IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT JONES,)

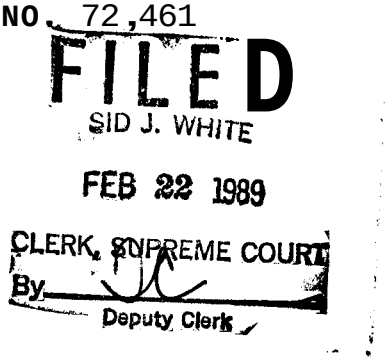
Defendant/Appellant,)

vs.)

STATE OF FLORIDA,)

Plaintiff/Appellee.)

CASE NO. 72,461



APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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Defendant/Appellant,
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STATE OF FLORIDA,
Plaintiff/Appellee.

REPLY BRIEF OF APPELLANT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM THE DEFENDANT FOLLOWING A REQUEST FOR COUNSEL THAT WAS NOT GRANTED.

The state contends that there exists "conflicting testimony given by the Appellant and Officers Hord and Stout" concerning whether an attorney was asked for by Jones. (Answer Brief ["AB"] at 7). The state misapprehends the significance of the earlier request by Jones to the Mississippi authorities for an attorney. At the suppression hearing the state never contested that Jones asked for counsel when he arrested in Mississippi, and that he thereafter sought to remain silent. The state asserts, "The issue of credibility was resolved against the appellant at the suppression hearing (R466)." (AB at 7) In fact, the trial court found that Jones asserted his right to counsel when arrested, as was wholly uncontradicted by the state.

> Court: Now, I don't know what evidence the state intends to introduce, but with regard to any statement this Defendant made to the Mississippi authorities prior to invocation - or prior to the entrance on the scene of the Florida authorities, I will reserve jurisdiction on that matter because this Defendant has indicated that he requested an attorney, and we all agree that once an attorney is requested, must be afforded and all questioning should cease.

(R465).

The state continues, "If by some chance, Appellant's first statement to Hord is found to be involuntary and suppressible, admission of such was harmless since Jones did not confess to having committed the murder in that first statement and it was basically cumulative of the second statement, which was properly admitted because it was made after Appellant initiated the conversation with the officers." (AB at 12-13) Any assertion that the second statement is not the product of the first unlawful interrogation by the Florida authorities is untenable. Citing Wasko v. State, 505 So.2d 1314 (Fla.1987), the state asks this court to simply presume that the trial court's ruling on the motion to suppress is correct. (AB at 7) In reply, Jones asserts that an appellate court is "duty bound to make an independent evaluation of the record" to determine "whether the State has obtained [a] confession in a manner that comports with due process[.]" Miller v. Fenton, 474 U.S. 104, 110 (1985). The record here supports no other reasonable conclusion but that Jones invoked his right to counsel and remained silent when first arrested, and that he thereafter was improperly interrogated by authorities.

The reliance by the state on the federal cases cited in its Answer Brief for the premise that a written waiver is essentially all that the police need produce (AB at 9) is misguided, in that those cases all concern a written waiver executed by a defendant who never invoked his rights, but instead waived them when arrested. It is here uncontroverted that Jones invoked his right to an attorney when arrested, and it is therefore incumbent on the state to establish a knowing and voluntary relinquishment by Jones of those rights after his invocation of them has not been scrupulously honored by the police. The state must show a waiver untainted by police disregard of the request for an attorney. The state cannot do *so* here. The correct resolution of this issue is controlled by Shea v. Louisiana, 470 U.S. 51 **(1985)** and Smith v. Illinois, **469** U.S. **91 (1984).** Clear error has occurred in the use of Jones' statements.

Any assertion by the state that the unlawful use by the state of the statements can be considered harmless error is untenable. The state must show beyond a reasonable doubt that the use of the improperly obtained statements could not have affected the jury's verdict before a court may conclude that such error is harmless. The state has not, and can not, meet such a burden in this case. The convictions must be reversed and the matter remanded for retrial without the use of the statements obtained by the police in defiance of Jones' request for an attorney.

POINT II

THE CONVICTION FOR SEXUAL BATTERY MUST BE REVERSED BECAUSE THE ACTS ALLEGEDLY CONSTITUTING THE SEXUAL BATTERY OCCURRED WELL AFTER THE DEATH OF THE VICTIM.

