IN THE SUPREME COURT OF FLORIDA

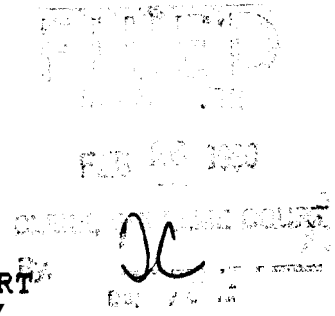
JAMES FLOYD, :

Appellant, :

vs. : Case No. 72,207

STATE OF FLORIDA, :

Appellee. :



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

REPLY BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Appellant, James Floyd, will rely upon his initial brief in reply to the arguments Appellee makes in its brief as to Issues III and VII.

ARGUMENT

ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED THE SOLE BLACK PROSPECTIVE JUROR REMAINING ON THE PANEL WITHOUT PROVIDING A VALID RACIALLY-NEUTRAL EXPLANATION FOR THE EXCUSAL.

Appellee argues that James Bentley was the black prospective juror peremptorily excused by the State, rather than Mark Edmonds, as Appellant stated in his initial brief, (Brief of Appellee, pp. 5-7) Whether the juror was Bentley or Edmonds, however, the fact remains that the court below abdicated his duty in at least two respects. After implicitly finding that Appellant had made a prima facie case of racial discrimination, and calling upon the prosecutor to justify his exercise of a peremptory to excuse the black juror, the court (1) failed to rule on whether the reason given was valid and racially-neutral, and (2) failed even to ascertain whether the reason stated was supported by the record; the court merely said, "I don't recall, specifically, the answer. It is on the record. Your objection is noted and overruled." (See cases Appellant cited on page 29 of his initial brief.)

Assuming, arguendo, that James Bentley was indeed the black

juror who was removed peremptorily by the State, had the trial court bothered to examine the matter he would have seen that the record did not support the prosecutor's stated reason for excusing the prospective juror, which was, "I think he said he would be satisfied for twenty-five years and that's punishment enough." (R671) Bentley was voir dired on his views on capital punishment as follows (R604):

> MR. MCGARRY: What is your opinion on capital punishment?
>
> VENIREMAN BENTLEY: I very much believe in it. I believe that the law should be followed, but the way the system works, it's lost its entire meaning.
>
> MR. MCGARRY: There has been a lot of articles about that and a lot of newsprint and television shows about that. Does that effect you, the fact that the system is bogged down, if it is bogged down? Is that going to affect you in sitting here and being a fair and impartial juror and weighing these facts?
>
> VENIREMAN BENTLEY: I'm afraid it would slant me a little.
>
> MR. MCGARRY: Okay. To the point where you don't think you could be a fair and impartial juror? I mean, has your opinion now become, because of the system, come to where, oh, the hell with it, why bother, it's just -- Is that what your attitude has become?
>
> VENIREMAN BENTLEY: I hate to use those words, but it's almost like that.

As one can see, Bentley never indicated in any way that he would be satisfied with 25 years as sufficient punishment. Rather, he indicated his strong support for the death penalty.

Also, contrary to what Appellee says at page eight of its brief, when Bentley said, "I hate to use those words, but it's almost like that," he was not responding to the prosecutor's question as to whether his opinion would prevent him from being a fair and impartial juror, but was saying his attitude was almost like, why bother with the death penalty when the system is so bogged down?

The prosecutor below, just as did the prosecutor in Thompson v. State, 548 So.2d 198 (Fla. 1989), erroneously told the court that the defense had to show systematic exclusion of blacks. (R671) He did not "think one black being taken from the panel" was enough. (R671) As in Thompson the prosecutor's misstatement of the law may have led the trial court into failing to conduct the full inquiry mandated by State v. Neil, 457 So.2d 481 (Fla .1984) and its progeny.

Finally, if this Court feels resolution of this issue turns upon whether the remaining black prospective juror who was peremptorily excused by the State was Mark Edmonds or James Bentley, then it will be necessary for this cause to be remanded to the lower court for a factual finding on this matter.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR HENDRY, WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY.

