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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 68,550

DUANE EUGENE OWEN

Appellant/Defendant,

vs.


STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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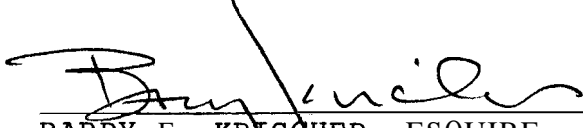

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PRELIMINARY STATEMENTS

The numerical designation given to the forthcoming arguments correspond to the arguments in Appellant's Initial Brief.

The symbols "R" will be used to designate the record on appeal, and the symbol "S.R." will be used to designate the supplemental record on appeal.

ADDITIONAL STATEMENT OF THE FACTS

The supplemental record on appeal which contains the transcription of the numerous hours of interrogation were made from copies of the original tapes. The Clerk of the Supreme Court has in its possession copies of the video taped interrogations rather than the originals which are still in the possession of the various law enforcement agencies.

I. THE CONVICTION FOR SEXUAL
BATTERY MUST BE REVERSED

Our system of assembly line justice sometimes loses touch with the controlling legal principle in this country that a person is still presumed innocent until proven guilty. Diecioue v. State, 131 So.2d 7 (Fla. 1961); and Davis v. State, 90 So.2d 629 (Fla. 1956). The Appellant maintains, and the State does not take issue with the theory that a person cannot commit sexual battery upon a corpse. The instant issue is whether the victim was alive or deceased at the time of the alleged sexual battery. An essential element of the offense of sexual battery is that the victim was a "person", with the burden of proof being on the State. Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987); In re Winship, 397 U.S. 358, 364 (1970); and Yates v. Aiken, ___ U.S. ___, 1 F.L.W.Fed. 1216 (January 15, 1988).

There existed no evidence that, at the time of the insemination, the victim was still alive. In fact, the evidence showed just the reverse. The State's expert testified that, "I believe in all probability Karen Slattery was dead by the time she was relocated to the back room." (R.3063) The expert further testified that there was no traces of semen in the large pool of blood in the dining room, and that the insemination occurred in the master bedroom, which is, according to the evidence after she was relocated. (R. 2693)

Before a cause can be submitted to the jury, the State must prove each element of the crime charged. In the instant case, the

State never proved that the victim was a "living person" at the time of the insemination as required by Florida and other jurisdiction. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); McCall v. State, 503 So.2d 306 (Fla. 5th D.C.A. 1987); Pennsylvania v. Holcomb, 498 A.2d 833 (Pa. 1985); California v. Standworth, 114 Cal.Rptr. 250, 11 Cal.3d 588, 522 P.2d 1058 (1974); Hines v. Maryland, 473 A.2d 1335 (Md.App. 1984); and U.S. v. Thomas, 13 C.M.A. 278 (Ct.Mil.App. 1962).

Because the State failed to prove that the victim was alive at the time of the insemination, the conviction for Count 11, Sexual Battery, must be reversed with directions to enter a judgement of acquittal. Additionally, since the jury was prejudiced in the guilt phase by deliberating on an offense which legally did not exist, a new trial is mandated. At the very least this cause must be remanded for a new sentencing because both the jury and the Judge relied on a non-existent aggravating factor in reaching the death sentence.

II. THE APPELLANT'S CONFESSION WAS
TAKEN IN VIOLATION OF THE FIFTH
AMENDMENT

Regardless of the other issues raised herein, Appellant's conviction must be reversed because of the irrefutable Fifth Amendment violation as recently interpreted in Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987). The Eleventh Circuit just reversed a ten (10) year old death sentence and conviction because the defendant stated, "I got nothing else to say", ruling that such a statement equated and elevated to an unequivocal innovation of his right to remain silent. In the instant cause, the Appellant no less than three (3) times invoked his Fifth Amendment right to remain silent.

APPELLANT: No, because you've got to get back over there and I really ain't got nothing else to say anymore. (S.R. 966)

* * *

APPELLANT: I'd rather not talk about it. (R. 3000) (S.R. 1078)

* * *

APPELLANT: I don't want to talk about it. (R. 3018) (S.R. 1095)

However, the Appellant's invocation fell upon deaf ears as the police totally disregarded the Fifth Amendment's protections.