The state initially advances that it is possible that Perry was still alive when sexually assualted. AB at 15. The evidence, indeed, common sense, refutes that contention. The twelve year old boy who was camping at the Rodman Dam heard three rapidly fired gunshots (R1108-12), which independently establishes that both victims were shot within moments of each other. The amount of trauma suffered by Perry as a result of the 30-30 caliber gunshot to the forehead at a distance of three to four feet leaves no room for a reasonable conclusion that the victim lived for any appreciable amount of time. The rifle shot was instantly fatal.

> Q: (Defense Counsel) Well, certainly, with respect to Ms. Perry, the single rifle shot was instantly fatal, was it not, sir?
>
> A: (Medical Examiner) That's correct, sir.
>
> Q. She could not have lived a minute?
>
> A. Well, maybe seconds. The heart would still be beating after you've blown out the head and it would still beat for a few seconds, sir.

(R1277). The suggestion by the state that Jones sexually assualted Perry in the cab of the truck seconds after the shooting, or that Perry was sexually assaulted after Brock was independently shot, is simply unsupported by reason or common sense.

The fall-back position of the state is that, because "the statutory definition of 'person' does not specifically exclude a deceased person and it does include in its definition 'estates'", the criminal definition of a sexual battery on a "person" still applies. (AB at 17) "Kelly Perry's body is part of her estate and thus it is a 'person' according to our statutory definition until it is disposed of in accordance with the terms of a will or the laws of the state of domicile of the decedent." (AB at 17) This strained though intriguing approach raises the spector of the state also being able to obtain convictions for lewd and lascivious assault, kidnapping, or perhaps even false imprisonment where a body is violated in some manner prior to its disposition in accordance with the terms of a will or the laws of the state of domicile of the decedent.

It is an accepted fact that penal statutes must be strictly construed. As perverse as necrophelia is, it does not amount to a sexual battery as that term is defined by the laws of Florida. Accordingly, the sexual battery conviction must be reversed. The state argues that, even assuming the conviction is erroneous, it's presence did not affect the jury recommendation for death. The truth is, however, the jury was privy to incorrect information upon which they could have relied in weighing the statutory aggravating factors against the mitigating circumstances. The matter never should have been before the jury, because Jones prior to trial moved to dispose of these charges by way of a sworn motion to dismiss. The traverse filed by the state did not disagree with the material facts stated in

the motion to dismiss but contended simply that a sexual battery can be committed upon a corpse. As a matter of law, it cannot. Any argument that an attempted sexual battery could be an appropriate charge now cannot withstand the fact that the state failed to sufficiently traverse the sworn motion to dismiss, *so* that procedurally the charge should have been completely eliminated prior to trial. Further, at issue here is not the application of a statutory aggravating circumstance which includes in its definition attempts to commit a sexual battery, but rather a separate crime independently charged and sought to be proved by the state. The evidence does not support a conclusion that Jones attempted to sexually batter Perry while she was alive and failed. If Jones in fact did this act, it was not against a person, but rather intentionally with a corpse after the fatal gunshot wound was inflicted and after Jones left the scene and later returned.

The misconception of the jury that Jones had committed the crime of sexual battery rendered their recommendation unreliable under the Eighth Amendment. Accordingly, the death penalties must be reversed and the matter remanded for a new penalty phase before a new jury. In any event, the sexual battery conviction must be reversed, the felony sentences vacated and the matter remanded for resentencing after recomputation of a correct recommended guideline scoresheet without points being assessed for the erroneous sexual battery conviction.

POINT III

DEATH PENALTIES WERE IMPOSED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY DID NOT DETERMINE THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES THAT DEFINE WHICH FIRST-DEGREE MURDERS ARE PUNISHABLE BY DEATH.

Three members of this Court have now recognized that the death penalty in Florida is being unconstitutionally applied. Specifically, in Burch v. State, 522 So.2d 810 (Fla. 1988), in the context of what constitutional function the jury plays in capital cases in Florida, Justice Shaw stated the following in a dissenting opinion joined in by Justices Ehrlich and Grimes:

> [O]ur decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g., Combs, and our death penalty statute. Moreover, the situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman court to hold that the death penalty was being arbitrarily and capriciously imposed by a jury with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was-not. Absent factual findings in the advisory recommendation, any distinctions we miaht draw between cases where the jury reconmends (sic) death and those where it recommends life must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires.