At page 12 of its brief Appellee emphasizes the discretion afforded to the trial court in ruling on a challenge for cause.

However, "[i]n exercising its discretion, the trial court must be zealous to protect the rights of an accused." Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734, 740 (1950), quoted with approval in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, 855 (1985). The court below was not sufficiently zealous in protecting the rights of Appellant, who was on trial for his life. The court refused to remove for cause a prospective juror who clearly was biased in favor of the death penalty, when the penalty to be imposed was the only matter to be considered by the jury.

ISSUE IV

THE DEATH RECOMMENDATION HEREIN WAS TAINTED BY THE JURY'S RECEIPT OF IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY THAT APPELLANT HAD THREATENED STATE WITNESS GREGORY ANDERSON.

Appellee argues that Appellant's alleged threat to "get" Gregory Anderson was somehow relevant to establish that Appellant had committed a burglary of the victim's residence. (Brief of Appellee, pp. 18-20) Interestingly, this argument never occurred to the prosecutor below, who argued instead that the threat should be admitted because defense counsel intended to go into Anderson's "record and the changes and everything along those lines" on cross-examination. (R785) The trial court apparently accepted this argument in overruling Appellant's objection. (R786)

Appellee's argument that Appellant's threat to "get" Anderson showed Appellant's consciousness of his guilt of burglary (Brief of Appellee, p. 19) is strained indeed. If Appellant was concerned

about Anderson testifying, logic would dictate that he was primarily concerned that Anderson would implicate him in murder, not burglary. But whether Appellant was guilty of murder was not an issue at his new penalty trial. He had already been convicted of murder, and the jury knew it.

Furthermore, even if this evidence had some tenuous relevance, it was far outweighed by the inflammatory impact of the evidence upon the jury. As this Court noted in State v. Price, 491 So.2d 536, 537 (Fla. 1986): "Care must be taken ... not to allow the introduction of unduly prejudicial evidence simply because the evidence is admissible under a different rule."

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS THOMAS SNELL ABOUT HIS KNOWLEDGE OF APPELLANT'S PRIOR CRIMINAL RECORD AND TO INTRODUCE EXTENSIVE EVIDENCE PERTAINING TO THAT RECORD.

With regard to the admissibility of Appellant's statement, "I know the police are mad at me for running, but I have been in jail before and I was afraid," Appellee takes the position that this matter was disposed of in Floyd V. State, 497 So.2d 1211 (Fla. 1986). (Brief of Appellee, pp. 21-22) However, in Floyd this Court ruled the statement admissible in the context of the guilt phase, because it was relevant to the issue of flight. At the penalty phase, however, consciousness of guilt, as shown through flight, had no relevance. To say, as does Appellee at page 21 of its brief, that "flight ... was relevant to proof of the burglary" stretches the relevance of this evidence past the breaking point.

It seems highly unlikely that the jury would conclude that Appellant fled from law enforcement authorities because he knew he was guilty of burglary.

With regard to the prosecutor's cross-examination of defense witness Thomas Snell as to his knowledge of other crimes allegedly committed by Appellant, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989) this Court noted that before the prosecutor may cross-examine a defense character witness by referring to specific acts of misconduct of the defendant, counsel must first demonstrate to the court that a good-faith factual basis exists for asking the questions. 547 So.2d at 1205. Here the prosecutor represented to the court that he had "certified copies of convictions" to support his proposed cross-examination of Snell. (R880-881) However, the prosecutor's subsequent introduction of these purported "convictions" showed that Appellant had not, in fact, been convicted of three of the five offenses that were mentioned in the prosecutor's cross-examination of Snell -- adjudication was withheld. (R384, 385, 387, 894) Thus the prosecutor lacked the required good-faith basis for asking Snell whether he knew that Appellant was "convicted" of these offenses.

Finally, Appellant would point again to this Court's acknowledgement in price that unduly prejudicial evidence should not come in merely because it might be admissible under some rule of evidence. Even relevant evidence may not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice. § 90.403, Fla. Stat. (1987).

As indicated by the cases cited in Appellant's initial brief, evidence of other crimes allegedly committed by the defendant can be extremely damaging in the eyes of the jury. It must be received with more caution than was demonstrated at Appellant's penalty trial.

ISSUE VI

THE TRIAL COURT ERRED IN PERMITTING THREE OF THE STATE'S NONEXPERT WITNESSES TO OFFER THEIR OPINIONS AND CONCLUSIONS AS TO VARIOUS MATTERS DURING APPELLANT'S PENALTY TRIAL.

Appellee says that Appellant never challenged the police officers' qualifications or questioned whether the opinions they ventured were beyond their experience. (Brief of Appellee, pp. 25, 27) This is not entirely accurate. After the prosecutor asked Detective Engelke whether the abrasion on Annie Anderson's nose looked any less fresh than the stab wounds to her abdomen, defense counsel objected as follows (R843):

> MR. LOVE: Judge, I am going to object. That is calling for a conclusion on this gentleman's part, which I don't believe he is qualified to do. You had the M.E. in here. He is the one that should be giving that kind of testimony.

At page 27 of its brief Appellee asserts that this issue is controlled by Johnston v. State, 497 So.2d 863 (Fla. 1986). However, Johnston is readily distinguishable fromthe instant case. In Johnston, unlike here, the police officer testified to the results of an objective test he performed, rather than giving his purely subjective opinions and conclusions. Furthermore, unlike the officers who testified at Appellant's penalty trial, the

officer in Johnston was an evidence technician whom "the prosecutor would have had little trouble in qualifying ... as an expert." 497 So.2d at 870.

At page 28 of its brief Appellee equates the officers' testimony that characterized certain injuries to Annie Barr Anderson as "defensive wounds" to the testimony of the officer in Jones v. State, 440 So.2d 570 (Fla. 1983) that a mark on a "stash house" window sill was made by the recoil of a high-powered rifle. However, the prosecutor below apparently recognized the need for expert medical testimony on the matter of whether wounds were "defensive" when he told the jurors in opening statement that they would hear testimony from the medical examiner (not the police officers) that the stab wound to Anderson's wrist was a defensive wound that occurred when Anderson put up her hand to defend herself. (R696-697) (In fact, the medical examiner never so testified. (R748-758))

ISSUE VIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED FOR FINANCIAL GAIN AND WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellee erroneously states that this Court, in its prior opinion in this case, found that the evidence supported the two aggravating circumstances in question, and that they had not been erroneously found by the trial court. (Brief of Appellee, p. 32) This Court did conclude in Floyd I that it could not say that the trial court erred in finding the homicide to be heinous, atrocious,

or cruel, 497 So.2d at 1214, but did not specifically address the propriety of the trial court's finding that the homicide was committed for pecuniary gain.

Appellee cites Johnston, supra, and Wright v. State, 473 So.2d 1277 (Fla. 1985) in support of its argument that the facts of the instant case warranted the trial court's finding that the killing of Annie Barr Anderson was especially heinous, atrocious or cruel. (Brief of Appellee, pp. 34-35) However, in Johnston the victim was also strangled, which Anderson was not. In Wright, in addition to multiple stab wounds to the neck and face, the victim suffered a vaginal laceration, suggesting a sexual assault, which was not present in the cause sub judice. Furthermore, Wright did not even challenge the propriety of the trial court's finding that the murder was especially heinous, atrocious, and cruel in his appeal to this Court. 473 So.2d at 1281. The cases cited by Appellee are inapposite.

ISSUE IX

THE TRIAL COURT ERRED IN FAILING ADEQUATELY TO CONSIDER THE MITIGATING EVIDENCE PRESENTED HEREIN AND IN NOT PROPERLY WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Appellee cites Hill v. State, 549 So.2d 179 (Fla. 1989) in support of its position that the court below properly dealt with the evidence offered in mitigation. However, in Hill the mitigating evidence was "presented to, and considered by, both the jury and judge." 549 So.2d at 183. Here it is not clear that the court considered all nonstatutory mitigating factors that emerged

at Appellant's penalty trial.

CONCLUSION

Appellant, James Floyd, respectfully renews his prayer for the relief requested 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 22ND day of February, **1990.**

Respectfully submitted,

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