face of the man leaving the scene. He saw the face of the man in the van.

As long as the state raises the issue of the officers' dereliction of duty. Appellant would point out that it was, at minimum, surely a dereliction "to issue on arrest. warrant based based on identifications not yet made. It was certainty a dereliction of duty to fail take pictures of the blood allegedly splattered on Ryan and a dereliction of duty

1/ Is Appellant seriously suggesting after James Thornton saw only one person leaving the scene of the crime, got that person's tag number and identified the owner of the car (once it was traced to donald Lloyd across the state) as the person he saw leaving the scene, that Lloyd's photograph should not have been shown to Ryan because it did not exactly fit the description given by Ryan?

to arbitrarily determine the description of the intruder provided by the only eyewitness was not sufficiently valid to include in the line up.

Much of the state's criticism of its police officers may be well taken however, appellant would point out that Detective Goethe who asked the complained of questions was specifically called in by her supervisor to interview Ryan due to her expertise in dealing with children. It is nothing less than extraordinary that the detective's superiors on the scene and now appellee have both refuted the work of one of their own experts. Obviously, the circumstances were not optimum to obtaining a description. There is no crime scene which presents such optimum circumstances. However, generally, descriptions of the assailants where there has been no prior relationship to the victim are rarely obtained in optimum circumstances.

Moreover, the State ignores the fact that some of Detective Goethe's questions, such as the need to require comparison of colors were necessitated by Ryan's inability to name colors, a rather curious inability in a child of five. Nevertheless, Ryan was able to sufficiently differentiate the colors as indicated by his specific differentiation of white from beige.

The totality of the circumstances demand the suppression of Ryan's identification of the appellant from the photographic line-up.

The totality ofthe circumstances demands the

suppression of Ryan's identification of the appellant from the photographic line-up andthe failure to allow examination of the identifying witness requires suppression of the identification and reversal of the conviction.

ARGUMENT IV

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE REYNOLDS TO TESTIFY AS TO RYAN OSBORNE'S OUT OF COURT IDENTIFICATION OF APPELLANT

Contrary to Appellee's assertion , a look at the photographs easily reveals that the picture of the assailant chosen by Ryan during the trial did not at all resemble the appellant. Even the man's beard and mustache were a different color than that of Appellant. Ryans failure to choose Appellants' photograph during the "in chambers" presentation was all the more astonishing when one considers that Ryan had already been in the courtroom. Thus Ryan saw the Appellant immediately before he identified the picture of a distinctively different person as the assailant.

Although Ryan did testify that he had identified the man who had shot his mommy, this court's attention is again drawn to the trial courts failure to allow defense questioning of Ryan as to the identification process. (Please see Argument III, supra and Arguments III and IV in the initial brief).

Unlike the cases upon Appellee relies, this is not a case of a witness stating they can no longer identify the culprit due to the culprits changed appearance or a time lapse. In the instant case, immediately after he identified someone other than the appellant as the assailant the witness continued to state that he recalled what the assailant looked like.

ARGUMENT IV

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE REYNOLDS TO TESTIFY AS TO RYAN OSBORNE'S OUT OF COURT IDENTIFICATION OF APPELLANT

Contrary to Appellee's assertion , a look at the photographs easily reveals that the picture of the assailant chosen by Ryan during the trial did not at all resemble the appellant. Even the man's beard and mustache were a different color than that of Appellant. Ryans failure to choose Appellants' photograph during the "in chambers" presentation was all the more astonishing when one considers that Ryan had already been in the courtroom. Thus Ryan saw the Appellant immediately before he identified the picture of a distinctively different person as the assailant.

Although Ryan did testify that he had identified the man who had shot his mommy, this court's attention is again drawn to the trial courts failure to allow defense questioning of Ryan as to the identification process. (Please see Argument III, supra and Arguments III and IV in the initial brief).

Unlike the cases upon Appellee relies, this is not a case of a witness stating they can no longer identify the culprit due to the culprits changed appearance or a time lapse. In the instant case, immediately after he identified someone other than the appellant as the assailant the witness continued to state that he recalled what the assailant looked like.