Burch v. State, 522 So.2d 810, 815 (Fla. 1988)(Shaw, Ehrlich and Grimes, JJ., dissenting)(emphasis added).

The state argues that Jones was afforded his Sixth Amendment right to a jury trial because he was found guilty of first-degree murder, and further contends that he has no right under the Sixth Amendment for the jury to be the entity that determines the existence of the statutory aggravating circumstances upon which imposition of the death penalty is based. (AB at 21-22). Understandably, the state argues that Jones is attempting to have the jury become his sentencer. This is not the case. Rather, Jones submits that because imposition of the death penalty is contingent, and exclusively contingent, upon the finding of one or more aggravating circumstances, due process and the right to a jury trial requires that the jury determine the facts upon which those aggravating circumstances are based. Since the Initial Brief of Appellant was submitted, the Ninth Circuit Court of Appeal en banc decided an identical issue squarely in favor of the position now advanced. See Adamson v. Ricketts, Case No. 84-2069, (CA9 Dec. 22, 1988) [(44 Crim.Law 2265 (Jan. 18, 1989)]

The current turmoil over the death penalty involves a sentence of death coming from a jury that was led to believe that the responsibility to arrive at the correct sanction rested somewhere else. The denigration of the role of the jury in imposing the death penalty is strictly forbidden under the dictates of Caldwell v. Mississippi, 472 U.S. 320 (1985). Thus, it seems that the role of the jury in Florida, if sufficiently downplayed, will not be subject to the strict rule of Caldwell where the jury was the actual sentencer, whereas in Florida an

"advisory recommendation" is issued. If the jury recommendation indeed is now no more forceful than a breath of wind to steer the sentencer to the correct sanction, then prosecutors may without apprehension demean the role of the jury in issuing what is a hollow recommendation and assuage the juror's fears over the consequences of issuing a straw ballot for death. By the same token, however, it is respectfully submitted that the Sixth and Fourteenth Amendments guarantee that the jury construct the vessel upon which rides the trial court's discretion in imposing a sentence. This is accomplished when the jury selects which, if any, statutory aggravating circumstances have been proved, to their satisfaction, during the guilt and penalty phases of trial.

The fallacy in allowing a trial judge to make these critical findings in the face of a generic recommendation from the jury is that the majority of the aggravating circumstances are comprised of facts already determined by the jury when the verdict was rendered. Those facts do not necessarily support such things as cold, calculated and premeditated murder without *any* pretense of moral or legal justification, an especially heinous, atrocious or cruel murder, knowingly creating a great risk of death to many persons, or a murder committed for pecuniary gain. These subjective determinations, as implicitly recognized by the dissenting opinion in Burch, rest exclusively and historically within the realm of the jury. Appellate court speculation in the total absence of jury findings produces arbitrary, capricious, and unreliable results in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER AND IN PREVENTING DEFENSE COUNSEL FROM ARGUING TO THE JURY THE INAPPLICABILITY OF THAT CIRCUMSTANCE AS A MATTER OF LAW.

The state concedes, and appropriately so, that it was error for the trial court to instruct the jury on the aggravating circumstance of an especially heinous, atrocious or cruel murder since the trial court found that the law did not support the application of that factor. (AB at 24). The state argues, however, that because Florida has an ability to correct on appeal misapplication of that circumstance by the sentencer, the error was harmless. (AB at 25). The state argues, "The facts of the instance [sic] are perfect illustration[s] of how Florida's sentencing procedure overcomes any problem with the language of this aggravating circumstance. The trial court, as actual imposer of sentence, found that the circumstances surrounding the crime in this case did not call for the application of the HAC factor as it has been construed previously by this Court. The trial court did not include this factor in its weighing process (R686,690). Thus, any issue regarding the inapplicability of this aggravating factor to the case at bar is moot and no new penalty phase is necessary." (AB at 25-26) The state misses the point. Is not part of the weighing process an untainted jury recommendation? What purpose does it serve if the jury can, over objection, be grossly misled as to what statutory factors to

weigh in issuing their recommendation? This is but one facet of the problem with not having the jury affirmatively make the findings of the existence of the aggravating circumstances. Only the jurors know what weight was attributed to any particular aggravating factor. Appellate review of a trial court's findings, which is speculative at best, cannot effectively determine what influence the presence of a vague statutory aggravating factor had on the jury's determination to recommend a sentence of death. Had the jury made the findings requested by Jones, the state would be in a much better position to argue "harmless error" if the jury did not in fact utilize this unconstitutionally vague aggravating circumstance.