The Fifth Amendment requires the police to immediately cease questioning of a suspect once the suspect "indicates in any manner, at any time" during questioning, that he wishes to remain silent. Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S.

Ct. 1602, 1627-28, 16 L.Ed.2d 694 (1966); Michigan v. Mosley, 423 U.S. 96, 100, 76 S.Ct. 321, 325, 46 L.Ed.2d 313 (1975); Martin v. Wainwright, 770 F.2d 918, 923-24 (11th Cir. 1985), modified, 770 F.2d 185, cert. denied, ___ U.S. ___, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986); and Christopher v. Florida, supra.

For, as the Court stated in Mosley, the underlying purpose of the right to cut off questioning is to give the suspect control over "the time at which questioning occurs, the subjects discussed, and the duration of the interrogation", so as to "counteract the coercive presumes of the custodial setting". Mosley, 423 U.S. at 103-04, 96 S.Ct. at 326. Allowing a suspect to control the timing of an interrogation through his ability to "initiate" it serves this purpose; permitting the police to continue a custodial interrogation despite a request to stop in hope that the suspect will eventually ask a question does not. Christopher v. Florida, supra., note 22.

In the instant cause, although the Appellant repeatedly stated that he didn't want to talk about it, the police continued with their interrogations which directly violated the Fifth Amendment.

In its brief, the State makes the argument that because the Appellant continued to answer questions, that was a voluntary waiver of his rights. (Answer Brief p. 90). However, the State has overlooked the proposition that "just as one cannot start an engine that is already running, a suspect cannot initiate an on-going interrogation". Christopher v. Florida, supra.; and Smith v. Wainwright, 777 F.2d 609, 618 (11th Cir. 1985). In the instant cause, the Appellant did not waive his right to remain silent or initiate the interrogation, but rather, his request to

terminate the interrogation was totally ignored by the police as they continued to question the Appellant. This is a clear and blaintent violation of the protections afforded by the Fifth Amendment.

In light of recent Court decisions, the State's argument that Appellant's statement "I don't want to talk about it", was not an unequivocal invocation of his right to remain silent is totally without merit. In Christopher v. Florida, supra., the Eleventh Circuit reversed a death conviction because the defendant stated "then I got nothing else to say". In U.S. v. Poole, 794 F.2d 462, 466 (9th Cir. 1986), the Court reversed based upon the defendant stating that he has "nothing to talk about". And in California v. Carey, 27 Cal.Rptr. 813, 814-15, 183 Cal. App. 3d 99 (2d Dist. 1986), cert. denied, sub nom., 107 S.Ct. 1297, 94 L. Ed.2d 153 (1987), the Court ruled that the defendant's statement "I ain't got nothing to say" was an unequivocal invocation of his right to remain silent. During the interrogation which directly relates to the instant case, the Appellant twice stated that he did not wish to talk about it. This was clearly an invocation of his right to remain silent, and because this right was ignored, and the error being anything but harmless, the conviction must be reversed.

Finally, not only did the police violate the Appellant's Fifth Amendment rights by failing to "immediately cease" the interrogation, but they also violated the Fifth Amendment by questioning the Appellant as to why he wished to not talk about it.

Officer Lincoln: Were you looking at that particular house or just going through the neighborhood?

Appellant: I'd rather not talk about **it**.

Officer Woods: Why?

Officer Lincoln: Why?(S.R. 1078)

* * *

Officer Lincoln: Now, where did you put it?

Appellant: I don't want to talk about **it**.

Officer Lincoln: Don't you think **its** necessary to talk about **it**, Duane? **Two** months have gone by already. (S.R. 1095)

Inquiry as to why a suspect wishes to remain silent is an impermissible interrogation, not lawful clarification as argued by the State. Christopher v. Florida, supra.; U.S. v. Lopez-Diaz, 630 F.2d 661, 665 (9th Cir. 1980); see also, U.S. v. Johnson, 812 F.2d 1329, 1331 (11th Cir. 1986).

The record is abundantly clear that the police in their seventy-two (72) hours of interrogations, violated several Fifth Amendment guarantees, and as such, this conviction must be reversed with directions to suppress the confession as **it** pertains to the instant case.

Although the above listed error is controlling and absolute, counsel for Appellant is compelled to briefly re-address the remaining confession issues. As the State correctly notes, the totality of the circumstances surrounding an interrogation must be considered in determining whether the Appellant's rights were violated. State v. Rowell, 476 So.2d 149 (Fla. 1985).

Up to this point, both counsel for the State and Appellant have addressed and briefed the Fifth Amendment issues

individually. Now, it becomes necessary to view all of the issues together, in a totality of the circumstances: do not focus on the individual trees in the forest, but rather, the entire forest of trees.

In the instant case, the police interrogated the Appellant for seventy-two (72) hours over a three (3) week period while he was incarcerated in the Palm Beach County Jail. During this extended period, the police made various promises to the Appellant, appealed to his sense of morality, conducted "Mutt and Jeff" and false friend techniques, continued interrogation after he stated that he did not want to talk about it, made misstatements of the law, and utilized his brother as a bargaining tool. By analyzing all of the Fifth Amendment issues together under a totality of the circumstances approach, it becomes clear and evident that the police continued to wear down the Appellant until they coerced a confession from him. Rather than physical torture of days past, the police here utilized a massive form of psychological torture to break the Appellant. Such a form of coercion cannot be tolerated in today's civilized society, and this Court must reverse the conviction and remand for a new trial because of the numerous Fifth Amendment violations.

V. VICTIM IMPACT STATEMENTS IN HOMICIDE
CASES ARE UNCONSTITUTIONAL AS VIOLATIVE
OF THE EIGHTH AMENDMENT

The law in Florida is now affirmed that "victim impact statements" (VIS) in capital cases violate the Eighth Amendment to the United States Constitution. Grossman v. State, 13 FL.W. 127,131 (Fla. February 26, 1988); and Patterson v. State, 513 So.2d. 1257 (Fla. 1987); citing to Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). In Grossman v. State, supra., this Court held that:

...the provisions of section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing. Id. at 131.

Additionally, this Court held in Patterson v. State, supra., that reversible error occurred by allowing the victim's niece to testify at the sentencing hearing before the Judge alone.

Before the jury returned its sentencing recommendation, the trial Judge indicated that he would receive advice from the victim's family. (R. 3697) After the jury returned its opinion, the trial court again stated that he intended to hear from the family before he imposed sentence. (R. 4056-57) Finally, the victim's father addressed the trial Court as to his feelings for the sentence. (R. 4058-65) Counsel for the Appellant objected to such testimony prior to its admission. The Appellant would maintain that since the sentencing Judge heard from the victim's

family prior to imposing the death sentence, and since such conduct violates the Eighth Amendment, then this cause must be remanded for a new sentencing hearing.

The State argued that the instant error should be deemed harmless in light of Grossman v. State, supra. Appellant would first maintain that the harmless error analysis as set forth in Grossman is in itself error. The Booth opinion in no way indicated a harmless error approach, in fact, just the opposite is mandated, The sole issue before the Booth Court was the VIS. The Court held that:

We conclude that the introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment. Id. at 55 U.S.L.W. 4839.

The Booth opinion concerned itself with death sentences being handed down in an arbitrary manner focusing on victims being a sterling member of the community rather than someone of questionable character. citing to, Furman v. Georgia, 408 U.S. 238 (1972). Under Booth and Furman, if a death sentence has the appearance of being made in a arbitrary manner, then **it** must be reversed, not subject to a harmless error analysis.

Since Grossman v. State, supra., is for the time controlling precedent, Appellant maintains that the VIS in the instant cause was in fact harmful error. It is obvious that the trial Judge gave great weight and extreme consideration to the statements of the victim's father, Even prior to the jury returning its eleven (11) to one (1) recommendation, the Judge

requested to hear from the family.

...it would be my intention, after receiving the jury's advisory opinion to receive any advice from the victim's family. (R. 3769)

The Judge was actually soliciting "advice" from the family, his own words showing the great weight he intended to give to the victim impact evidence. Additionally, after the jury returned its verdict, the trial Judge again addressed the victim's family.

I indicated to you earlier...that it was my intention to inquire of the victim's family with regard to any suggestions that you might have, or advice to me, with regard to these matters. (R. 4056-57)

* * *

I will repeat that I do not intend to impose sentence with regard to these matters at this time. (R. 4057)

* * *

If I do not hear from you, I assure you, before these matters are concluded I will hear from the people that I have indicated. At this time, is there a spokesman for the family, or somebody from the family who would like to be heard from at this time?(R. 4057)

Again, from the Judge's own words, it is clear that great weight was given to the concerns and wishes of the victim's family. The Judge's statements, "suggestions" and "advice to me", shows reliance on the forthcoming testimony. Additionally, the Judge made it clear that he would not even impose sentence until

somebody from the family came forth.

The harmful nature of allowing the victim's father to testify in the instant cause before the particular Circuit Judge was seen immediately by Appellant's counsel. Prior to sentencing, counsels for Appellant filed a Motion for Disqualification of the Judge for purposes of sentencing because of the victim impact evidence. (R. 4649) Counsels argued that it was error for this Judge to impose sentence after listening to "a lengthy and impassioned letter to the trial Court regarding his feelings prior to sentencing". (R. 4649) Counsels continued by arguing that "an impartial trial Judge having not heard non-statutory aggravating circumstances should sentence this Defendant". (R. 4650) Additionally, Appellant's counsels argued in their Motion for New Trial, point 41, that "the Court will err in considering for purposes of sentencing the statements made by Eugene Slattery on November 7, 1985 following the jury's return of a recommendation of death". "All statements by Eugene Slattery cannot and should not be considered at sentencing as the same statements amount to non-aggravating statutory factors which neither this Court nor any jury in this State should consider prior to sentencing." (R. 4648) The harmful error of the VIS was seen even before Appellant was sentenced to death.

When the harmless error analysis is utilized, the burden of proof is upon the State. Not only has the State failed to demonstrate that the instant fundamental error was harmless, but the record is clear that said error was grossly prejudiced and harmful. This cause must be remanded for a new Phase II hearing

along with direction for the former sentencing Judge to recuse himself.

VI. APPELLANT'S DEATH SENTENCE
WAS BASED UPON INVALID
AGGRAVATING CIRCUMSTANCES

- c. The record does not support a finding of a cold and calculated premeditated murder.

To sustain a finding of a cold calculated premeditated murder, the State must show premeditation beyond that normally sufficient to prove premeditated murder. This Court has repeatedly held this aggravating factor is applied in cases of contract murders or execution style killings and emphasized cold calculation before the murder itself. Henderson v. State, 463 So.2d 196 (Fla. 1985); and, Jent v. State, 408 So.2d 1024 (Fla. 1982); see also, Perry v. State, 13 F.L.W. 189 (Fla. March 18, 1988).

Additionally, this Court has held that an accused's premeditation to commit a felony cannot be transferred to the actual homicide. Perry v. State, supra.; Hardwick v. State, 461 So.2d 79 (Fla. 1984). In Hardwick, this Court held that:

The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for the purpose of this aggravating factor. What is required is that the murder fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. Id at 81; cited therein, Gorham v. State, 454 So.2d 556 (Fla. 1984).

In the instant cause, there was no evidence which demonstrated that the Appellant planned the killing of the victim.

This aggravating factor was improperly found by the trial court and must now be reversed.

Should be

VII, RESTRICTING APPELLANT'S CROSS
EXAMINATION OF A STATE WITNESS
VIOLATED THE SIXTH AMENDMENT

The right to present a defense is firmly established in the Sixth Amendment. Taylor v. Illinois, 1 F.L.W.Fed. 1266 (January 29, 1988); and Washinuton v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967), see also, Floyd v. State, 514 So.2d 413 (Fla. 1st D.C.A. 1987). The Washinuton Court held that the right to present a defense "is a fundamental element of due process of law." 87 S.Ct. at 1922. Additionally, the Third District recently ordered a new trial holding that the appellant was underly limited in the presentation of his defense.

The jury was entitled to consider the evidence as to this theory of defense and appellant should have been allowed to present testimony in this regard. Floyd v. State, supra.

In the instant cause, the defense was excluded from introducing evidence found at a second crime scene so similar in nature so as to implicate another person to the instant homicide. The State argues that there existed insufficient similarities to allow the evidence. The Appellant takes issue with the State's conclusion of law and fact. First, any similarities whatsoever, act to trigger the protections of the Sixth Amendment, being a fundamental right. Second, the similarities are numerous: the suspect in both cases used a bicycle, both incidents involved a burglary of a simple family residence, gum was found at the scene of both crimes, and the Appellant's bicycle had handlebars attached in a unique fashion matching the bicycle found at the

second burglary. (R. 2488-89)

Essentially, the Appellant should have been permitted to present this theory of defense to the jury for determination. The credibility or weight of this evidence should have been determined by the jury to ensure a fair trial. **As** held by the U.S. Supreme Court in reversing a 1789 common-law rule:

The conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury. Rosen v. U.S., 245 U.S. 467, 471, 38 S.Ct. 148, 150, 62 L.Ed. 406 (1918); cited in, Washington v. Texas, 87 S.Ct. at 1924.

Because the Appellant was denied his Sixth Amendment right to present a defense, the conviction must be vacated and remanded for a new trial.

XII. THE STANDARD JURY INSTRUCTIONS
VIOLATE THE EIGHTH AMENDMENT

It is constitutionally impermissible to lead the jury to believe that the responsibility to impose the death sentence rests with the Judge. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985), see also, Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987); and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), vacated in part, 816 F.2d 1493 (11th Cir. 1987). The Florida standard jury instructions violate the Eighth Amendment as interpreted by the Federal Courts and must be revised to reflect more accurately the extreme importance of the jury's role. See, Foster v. State, 518 So.2d 901 (Fla. 1987), Justice Barkett specially concurring.

The Eleventh Circuit specifically held that the Caldwell analysis applies to Florida.

Clearly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell. Adams v. Wainwright, supra. at 1530.

The trial court in Adams charged the jury that they were an advisory group, which violated the Eighth Amendment.

...the judge's statements to Adams' jury clearly violated the principles enunciated in Caldwell, thereby creating an impermissible danger that the jury's recommended sentence was unreliable and consequently, that Adams' death sentence was unreliable. Adams v. Dugger, 816 F.2d at 1501 (11th Cir. 1987).

In the instant cause the Appellant attempted to cure the Caldwell problem with a special defense instruction. This request, which was denied, accurately explained the law as mandated by Caldwell. This error was compounded by the trial Judge at least twelve (12) times instructing the jury that their recommendation was nothing more than an "advisory sentence". (R. 4041-47)

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. (R. 4041)

Because of the trial Judge's failure to give the requested jury instruction, the unconstitutionality of the standard jury instructions, and the trial Judge's repeated reference to advisory sentence, this cause must be remanded for a new Phase II hearing.

CONCLUSION

For the reasons set forth above and in the previous briefs, the Appellant, Duane E. Owen, respectfully prays this Honorable Court to reverse both the sentence and conviction entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.

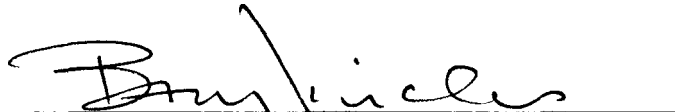
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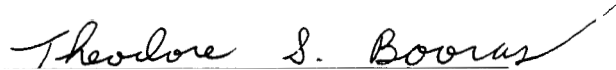
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Georgia Jimenez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, and to Duane E. Owen, #101660, Florida State Prison, Post Office Box 747. Starke, Florida 32091, this 15th day of April, 1988.



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