Ryan's testimony as to the previous identification is invalidated where, as previously argued there was no examination of the identifying witness as to the identification process, where the witness had described another person as the assailant and where the witness, while stating he recalls what the assailant looks like, identifies another person as the assailant. In United States v. Owens, 789 F2d 750 (9th Cir.1986) the court analyzed Fed R Evid 801 (d)(1)(c) which is analagous to Fla. R. Evid. The court stated that the above cited rule "contemplates cross-examination of the declarant on the facts and circumstances underlying the identification." id at 756. The court concluded the extra-judicial identification may not be admitted unless the declarant is subject to cross-examination on the reason why he made the identification." Thus, the court ruled that the scope of cross-examination contemplated by the Rule extends beyond the mere incident of identification and includes the basis on which the declarant made the out-of-court identification. id p 756. The declarant inthis case, Ryan was not subject to cross-examination, thus his testimony must be stricken as well as the heresay statement of Detective Reynolds.

ARGUMENT V

THE TRIAL COURT ERRED
IN FAILING TO SUPPRESS
APPELLANT'S STATEMENTS

The state is incorrect. Lloyd was not "merely being sought for questioning" when he arrived at the Indian River Sheriff's Office. The officers testified that Lloyd was not free to leave and that he would have been detained if he did not agree to remain (Vol XII,p.1823-24). The court took judicial notice of that fact (Vol. VI,p.696). Appellant was, for all practical proposes under arrest.

Appellee complains that Edwards v. Arizona, 451 U.S. 477 101 S.Ct 1880; 68 L.Ed.2d 378(1981). Arizona requires cessation of questioning only where an accused requests counsel. Appellant disagrees. As pointed out in Michigan v. Jackson, ' __U.S.___ ; 106 S.Ct 1404; ___ L.Ed2d__ (1986). Edwards rested on the Fifth Amendment privilege against self-incrimination. The suspect need not assert his right to Fifth Amendment protection through counsel.

Once the suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" Miranda v. Arizona, 384 U.S. 436; 86 S.Ct 1602; 16 1.Ed 2694 (1966.

ARGUMENT VI

THE TRIAL COURT ERRED IN ALLOWING THE WITNESS JACK WILLIAMSON TO TESTIFY

Contrary to appellee's assertion, both the testimony presented by Mr. Williams as well as the manner of its presentation resulted in the admission of unduly prejudicial information.

Appellee contends that the recall of Mr. Williamson after the court evidenced some degree of temporary hostility towards the state when it ordered the witness to step down attached weight and credibility to the witness and reflected an impression that the witness had something very important to say.

Williamson's testimony was not rendered harmless, as appellee asserts, in view of deputy Schwarfswerdt's testimony, which the court erroneously refused to exclude as too vague and remote. Schwarfswerdt's testimony a year and one half before the crime that he had given appellant .38 wad cutter bullets which are widely used in target shooting lent credibility to Williamson's speculation as to the type of gun appellant carried during the trucker's strike which occurred several months before Cheryl Osborne was murdered.

None of the recovered ammunition was tied to appellant.

Only the rank speculation of Williamson ties appellant to a weapon which may have been of the type gun similar to that used to kill Cheryl Osborne. Such speculative testimony which allows tying appellant to a type of weapon which may have been used in the crime only through the improper pyramiding of remote and speculative inferences must be excluded. Wells v. State, 11 FLW 1581 (Fla.1st DCA July 18, 1986.

ARGUMENT VII

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH

The State misreads the record. (Appellee's brief p. 41) As stated in the initial brief, In Vol XIX p. 2753 of the transcript the court explicitly agreed that there was no proof the offense was committed for pecuniary gain. The court cannot, as appellee contends, reweigh the evidence and overrule the trial court's finding that the factor of pecuniary gain was not supported by the evidence. By its ruling (nothwithstanding the later sentencing document prepared by the state), the trial court noting the insufficiency of the evidence, acquitted appellant as to the aggravating facts. See Poland v. Arizona, ___ U.S.___ ; 106 S.Ct. 1748; ___L.Ed2d ____(1986).

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, appellant would respectfully request that this Honorable Court reverse the conviction and vacate the sentence of death imposed by the trial court..

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoingInitial brief on behalf of Donald Robert Lloyd was mailed to Assistant Attorney General Candance Sunderland, Department of Legal Affaairs, Park Tramell Building, 1313 tampa Street, 8th floor, Tampa, florida 33602, this 16th day of November, 1986 and to appellant Donald Robert Lloyd, prison # 007214, florida State Prison, P.O. Box 747, Starke, Florida 32071.

LAURA R. MORRISON,
Attorney at Law
633 south Andrews Avenue
Third Flor
Fort Lauderdale, Florida
33301