IN THE SUPREME COURT OF FLORIDA

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ANDREW WILLIAMS,	:	
Appellant,	:	
	:	
vs.	:	Case No. 71,122
STATE OF FLORIDA,	:	
Appellee.	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

The Defendant will rely on the Statement of the Case and Facts contained in his Original Brief.

ISSUE I

THE TRIAL JUDGE IN THE PRESENT CASE EXCEEDED HIS JURISDICTION AS A COUNTY JUDGE AND WAS WITHOUT AUTHORITY TO HEAR FELONY OR CAPITAL CASES SINCE HE WAS NEITHER ELECTED BY THE VOTERS OF THE JURISDICTION NOR APPOINTED BY THE GOVERNOR TO FILL A VACANCY ON THE CIRCUIT COURT.

The defendant reasserts his argument and authority contained in his Original Brief and requests that his conviction be reversed and his case remanded for a new trial before a Circuit Judge of Hillsborough County.

ISSUE II

ANDREW WILLIAMS WAS DENIED HIS FUNDAMENTAL RIGHT TO AN IMPARTIAL JURY WHERE THE VOIR DIRE WAS REPLETE WITH ERRORS AND INFIRMITIES, INCLUDING THE SYSTEMATIC EXCLUSION OF BLACKS AND THE ERRONEOUS EXCUSAL OF PROSPECTIVE JURORS BASED ON THEIR VIEWS ON THE DEATH PENALTY.

A. The Trial Court Allowed The Systematic Exclusion Of Black Prospective Jurors When It Failed To Require An explanation For One Such Exclusion And Accepted An Explanation For Another Which Was Unsupported By The Record.

1. The trial court erred in failing to require an explanation for the use of peremptory challenges against Blacks following a prima facie case of racial bias.

The defendant is challenging the excusal of two Black prospective jurors, Jurors number 25 and 103. Initially, as the State concedes, the court "... clarified that defense counsel was requesting a Neil inquiry on jurors 25 and 51." (State's brief at 10) After requesting and receiving an explanation from the

State relating to Juror 51, "...the court elected to move on without questioning the State." (emphasis added) (State's brief at 10)

The State maintains that the "... decision as to whether to inquire was largely discretionary." (State's brief at 11) However, in a case which the State itself cites in its brief, this Court recently reasserted the prohibition against exactly what the State in the case at bar is attempting to do, namely to place the burden of proving racial bias on the defendant. McCloud v. State, 530 So.2d 56 (Fla. 1st DCA 1988). As the court again held, "... any doubt as to whether the complaining party has met its initial burden in challenging this practice should be resolved in that party's favor." McCloud v. State, 530 So.2d at 57.

Since there are absolutely no race-neutral reasons for excusal evident on the record, the State's argument can be summed up as 'the judge must have known something we do not know." The defendant's response is that if he did he should have placed it on the record. An examination of the record reflects that Juror 25 was very probably challenged by the State for racial reasons and, following the defendant's objection, the trial court erred in failing to require the State to provide a race-neutral explanation.

2. The trial court erred in accepting the State's explanation for use of its peremptory challenge to strike a Black prospective juror.

Juror 103 was also improperly excused for racial reasons. The State's contention that the trial judge accepted the State's reasons as race-neutral obfuscates the issue. Although the reasons proffered by the State for challenging Juror 103 were indeed race-neutral, they were completely unsupported by the record. This is not a question of credibility or discretionary interpretation of vague answers, but rather a complete lack of evidentiary support. As the defendant pointed out in his Original Brief, Juror 103 stated that he could recommend the death penalty and at no time displayed any confusion or difficulty in carrying out the duties of a juror. (Defendant's Original Brief at 26) (R. 128,369-370)

The State repeatedly refers to the juror questionnaires as possible support for the trial judge's excusal of jurors. (State's brief at 12 and 14) Again the State would have us speculate as to the reasons for action which may have denied the defendant his fundamental constitutional rights to a fair trial and impartial jury.

