IN THE SUPREME COURT OF FLORIDA

JAMES ANSEL HARMON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,824

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JAMES ANSEL HARMON, Appellant,	)	
vs.	)	CASE NO. 69,824
STATE OF FLORIDA, Appellee.	)	

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF COLLATERAL CRIMES OVER OBJECTION WHERE SUCH EVIDENCE BECAME A FEATURE OF THE TRIAL.

Appellee contends that the record does not support Appellant's assertion that the state introduced collateral crime evidence that Jim Harmon was involved with stolen jewelry. Appellee admits that the trial court did allow some testimony regarding diamonds but refused to allow any indication that the diamonds were stolen. As defense counsel pointed out in his argument that any evidence concerning the diamonds should be excluded:

> Judge, unless we have and I'm -- with all due respect to the jury, unless we have 12 people who were either of mongoloid ancestry or of 60 or 70 IQ, they're

> going to know that the diamonds that they're talking about, somebody stole them and he's got knowledge of them.
>
> I mean, that's just -- it is ridiculous to assume that they wouldn't. (R473-474)

In response, the trial court points out that the diamonds could have belonged to a "relative or something". (R474) Appellant submits as he did at trial that the jury most likely recognized that the diamonds were stolen.

James Harmon did testify on direct examination that Pop Wilson told him that the police were at the shop in San Antonio looking for Harmon regarding an alleged Alabama offense. (R1173) However, on cross-examination, the state questioned Harmon about his failure to talk to the police in San Antonio in an attempt to straighten things out. (R1212-1213) That is the point at which defense counsel objected and moved for a mistrial pointing out that the prosecutor knew that Harmon had an extensive criminal record in Texas and did not get along with "those particular people." (R1213) The trial court denied Appellant's request for a curative instruction. (R1213-1214)

Appellee further contends that the record does not support Appellant's assertion that the trial court improperly admitted collateral crime evidence when the court allowed the testimony that Mickey Powell testified that he met Jim Harmon while incarcerated in a Kentucky county jail. Appellant submits that it would be extremely naive to think that the jury would not assume that Harmon was incarcerated in the same county jail. There was no evidence that Harmon had previous employment as a corrections officer. Appellant submits that the evidence speaks

for itself. A similar argument relates to Appellee's contention that Investigator Combs' interview of Harmon implies illegal activities only to Marion Germany and not James Harmon. Harmon's reluctance to discuss the obvious implications indicates otherwise.

Appellant also disputes Appellee's contention that testimony regarding Harmon's cocaine habit was not beyond the scope of redirect-examination by the state following cross-examination of Kathy Gates. Appellant does not believe that such evidence related to testimony regarding Harmon's character as a person who had feelings for others. The state's argument that Harmon's use of drugs demonstrated, in rebuttal, a character trait of self-indulgence is tenuous at best. Certainly any perceived relevance is outweighed by the resulting prejudice.

Certainly much of the objectionable evidence regarding James Harmon's bad character and propensity to commit crimes was admitted without objection. However, defense counsel did object to a lot of the damning testimony. Appellant asks this Court to consider all of the bad character evidence in total. Viewed cumulatively, Appellant submits that the result was an unfair trial. The introduction of the sum of all of the objectionable evidence resulted in a portrayal of James Harmon as an unsavory, career-criminal. Such a portrayal undoubtedly had an effect on the jury and their ultimate decision.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, BY TWICE PERMITTING HEARSAY TESTIMONY OVER OBJECTION TO THE PREJUDICE OF THE APPELLANT.

Appellee contends in his answer brief that Steven Germany's testimony that Marion called him on Monday to tell Steven that Marion had not made it down to Florida was not offered for the truth of the matter asserted. Appellee also contends that trial counsel did not object to the testimony on the grounds that it improperly bolstered Marion Germany's testimony regarding Marion's alibi. Appellee concludes by pointing out that defense counsel did not seriously suggest in closing argument that Marion Germany was involved in the murder.

Defense counsel did object to the impermissible testimony based upon the proper and specific grounds that such testimony constituted hearsay. (R268-269) Appellant pointed out in the initial brief the fact that the objectionable testimony had the effect of improperly bolstering Marion Germany's testimony regarding Marion's alibi. This was simply an attempt to point out the prejudice caused by the trial court's inaccurate ruling in allowing the hearsay evidence. Appellant submits that trial counsel probably abandoned any serious argument to the jury that Marion Germany was involved in the murder when the trial court allowed the impermissible hearsay evidence which had the effect

of bolstering Marion Germany's alibi testimony. This is also an indication of the prejudice caused by the adverse ruling.

Appellee contends that the testimony of Steven Germany did not constitute hearsay since it was not offered to prove the truth of the matter asserted. Appellant submits that Appellee's analysis is tenuous at best. Certainly the jury concluded from Steven Germany's testimony that Marion Germany remained in South Carolina on the day of the murder, and thus was probably not involved in his brother's demise. Appellee can attempt to minimize the error, but scrutiny of the facts reveal the damage done to Jim Harmon's defense.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO RECESS THE TRIAL AT SEVEN O'CLOCK P.M. WHERE APPELLANT'S COUNSEL WAS EXHAUSTED AND UNSURE OF HIS EFFECTIVENESS.

Appellee harps on the contention that neither defense counsel claimed that their effectiveness was impaired in any way. Appellant points out that, to the contrary, Mr. Eddy stated that he believed that Jim Harmon was entitled to a "fresh jury, fresh judge, and fresh defense counsel", and that "it would be imminently unfair to (Appellant) to require this jury to proceed to the defense case." (R948) Mr. Shelnutt told the trial court that his hard contact lenses render him practically blind after 8:00 o'clock. (R948-949) Appellant points out that these statements are obviously assessments by the attorneys of their own effectiveness. Appellant submits that trial counsel could not have ethically done much more without incurring the wrath of the court. The attorneys could have refused to continue and risked contempt of court. Appellant submits that this issue was adequately preserved for review by this Court. The trial judge obviously denied defense counsels' request to recess for the night when the court placed both defense counsels' age on the record and announcing its intention to continue the proceedings that evening. (R950-952) When the trial court pointed out that the jury might object to working on the weekend, defense counsel suggested that the court specifically ask them. (R952) This was

never done by the trial judge. The trial court also announced its intention to ask the jury to raise their hand at any point when they became fatigued. (R951) This was also never done. (R955) Defense counsel did everything in their power to obtain a recess for the evening. The trial court abused its discretion in honoring their request resulting in a deprivation of Appellant's constitutional rights.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN SENTENCING HARMON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT WHERE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

In his argument that the trial court's override of the jury's life recommendation was appropriate, Appellee relies almost completely upon what he calls the "emotional appeal" by defense counsel during closing argument at the penalty phase. Unfortunately, the trial court did not similarly rely on this consideration in summarily overriding the jury recommendation and sentencing Jim Harmon to death. Additionally, contrary to Appellee's assertion, the record supports numerous non-statutory mitigating circumstances on which the jury could have relied in reaching their ultimate recommendation for life imprisonment. The defense presented evidence that Jim Harmon is a good father as well as a good son. He is a religious man and is intelligent as well. He was a model prisoner prior to trial and acted as arbiter in several disputes between other inmates. He suffers from health problems. The testifying psychologist concluded that James Harmon could contribute to society. (R1790-1799) The jury may have also questioned the respective roles of Harmon and Bennett in the murder. Additionally, the disparity in the treatment of James Harmon and Larry Bennett is so incompatible

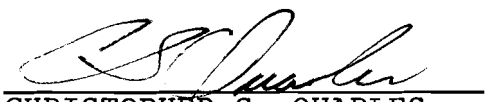
that a life override is simply unfair. The trial court's conclusion that no reasonable man could differ on the imposition of the death sentence is, quite simply, unsupported by the record.

CONCLUSION

Based on the foregoing cases, arguments, and policies, and those in the Initial Brief, Appellant respectfully requests this Honorable Court, as to Points I through IV, to reverse his convictions and remand for a new trial; as to Points V and VI, to vacate the sentence and remand the cause to the trial court with instructions to impose a life sentence; and as to Point VII to declare Florida's death penalty statute unconstitutional.

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 hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Fla. 32014, in his basket at the Fifth District Court of Appeal, and mailed to Mr. James Harmon, #105506, P.O. Box 747, Starke, Fla. 32091 on this 14th day of October 1987.

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