IN THE SUPREME COURT OF FLORIDA

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ROY CLIFTON SWAFFORD, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 68,009

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

POINT I: In his Initial Brief Appellant argued the testimony of Ernest Johnson was improperly admitted as "Williams Rule" similar fact evidence. The state, without conceding the "Williams Rule" argument, contended in the alternative that all of Johnson's testimony was admissible to explain one line of said testimony which was characterized as an "admission".

In this Reply Brief Appellant argues first that the alleged "admission" was irrelevant and inadmissible. Alternatively, Appellant contends that even if the "admission" had some slight relevance, its probative value was substantially outweighed by the danger of unfair prejudice. There is a great risk that the jury will assume bad character or propensity to violence from Ernest Johnson's testimony. This risk is simply too great to justify allowing into evidence Appellant's vague "admission." Further the trial judge never properly assessed the "probative value versus prejudice" issue because he concluded (incorrectly) that most of Ernest Johnson's testimony was admissible as "Williams Rule" similar fact evidence.

ARGUMENT

POINT I

IN RESPONSE TO APPELLEE'S CONTENTION THAT THE TESTIMONY OF ERNEST JOHNSON WAS PROPERLY ADMITTED INTO EVIDENCE.

The State contends that the testimony of Ernest Johnson was properly admitted into evidence under either of two theories. First it is argued there are sufficient similarities between the Nashville incident and the Rucker murder to admit Johnson's testimony as "Williams Rule" evidence to prove identity. Alternatively, it is argued the entire story is necessary to explain Appellant's one line: "you get used to it."

Appellant believes the first argument is refuted by his Initial Brief. This Court must make a common sense judgment. Are the fact patterns so similar and so unusual that the same person who was with Johnson in Nashville must have committed the Rucker murder? Appellant believes the Court must hold they are not. Drake v. State, 400 So.2d 1217 (Fla. 1981); Peek v. State, 488 So.2d 52 (Fla. 1986).

The State's alternate theory of admission was not addressed in Appellant's Initial Brief, neither was it reached below. The lower court specifically ruled the majority of Johnson's testimony admissible under the Williams rule theory. The State now cites Waterhouse v. State, 429 So.2d 301 (Fla. 1983) for the proposition that "Johnson's entire testimony was

admissible to prove the context of an incriminating admission." There are two problems with this theory.

First, the State's contention assumes the so called "admission" itself is relevant. In Waterhouse the defendant admitted personally committing a specific act, very possibly the act done to the murder victim. In this case, Appellant is alleged to have said "you get used to it" referring to murder. To convert this remark into an admission of guilt to the crime charged one must layer inference upon inference upon inference. It must be assumed when Appellant said "you get used to it" he meant he had already gotten used to it. One must then assume Appellant was speaking from experience and not just bragging or conjecturing. Finally it must be inferred Appellant's "experience" was the Rucker murder. Appellant acknowledges that a clear and unmistakable connection to the crime charged would not be necessary to make his alleged statement admissible. However at some point the connection becomes so unclear and tenuous that relevance must be questioned. The statement at issue here is to vague to be relevant.

Even if this Court decides that there is some slight relevance contained in the so called "admission", the Court should nevertheless hold that it would be reversible error to admit Johnson's entire statement to put such a tenuously relevant statement in context. This Court should balance the slight probative value of the alleged admission against the unfair prejudice of the collateral crime evidence contained in the remainder of Johnson's testimony. Appellant contends that this

balancing is mandated by Section 403 of the Florida Evidence Code which reads:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. . . .

Section 90.403 Fla.Stat. (1985)

In the typical case where an objection is raised under Section 403, the discretion of the trial judge is broad. "Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion." Trees v. K-Mart Corp., 467 So.2d 401,403 (Fla. 4th DCA 1985).

In the instant case an objection was made (R949-950) but the weighing process was improperly done. The trial judge found the majority of the Johnson testimony relevant to prove identity as similar fact (Williams Rule) evidence. Therefore the lower court did not weigh the slight probative value of the "admission" against the prejudice of Johnson' entire testimony. Most of the testimony was admitted separately as similar fact evidence to prove identity. Assuming this Court accepts Appellant's argument that Johnson's testimony was not relevant to prove identity, the question raised here was not properly addressed below.

Assuming this Court finds it relevant at all, the only possible relevance of Ernest Johnson's testimony was to explain Appellant's "admission." The "admission" is so tenuously and

speculatively connected to the Rucker murder that its probative value is slight. The danger of unfair prejudice, on the other hand, is great because the evidence tends to show bad character and a propensity to violence. While the testimony may have had some relevance it is still not admissible where the danger of unfair prejudice substantially outweighs its probative value. Aho v. State, 393 So.2d 30 (Fla. 2d DCA 1981). In a capital case, with Appellant's very life at stake, the possibility that such inflammatory testimony tipped the scales unfairly against Appellant cannot be overlooked.

CONCLUSION

Based on the arguments and authorities cited in Point I herein and Points I and II of his Initial Brief, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence in this cause and order a new trial.

Alternatively, based on Points III and IV in the Initial Brief, Appellant requests that the Court reverse the sentence to life imprisonment or order a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Roy Clifton Swafford, #087905, P.O. Box 747, Starke, Florida 32091 on this 25th day of September 1986.

Daniel J. Schafer

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