Lastly, in a footnote, the State attempts to redeem the jury selection process by stating that "... the presence of a black on the jury... is relevant." (State's brief at 11, fn 2) This Court and the United States Supreme Court are not so easily persuaded. See Slappy v. State, 522 So.2d 18,24 (Fla. 1988). It is of

minimal importance that one Black juror served from an original venire of 135 people. Further, it is irrelevant to the question of whether other Black prospective jurors were improperly excluded based on race. It is clear from the record in the case at bar that Andrew Williams was denied his right to a fair and impartial jury as a result. He is entitled to a new trial before a new jury.

B. The Trial Court Made Mistakes Of Fact And Law In Allowing The State To Challenge Two Jurors For Cause On Their Alleged Views On The Death Penalty.

A further two prospective jurors were improperly excused from the venire, in this instance due to their alleged views on the death penalty.

1. A prospective juror was erroneously struck for cause where the State's reason was completely unsupported by the record.

The conclusions drawn by the State in its brief regarding the propriety of the excusal of Juror 4, Mr. Hope are unfathomable to the defendant. As the defendant pointed out in his Original Brief, the prosecutor was completely mistaken when he claimed that Juror 4 had said that his relation to someone in a religious order would impair his ability as a juror. (R. 447) When the judge claimed, "Yeah, I got that on him too, " (R. 447), he was merely compacting the mistake, not lending credibility to

the State's claim. The State tries to cover the error by concluding that it was clear to the judge "... either by the juror's actions, attitude or questionnaire, that Hope should be excused for cause." (State's brief at 14)

Once again the State asks us to speculate regarding the judge's reasons for excluding this juror. Nothing could be more clear than the fact that the record in the case at bar is devoid of any statement or action by Mr. Hope relaying any opposition to the death penalty. (See Defendant's Original Brief at 28-29) Resultingly, when the State argues that "Juror Hope's circumstances... made it clear that [he] more than generally opposed the death penalty [and] that [his] opinion on the death penalty would impair [his] performance as a juror," (State's Brief at 13), the source of this conclusion is a complete mystery to the defendant. The State may not use the argument of judicial discretion in this instance. The defendant's right to an impartial jury was violated and he is entitled to a new trial as a result.

2. The trial court erred in accepting the State's reason for striking another prospective juror because of his views on the death penalty where the reason did not meet the standard for such exclusion.

The State points to Mr. Whaley's answers on pages 119 and 121 of the record as support for his excusal for cause based on his alleged views on the death penalty. The State understandably

ignores Mr. Whaley's statements that he could carry out his duty as a juror but that he "... would really have to think about it,' (R. 121), and that he thought he could be a fair and impartial juror. (R. 282)

The State itself concedes that the crucial question here is whether the trial court's "... findings are fairly supported by the record." (State's brief at 15) Indeed, the cases cited by the State demonstrate how determined this Court is to find support on the record, and how much stronger that support must be than in the case at bar. In Lambrix v. State, 494 So.2d 1143,1146 (Fla. 1986), this Court concluded that the

" ... transcript of voir dire indicates that [the excluded juror] repeatedly wavered when questioned about her ability to vote in favor of the death penalty, and "the fact that she could not vote for the death penalty under any circumstances is controlling."

Also, in Mitchell v. State, 527 So.2d 179,180, (Fla. 1988), this Court found that a "review of the voir dire record supports the conclusion that the jurors' views on the death penalty would have substantially impaired, if not totally prevented, the proper performance of their duties as jurors." This is a very different conclusion than may be drawn in the case at bar. The juror in question, Mr. Whaley, was clearly excused improperly under the standards established by the United States Supreme Court in Wainwright v. Witt, 469 U.S.412,105 S.Ct.844,83 L.Ed.2d 841 (1985). The above-mentioned cases make it clear that this Court

refuses to allow speculation to suffice, as the State would urge.

The State contends that the defense counsel's failure to request further interrogation of the excluded jurors is evidence of acceptance of the excusal. (State's brief at 14) The State's contention must fail on two grounds. First, and most fundamentally, the two cases it cites do not support the argument. Justice Stevens' (not Justice Stewart as the State asserts) comment on a similar situation in his concurring opinion in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844,83 L.Ed.2d. 841 (1985), has no binding or precedential effect on the case at bar. The second case cited, Mitchell v. State, 527 So.2d 179 (Fla. 1988), admittedly not directly on point, involves a wholly different situation where defense counsel's views on the exclusion of the jurors were obviously not clear. Such is not the situation in the case at bar. It is abundantly clear from the record in the case at bar that defense counsel strongly objected to the excusal, providing evidence of explicit refusal to accept the excusal. (R. 446-459)

For the reasons stated herein and in the defendant's Original Brief, he is entitled to a new trial before a new, fairly selected jury.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING REQUESTED BY THE DEFENSE COUNSEL.

The State's assertion that the trial court's inquiry in the case at bar satisfied the requirements of Richardson is clearly unsupported by the caselaw it cites.

In State v. Hall, 509 So.2d 1093 (Fla. 1987), the only case cited in support of the State's contention that the inquiry in the case at bar was sufficient, the trial court made a clear determination that the State's discovery violation was harmless and of no surprise and no prejudice to the defendant. State v. Hall, 509 So.2d at 1096. In that case, the State sought to introduce, against the defendant, testimony of a handwriting expert who was originally listed as a witness only against the co-defendant. The court established, however, that the State had told the defendant's counsel the week prior to trial that the expert had also compared the defendant's signature, putting the defendant's counsel on notice that he might testify against the defendant also. State v. Hall, 509 So.2d at 1096. This level of inquiry, as well as the resulting determination, is far different to that of the case at bar.

The inquiry and determination made in the case at bar was to the effect that the State had notified the co-defendant's counsel that the witness would be testifying to the results of a trigger

pull test. At no time was the counsel for Mr. Williams, against whom the evidence was admitted, notified of the evidence to be used. Contrary to the State's assertion, the resulting harm to the defendant is quite clear and even conceded by the State in its brief.

In its argument to the effect that the death penalty is an appropriate penalty in the case at bar, the State refers to the fact that the defendant "pulled the hard to pull trigger three times." (emphasis added) (State's brief at 30) Yet the State argues that the results of the trigger pull test "had no bearing on petitioner's defense." (State's brief at 19) The State very adeptly demonstrates the harm and prejudice of this discovery violation on the defendant.

Admittedly, Smith v. State, 500 So.2d 125 (Fla. 1986), stands for the proposition that the purpose of a Richardson hearing is to determine whether the discovery violation is harmless. It also reaffirms this Court's determination that, if a Richardson hearing is not properly held, a new trial is required even if the reviewing court thinks the discovery violation is harmless. The inquiry in the case at bar was clearly insufficient to meet the mandate of Richardson and, further, the prejudice and harm of the discovery violation has already been demonstrated. As a result, Mr. Williams is entitled to a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT INADMISSABLE HEARSAY AND OPINION TESTIMONY FROM ITS WITNESSES.

A. The Defendant Was Severely Prejudiced By The State's Continued Hearsay Testimony.

The State in its brief maintains that the verdict in the case at bar would not have changed had the hearsay testimony been excluded from trial. (State's brief at 21) However, as this Court has held, "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." State v. DiGuilio, 491 So.2d 1129, 1131 (Fla. 1986). Considering the number of times the hearsay violations occurred in a case in which credibility of the witnesses was paramount, the harm to the defendant is obvious.

For the reasons stated herein and in the defendant's Original Brief, (Issue IV A. and B.), the convictions must be reversed and the case remanded for a new trial.

ISSUE V

THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS RELATING TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE WEIGHED DURING THE PENALTY PHASE OF A CAPITAL CASE.

The defendant reasserts his argument and authority contained in his Original Brief and requests that his cause be remanded for a new sentencing hearing.

ISSUE VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THREE STATUTORY AGGRAVATING CIRCUMSTANCES, IN USING THESE AS SUPPORT OF A DEATH SENTENCE, AND IN CONCLUDING THAT THE SENTENCE OF DEATH WAS APPROPRIATE IN THIS CASE.

The State continually refers to the cases cited in the Defendant's Original Brief as "... inapplicable here since they do not involve the circumstances..." of the case at bar. (State's brief at 28) However, as will be shown below, the State makes no attempt to analogize the facts of its cited cases to those of the case at bar and merely uses these cites as support for very general propositions of law. The defendant contends that the cases cited in his Original Brief are applicable and relevant, indeed much more so than those cited by the State in its brief.

A. There Being No Support For Such A Finding In The Record, The Trial Court Erred In Applying The Aggravating Circumstance Of "Heinous, Atrocious And Cruel" To The Present Case.

The defendant takes issue with two aspects of the State's argument. First, in contending that the proper focus of attention here must be the victim's attempt to protect herself and bank customers, it cites no cases which suggest that this constitutes especially heinous, atrocious or cruel circumstances. (State's brief at 26) Secondly, the cases it cites in support of

general propositions of law are factually so different to the case at bar as to be of no analytical use except to distinguish them completely.

For example, the State correctly asserts that the victim's feeling of fear before his or her instantaneous death can be considered. (State's brief at 27) However, the factual situations in the cases it cites are far different from that of the case at bar. In Parker v. State, 476 So.2d 134,139 (Fla. 1987), the victim was told that she was to be killed and "in a 13-mile death ride, she continued to plead for them not to hurt her. The record reflects that the victim knew her execution was imminent." The victim was pulled from the car so hard that her hair was pulled out, stabbed and then shot execution-style in a kneeling position which caused her death.

The victim in another case cited by the State was an eight-year old girl who was abducted, nearly raped and strangled to death while screaming out. Although death was instantaneous, this Court determined that there was fear and emotional strain certainly present. Adams v. State, 412 So.2d 850,856 (Fla. 1982). When the victim in yet another case was taken on a mile and a half journey and forced to walk some distance at knifepoint before her throat was slashed with such force that the veins, arteries and trachea were severed, this Court held that the aggravating factor of especially heinous, atrocious and cruel was applicable in cases of instantaneous death "when, before death occurred, the victims were subject to agony over the prospect

that death was soon to occur." Preston v. State, 444 So.2d 939,945 (Fla. 1984). As can be seen by another case decided by this Court, the facts of the case at bar simply do not rise to this level.

In Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed. 2d 239 (1977), this Court held that the killing as not especially heinous, atrocious and cruel where the defendant walked up to a deputy sheriff and shot him twice in the head. This would appear to be much more similar to the facts of the present case. Since there was absolutely no evidence of the victim being "fearful" before death, this factor cannot support the application of the aggravating circumstance; let us now turn to the State's argument that the victim's "consciousness of impending death" is sufficient.

All the cases cited by the State involve either lengthy periods of time before death with the knowledge that death would come or pain and torture inflicted on the victim while still alive. In Knight v. State, 338 So.2d 201 (Fla. 1976), a man was abducted at gunpoint, forced to drive home to get his wife, return to the bank to obtain $50,000 and both were forced to a deserted spot where they were shot to death in the neck. Although instantaneous, these deaths were preceded by "hours [of] exceedingly cruel treatment of the victims." Knight, 338 So.2d at 202. The trial judge gave a lengthy explanation for the applicability of this aggravating factor.

There were several victims in unrelated incidents in Washington v. State, 362 So.2d 658 (Fla. 1978). Two deaths were considered especially heinous, atrocious and cruel because the victims were stabbed repeatedly while still alive and able to feel pain from each wound. Washington, 362 So.2d at 662,664. Another victim, a 64-year old woman whose home was broken into while she and her three elderly sisters-in-law were present, was tied up, stabbed numerous times and eventually shot in the head and killed. The three sisters-in-law survived but one has breathing difficulties, one was blinded and one remained in a coma. Washington, 362 So.2d at 660,663. To compare these cases to the present case is beyond the bounds of legal reasoning.

The State continues to analogize the facts of this case, where the victim died instantaneously or nearly so from a single gun shot wound inflicted within a few seconds of her realizing that she may be shot, to those of cases in which the victim was stabbed thirty times while aware of what was happening, Hansborough v. State, 509 So.2d 1081 (Fla. 1987), or the victim was bound and gagged, kidnapped and put in a car trunk before being shot and killed. Routly v. State, 440 So.2d 1257 (Fla. 1983). The focus of the inquiry in Routly was not on the instantaneous nature of death as the State suggests, (State's brief at 27), but rather on the cruel nature of what occurred preceding death.

Following a close examination of the cases cited by the State in its brief and the inevitable conclusion that they are completely inapposite and factually distinguishable, it is difficult to understand its dismissal of the defendant's cited cases on the grounds that they "do not involve the circumstances of two misfires at close range preceding the fatal shot." (State's brief at 28) As the State concedes, the finding of an aggravating circumstance can be overturned if there is "a lack of competent, substantial evidence to support it." Swafford v. State, 533 So.2d. 270 (Fla. 1988). There is precisely such a lack of evidence in the case at bar and the aggravating factor of especially heinous, atrocious or cruel must be overturned as a result. This error, in its own right or in conjunction with the erroneous application of other aggravating factors, requires that Andrew Williams be sentenced to life imprisonment upon remand.

B. The Trial Court Erred In The Present Case In Finding The Aggravated Circumstance Of Great Risk Of Death To Many People.

The applicability of the aggravating factor of great risk of death to many people to the case at bar is questioned simply because it is unknown whether many people were indeed at great risk. The fact that there may have been seven or eight people in the bank does not mean that any or all of them were at great risk. As a result, the aggravating factor was erroneously

applied and Andrew Williams' sentence of death must be vacated and a sentence of life imprisonment imposed.

C. There Was No Evidence To Show That The Killing In The Present Case Was Committed For The Purpose Of Avoiding Arrest And The Trial Court Erred In Using This As Support For A Sentence Of Death.

Contrary to the State's claim in its brief, (State's brief at 30), there are several possible explanations for the killing in the case at bar. The State's contention that the defendant's alleged commission of three other robberies provided a strong motive for the killing is pure speculation and falls far short of the strong evidence of motive present in the cases it cites in its brief.

When the State analogizes the facts of the case at bar to those of Bolander v. State, 422 So.2d 833 (Fla. 1982), it fails to provide important details of distinction. Unlike the situation in the case at bar, the defendant in Bolander had recently committed two murders in the presence of a police informant who he then also killed. This Court concluded that the killing was for the purpose of preventing retaliation as well as arrest. Bolander, 422 So.2d at 838. In White v. State, 403 So.2d 331 (Fla. 1981), the defendants discussed the need to kill the victims after one of the defendant's masks had fallen off. Indeed, one defendant had told another not to worry about

detection because none of the victims would live. White, 403 So.2d at 338. Contrary to the speculation required in the case at bar, the evidence of motive in the two above-mentioned cases is clear and strong.

This Court has held that "proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19,22 (Fla. 1978). An example of this was the perpetrator in Riley who expressed concern for subsequent identification before the victim was killed. None of the factual circumstances in the above-mentioned cases provides support for the State's contention that the aggravating factor of killing to avoid arrest should be applicable to the case at bar. Since there is no evidence to suggest that the defendant's purpose was to avoid arrest, this aggravating factor was improperly applied and the defendant's sentence of death must be reversed.

ISSUE VII

THE FLORIDA CAPITAL SENTENCING STATUE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The defendant reasserts his argument and authority contained in his Original Brief and requests that his sentence of death be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the copy hereof has been furnished to the Office of the Attorney General, Park Trammel Building, 1313 Tampa Street, 8th floor, Tampa, Florida, 33602; Mr. Andrew Williams, Inmate No. 108776, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, by mail this 13th day of January, 1989.

JAN K. DARGEL