Because the state cannot show that the clear error invited by the prosecutor over defense objection did not contribute to the jury recommendation of death in this case, the death penalties must be reversed and the matter remanded for a new sentencing proceeding for, as previously stated by this Court, "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Elledge v. State, 346 So.2d 998, 1003 (Fla.1977)(emphasis added).

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

Interestingly, the state does not refer to the order of the trial judge when developing its own reasoning as to why the murders are cold, calculated and premeditated. The state argues that the conversation between Jones and Christopher Reesh show that the premeditation was heightened beyond what is necessary for "simple" premeditated murder, whatever that is. The state argues, "If all Appellant wanted was a truck to get his car out of the sand (as he contends in Point V), he could have had it without killing the people inside. Even though he wanted to steal the truck, there was still no need to murder these two people as they slept. However, Appellant's full intention consisted of killing the occupants of the truck as much as it consisted of obtaining the truck." (AB at 31) To the extent that Jones' mental intent to kill the occupants of the truck was from a conscious decision to obtain pecuniary gain and/or to facilitate the taking of the truck, it appears that reconsideration of the mental aspect to constitute another aggravating circumstance is doubling the aggravating factors which is strictly prohibited. See Provence v. State, 337 So.2d 783 (Fla. 1976). If the circumstance does not rely on the subjective intent of the murderer but instead on the bare manner in which the crime is carried out, See Provenzano v. State, 497

So.2d 1177 (Fla. 1986), then the concluding portion of the statutory aggravating factor [e.g., "no pretense of moral or legal justification"] makes absolutely no sense and is surplusage. This is yet another reason to have the jury find the presence of the aggravating circumstances. Use of this factor under these circumstances is unsupported by the record and/or it constitutes impermissible doubling with other aggravating circumstances. This renders the circumstance unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. The death penalties should be vacated and the matter remanded for resentencing absent this aggravating circumstance.

POINT VIII

THE FLORIDA DEATH PENALTY VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY; THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION.

The state begins its argument by asserting, "None of the alleged constitutional infirmities raised in this issue were ever presented to or ruled upon by the trial court. It has been made clear by this Court that absent an allegation and showing a fundamental error, an appellate court will not consider an issue unless it was first presented to and ruled upon by the trial court." (AB at 36). The state overlooks that the arguments presented herein concern the death penalty and violations of Due Process and the Eighth Amendment. As noted by this Court, such violations of the Eighth Amendment require raising in the direct appeal, even when wholly unpreserved by counsel at trial level, or they shall be deemed waived. See Woods v. State, 531 So.2d 79 (Fla.1988); Copeland v. Wright, 505 So.2d 425 (Fla. 1987); Sireci v. State, 469 So.2d 119 (Fla. 1985), cert. denied, 106 S.Ct. 3308 (1986).

> [At] the time of Appellant's trial and sentencing, any confusion in the law had been resolved and the matter clarified. If defense counsel at trial had perceived any injury or prejudice in the instructions given to the jury concerning the consideration of mitigating circumstances, he could have raised the issue by appropriate motion, objection, or request for alternative instructions based on Lockett and Songer. Thus the argument that improperly restrictive instructions were

> given could have been raised at trial and, had no appropriate relief been given by the trial judge, argued on appeal. Matters that could have been raised on appeal are not proper grounds for motion by means of a Rule 3.850 motion.

Copeland, 505 So.2d at 427.

> "The prosecutor's supposed comments on Woods' failure to produce evidence [which were unobjected to] also should have been raised on appeal. Presenting that claim under the alternate cruise of ineffective assistance of counsel is unavailing. See Sireci. Likewise, the court's reliance on certain material in sentencing could and should have been raised on appeal. Caldwell is not such a change in the law as to give relief in post-conviction proceedings. Foster v. State, 518 So.2d 901 (Fla. 1987). Therefore, the claim regarding the jury's role in sentencing should have been raised, if at all, on appeal."

