IN THE SUPREME COURT OF FLORIDA

BILLY RAY NIBERT,

Appellant,

vs. : Case No. 71,980

STATE OF FLORIDA, :

Appellee. :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

Comparison between the facts at bar and those in Hudson v. State, 538 So.2d 829 (Fla. 1989) shows that a sentence of death is disproportionate for Wibert.

Appellee's reliance upon Holland v. Illinois, 46 Cr.L.Rptr. 2067 (1990) does not affect the result which should be reached at bar. While Holland holds that the Sixth Amendment does not forbid racial discrimination in the exercise of peremptory strikes, it clarifies that the Equal Protection Clause of the Fourteenth Amendment permits a defendant to object to racially motived excusal of jurors even when he is of a different race than the challenged juror.

The homicide victim, Eugene Snavely, was no more vulnerable than the average victim. Appellee's characterization of Snavely as the "vulnerable 'old man'" and the "elderly victim" is not supported by the record.

Appellant's argument that the sentencing judge should not have given great weight to the jury's 7-5 death recommendation does not require any extension of Tedder v. State,

322 So.2d 908 (Fla. 1975). Tedder applies only to jury life recommendations.

Contrary to Appellee's assertion, Appellant's argument that this Court's construction of the vague aggravating circumstance "especially heinous, atrocious or cruel'' encroaches upon the domain reserved to the Legislature by the Florida Constitution was not raised in Smalley v. State, 546 So.2d 720 (Fla. 1989).

ARGUMENT

ISSUE I

A SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THIS COURT HAS REDUCED THE PENALTY TO LIFE IMPRISONMENT.

Appellee has not been able to cite any cases where this Court has affirmed a sentence of death under similar circumstances. The closest authority cited by the State is Hudson v. State, 538 So.2d 829 (Fla. 1989), which bears closer examination.

The facts in Hudson are similar to the facts at bar in that both victims were stabbed to death in their homes. However, Hudson forced his way into the victim's house while Nibert was invited in. Appellant stayed in Snavely's house for about forty-five minutes before the stabbing took place. Thus, it may be inferred that he did not necessarily intend violence when he entered Snavely's house. Nibert may have intended only to drink beer with the victim.

Another distinction between Hudson and the case at bar is that Hudson brought the knife to his victim's house. At bar, there is no clear showing of where the knife came from; it might have belonged to Snavely.

The most important distinction between the two cases is that Hudson had previously been convicted of a violent felony while Nibert has not. This contrast alone is a compelling reason why death is a disproportionate sentence for Nibert.

ISSUE II

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO EXCUSE BLACK PROSPECTIVE JURORS BY PEREMPTORY STRIKE WITHOUT REQUIRING THE STATE TO GIVE NON-RACIAL REASONS FOR THE EXCUSAL.

Appellee's brief urges this Court to "revisit" the decision of Kibler v. State, 546 So.2d 710 (Fla. 1989) in light of the recent decision of the United States Supreme Court in Holland v. Illinois, 46 Cr.L.Rptr. 2067 (1990). Brief of Appellee, p. 11, 12. The Holland majority held that a defendant's claim of racially motivated peremptory challenges to jurors is cognizable only under the Equal Protection Clause of the Fourteenth Amendment and not under the Sixth Amendment. If Appellee correctly contends that the guarantee under Article I, section 16 of the Florida Constitution to an "impartial jury" is no broader than the federal counterpart of the Sixth Amendment, then not only Kibler but State v. Neil, 457 So.2d 481 (Fla. 1984) and all its progeny would rest on a constitutionally unsound

basis.

However, Holland v. Illinois, supra, also clarifies that a white defendant has standing to object to exclusion of blacks from his jury. Justice Kennedy, in his concurring opinion to Holland, stated emphatically:

> To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.

46 Cr.L.Rptr. at 2071.

Accordingly, Appellant requests this Court to consider his claim that the State's excusal by peremptory strike of black jurors from his jury as grounded in the Equal Protection Clause of the Fourteenth Amendment, United States Constitution as well as in Article I, section 16 of the Florida Constitution. While the Florida Constitution has no specific guarantee of equal protection, it cannot be doubted that racial discrimination is as repugnant to the Florida Constitution as it is to the federal constitution.

ISSUE III

THE TRIAL COURT ERRED BY EXCUSING PROSPECTIVE JUROR WEATHERFORD FOR CAUSE DUE TO HIS OPPOSITION TO THE DEATH PENALTY.

ISSUE IV

THE TRIAL JUDGE ERRED BY ALLOWING THE STATE TO INTRODUCE SPECULATION THAT NIBERT MAY HAVE BEEN ATTEMPTING TO ROB THE VICTIM.

Appellant will rely upon his arguments as presented in his initial brief.

ISSUE V

THE TRIAL COURT ERRED IN THE WEIGHING OF ONE AGGRAVATING FACTOR AGAINST MITIGATING FACTORS BECAUSE A) MITIGATING EVIDENCE WAS NOT WEIGHED FOR ARBITRARY REASONS, AND, B) GREAT WEIGHT WAS GIVEN TO THE 7-5 MAJORITY JURY DEATH RECOMMENDATION.

Appellant objects to Appellee's characterization of the victim, Eugene Snavely, as the "vulnerable 'old man"' (Brief of Appellee, p. 26) and the "elderly victim" (Brief of Appellee, p. 32). In fact, Snavely was fifty-seven years old (R211) and he was in good health. (R217-8) During the struggle with Nibert, Snavely was able to take the knife away and run across the street. (R197)

While state witness Andruskiewiecz referred to Snavely as "the old man", this is because he did not know Snavely's real name. (R238) It also reflects the viewpoint of individuals in their twenties such as Nibert. There is no reason to consider

Snavely as more frail or vulnerable than the average homicide victim.

Appellee has misinterpreted Appellant's argument with regard to the significance of a 7-5 jury recommendation of death. Appellant is not requesting "Alice-in-Wonderland ... extension" of Tedder v. State, 322 So.2d 908 (Fla. 1975). Brief of Appellee, p. 28. Because Tedder is premised on jury recommendations of life, it is manifestly inapplicable to the case at bar.

Appellant's position on a 7-5 jury vote is grounded in the Eighth Amendment requirement that capital punishment not be arbitrary. There must be a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey V. Georgia, 446 U.S. 420 at 433 (1980). The vote of one juror which distinguishes a 7-5 death recommendation from a 6-6 tie vote jury life recommendation is not a "principled" distinction. Accordingly, where borderline jury recommendations are involved, there must be clear and convincing reasons why death rather than life is the appropriate sentence.

At bar, the sentencing judge emphasized the significance of the jury's recommendation in her decision to impose a death sentence when she specifically mentioned the "great weight" she was giving it. (R462, 536) Had the jury recommendation been given little weight, the scales might have tipped to a life sentence.

ISSUE VI

NIBERT'S SENTENCE OF DEATH IS UNCONSTITUTIONAL BECAUSE THERE IS NO PRINCIPLED DISTINCTION BETWEEN THE FACTS AT BAR AND THE VAST MAJORITY OF HOMICIDES COMMITTED WITH A KNIFE WHICH ARE NOT PUNISHED BY DEATH.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VII

THIS COURT'S JUDICIAL CONSTRUCTION OF THE SECTION 921.141(5)(h) AGGRAVATING CIRCUMSTANCE TO CURE ITS FEDERAL CONSTITUTIONAL INFIRMITY OF VAGUENESS HAS RESULTED IN JUDICIAL LEGISLATION WHICH VIOLATES ARTICLE 11, SECTION 3 OF THE FLORIDA CONSTITUTION.

Appellee's brief states that this Court has already addressed Nibert's claim in Smallev v. State, 546 So.2d 720 (Fla. 1989). This simply misapprehends Appellant's argument. Smalley rejected an attack on the section 921.141(5)(h) aggravating circumstance which was based upon the Eighth Amendment, United States Constitution. At bar, however, Appellant demonstrates that this Court's construction of the (5)(h) aggravating circumstance has resulted in this Court exercising powers reserved by the Florida Constitution to the Legislature. Accordingly, an analysis of Article 11, section 3 of the Florida Constitution is necessary.

ISSUE VIII

THE TRIAL JUDGE'S INSTRUCTION TO THE JURY ON THE SECTION 921.141(5)(h) AGGRAVATING CIRCUMSTANCE WAS CONSTITUTIONALLY INADEQUATE BECAUSE IT FAILED TO INFORM THE JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

Appellant will rely upon his argument as presented in his initial brief.

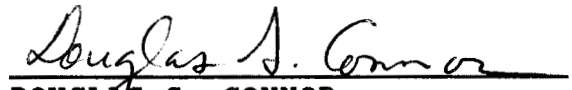
CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 26th day of February, 1990.

Respectfully submitted,



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