Woods v. State, 531 So.2d at 83 (emphasis added)(bracketed portion set forth in facts of case, Woods, 531 So.2d at 80). Apparently, under the rationale of the foregoing cases, a violation of the Eighth Amendment must be raised on direct appeal notwithstanding the total absence of an objection by trial counsel and/or a ruling by the trial court lest the Eighth Amendment challenge be waived for post-conviction proceedings.

Moreover, in capital cases, this Court scrupulously "examine[s] the record to be sure that the imposition of the death sentence complies with all of the standards set by the constitution, the legislature and the Court." Stone v. State, 378 So.2d 765, 773 (Fla.1980)(emphasis added). See Harvard v. State, 375 So.2d 833 (Fla.1977)("The Legislature has imposed a duty upon

this Court to examine every case in which the death penalty was imposed."). Because this Court undertakes a ~~de novo~~ review of the record in capital cases "to be sure that the death sentence complies with all standards of the constitution", capital defendants on direct appeal may advance ~~de novo~~ objections to the sufficiency of evidence and/or to the constitutional standard that the evidence must satisfy in order to assist the court in its ~~de novo~~ review. Any error in sentencing that is apparent from the face of the record requires no objection to preserve it for appeal. State v. Whitfield, 487 So.2d 1045 (Fla.1986).

This Court must review the consistency of its own application of statutory aggravating factors. A trial court is in a poor position to review the rulings of this Court, especially where the issue concerning the constitutionality of Florida's death penalty scheme has repeatedly been upheld by this Court. It would have been a useless act indeed to ask a trial court to declare Florida's death penalty scheme unconstitutional following State v. Dixon, 283 So.2d 1 (Fla.1973) and its progeny. An attorney is not required to perform a useless act to preserve an issue that has been so clearly litigated by this Court. See Thompson v. State, 419 So.2d 634 (Fla.1982); Brown v. State, 206 So.2d 377, 384 (Fla.1968)("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless.").

POINT IX

THE TRIAL COURT ERRED IN ALLOWING, OVER OBJECTION, FAMILY MEMBERS TO IDENTIFY THE MURDER VICTIMS.

The state argues that, pursuant to Welty v. State, 402 So.2d 1159 (Fla. 1981), "this Court has previously held that admission of the identification testimony from a family member is not fundamental error and may be harmless error in certain instances." (AB at 41) The state's response misses the point. The testimony of the family members in this case was objected to, was thus preserved for appellate review; any reference to "fundamental error" is inapposite in light of a preserved issue. In reference to the "harmlessness" of this error, the state asserts that the victims' family members presented relevant testimony. For example, the state asserts that it was relevant and appropriate that Brock's brother explain why Brock was at the dam the night he was murdered, but the state fails to explain why that information is relevant. (AB at **42)** The testimony provided by the family of the victims in no way contributed relevant information to assist the jury. Rather, the testimony was calculated to inflame the emotions of the jury and to demonstrate that the victims had large families that now grieved the loss of their loved ones. Under Booth v. Maryland, 107 S.Ct. 2529 (1987), such clearly improper testimony over timely and specific objection rendered imposition of the death penalty unreliable under the Eighth Amendment. Accordingly, the death sentences must be reversed and the matter remanded for a new penalty proceeding.

CONCLUSION

Based on the arguments and authorities presented in the Initial Brief of Appellant and this Reply Brief of Appellant, this Court is asked in Points I, XI, and XII to reverse the convictions and to remand for a new trial; in Point 11, to reverse the conviction for sexual battery, to vacate all sentences and to remand for a new penalty phase and resentencing on the remaining felony convictions: Points 111, IV, V, VI, VII, IX, X, XIII to vacate the death sentences and to remand for imposition of life sentences; in Point XIV to remand for resentencing; and, in Point XI to reverse the convictions for burglary with an assault and shooting into an occupied vehicle.

Respectfully submitted,

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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, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Randall Scott Jones, #111508, P.O. Box 647, Starke, Fla. 32091, on this 20th day of February, 1989.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER