IN THE SUPREME COURT OF FLORIDA

ROBERT HENRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 73,433

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the 17th Judicial Circuit of Florida, In and For Broward County (Criminal Division)

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES **PAGE**

AUTHORITIES CITED

STATUTES

OTHER

STATEMENT OF THE CASE AND FACTS

Mr. Henry relies on the statement in his initial brief.

SUMMARY OF ARGUMENT

Mr. Henry relies on the summary in his initial brief.

ARGUMENT

GUILT ISSUES

A. The Legality of Mr. Henry's Statements

The state asserts that the decision to violate Mr. Henry's rights was merely a "tactical error." So might King George[1] have said about the actions of his agents who "obstructed the Administration of Justice."[2] It asserts that there was no conspiracy because the police ultimately owned up to their wrongdoing.[3] But in fact they did not reveal their deliberate misconduct in the probable cause affidavit, in the application for the search warrant, or (apparently) to the prosecutor working with them that day or to the judge acting on the application for the search warrant or to the committing magistrate. An after-the-fact confession does not absolve one of conspiracy.

1. Fourth amendment and due process

The state relies on Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) for the proposition that the federal constitution does not bar use of a confession obtained

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[1]The "royal we" in the state's brief suggests the analogy.

[2]Declaration of Independence,

[3]They had to because their records show that they did not comply with the law.

during an improper detention. This reliance is misplaced. In Culombe the Court merely noted that it had not yet imposed such a rule on the states. The Coulombe decision was predicated upon the rule (since abandoned in, e.g., Brown v. Illinois, 422 U.S. 590, 95 So.Ct. 2254, 45 L.Ed.2d 416 (1975) (confession suppressed where product of illegal detention)') that a confession is unconstitutional only if involuntary. 367 U.S. 601-602 (stating, inter alia, that a confession obtained without warning of rights is not unconstitutional -- another idea since rejected). The assertion that in Finley v. State, 153 Fla. 394, 14 So.2d 844 (1943) this Court refused to hold that improper detention will lead to suppression of a confession is incorrecto this Court found no evidence of an illegal detention in that case.

New Yark v. Harris, 110 S.Ct. 1640 (1990) (error to suppress confession obtained after warrantless arrest at defendant's home) does not help the state. The analysis in that case is that a fourth amendment violation will not result in suppression where suppression will not serve the purpose of the rule that has been violated. The Court wrote that it was doubtful that the desire to

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[4]See generally Cardwell v. Taylor, 461 U.S. 571, 103 S.Ct. 2015, 76 L.Ed.2d 333 (1983) (discussing distinction between Suppression for violation of fourth amendment and suppression of involuntary confession under fifth amendment). At footnote 5 of its brief, the state cites several cases on this issue. The state's cases stand for the since-discarded propositions that voluntariness is the only ground for suppression of a confession and that failure to advise an arrestees of their rights does not render resulting confessions inadmissible. E.g. Rollins v. State, 41 So.2d 885, 886 (Fla. 1949) ("this Court is unequivocally committed to the rule that warning is not a prerequisite to the admission in evidence of a voluntary extra-judicial confession").

secure a confession would motivate the police to illegally arrest a suspect at home. In contrast, the police are motivated to hold persons, as at bar, without taking them before committing magistrates, in order to obtain statements from them. See the discussions in Culambe, 367 U.S. at 584-85 and in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (condemning incommunicado interrogation).

3. Article 1, section 16, and sixth amendment

To assert, as the state does, that first appearance hearings are not adversarial so that the right to counsel does not attach is to show ignorance of the day-to-day operation of the Florida criminal justice system. Cases are plead out or nol-prossed, evidentiary hearings are conducted on bail matters, and psychological, alcohol, and drug evaluations are ordered. Criminal cases are formally recognized as such by assignment of case numbers and reference to the parties in court documents as such. Rule 3.130(c)(1), Florida Rules of Criminal Procedure states unequivocally that determination of counsel "must be made" and that counsel be appointed "no later than the time of the first appearance, and prior to any other proceedings at the first appearance." Rule 3.130(d) states unequivocally that the court "shall proceed to determine conditions of release pursuant to Rule 3.131." Rule 3.131(b)(1) unequivocally requires that the court conduct a hearing to determine pretrial release. At the hearing, the court is to consider information and evidence presented by the defendant. Rule 3.131(b)(4). As a mattes of practice, defendants

have the burden of going forward with evidence (typically through their own testimony -- the prosecutor has little inclination to present such evidence) as to their community ties and likelihood of returning to court if released. In short, the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law," so that the right to counsel attaches. United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984).

The state's reliance on Gerstein v. Puuh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) is misplaced. While Gerstein holds that there is no right to counsel at a nonadversary probable cause determination, it also notes (in the portion elided by the state in the excerpt quoted in its brief) that one is entitled to counsel at preliminary hearings involving factual determinations.

The state expresses pique at the idea that the right to counsel might attach as soon as practicable after arrest, stating that Mr. Henry "does not grace us with a specific suggestion." The state need look no further than rule 3.111(a) which provides that the right attaches "as soon as feasible after custodial restraint."[5]

24 hours is obviously the outside limit. The requirement is that the hearing and the determination of counsel be conducted as

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[5]Similarly, standard 5-5.1, ABA Standards for Criminal Justice (Providing Defense Services) provides that counsel "should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest."

soon as practicable,[6] The 24 hour limit assures that the defendant be brought before the magistrate on the day of the arrest except where the arrest has occurred after the close of the court's business for the day. The violation occurred when the police held Mr. Henry beyond the time for taking him before a committing magistrate the day of his arrest. By holding Mr. Henry throughout the day, the police held him incommunicado until they obtained incriminating statements. They made it impossible for the magistrate to make the timely determination of counsel required by law. The state raises no legitimate reason for the actions of the police, simply terming it a "tactical error." The officers simply broke the law because the law interfered with their investigation.

B. The Statements of Ms. Thermidor

The state argues that the testimony of its "experts" was admissible because it consisted of little more than "educated guesses."[7] The law does not support this theory of admissibility. It is noteworthy that the state does not contend (there being no evidence to support such a contention) that Ms. Thermidor thought that she was faced with "immediate death" as required by the law.

C. Jury Instructions

It is fundamental error to fail to give accurate jury

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[6]Indeed, rule 3.130(c)(1) provides: "Where practicable, the magistrate should determine prior to first appearance whether the defendant is financially able to afford counsel and whether he desires representation."

[7]"The apinions expressed by the medical doctors at bar are little different, and no less reliable, than the educated guesses of psychologists or psychiatrists." Answer page, 33.

instructions on the law applicable to the disputed issues in a criminal case. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully"; "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). Materially erroneous jury instructions which adversely affect a defense constitute fundamental error. E.g. Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989). The state's response is that rule 3.390(d) nullifies these principles where the "defensive lawyer" slumbers. Mr. Henry submits that the constitution is not so easily overridden. See Tarpley v. Estelle, 703 F.2d 157 (5th Cir. 1983).

On the merits, the state contends that the "defensive lawyer" presented no legal defense, arguing that duress (the defense presented) is no defense to felony murder.[8] Alternatively, it argues that the defense was "fantastic (if not absurd)." These are make-weight arguments. Duress is a defense, and the prosecution's disbelief of the defense theory does not relieve the judge of the duty to give accurate instructions. In Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945), this Court reversed a conviction where there was an incorrect instruction an self-defense, writing:

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[8]The cases cited at page 37 of the state's brief simply do not support its position on this point.

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution....We have said that where the court attempts; to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Cit.] The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense.

The state's assertions, that there was no evidence of an imminent threat and that Mr. Henry did not establish that he could not escape, are untrue: Mr. Henry testified that the robbers pointed their guns at him, threatened to kill him if he resisted, and otherwise made it impossible for him to escape. R2248-51.

J. Alternative Theories of First Degree Murder

The state's disbelief of Mr. Henry's theory of defense is irrelevant. As the Court explained in Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988), a jury verdict must be set aside if it could be supported on one ground but not another, and the reviewing court is uncertain which ground was relied upon by the jury.

The state argues at page 46 of its brief (emphasis in original):

> "Felony" murder is "premeditated murder" and is listed separately only because the element of premeditation, as an evidentiary matter, is proven by proving any listed specific intent crime. Since the "difference" between the crimes only goes ta the mechanics of proving premeditation, a general charge of first degree murder covers both theories.

If what the state says is true (the authorities cited by the state do not support its assertion), the first degree murder statute is

unconstitutional under Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). There, a defendant in Maine was charged with murder, which under Maine law required proof not only of intent but of malice. The trial court instructed the jury that malice was an essential element of the crime. But then it instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, malice was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The Supreme Court held that the resulting conviction was unconstitutional because the instruction relieved the state of the burden of proving the malice element. See Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (discussing Mullanev). In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court held that a jury is unconstitutional where it relieves the state of the burden of persuasion as to the elements of the offense charged. Where a jury instruction authorizes a conviction on an improper theory of guilt, the resulting conviction is illegal. E.g. Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) (citing cases). Of course (contrary to the state's version of Florida law), the jury at bar was not told that the state had to prove a premeditated design in order to convict the Mr. Henry of felony murder. The instruction given to the jury completely relieved the state of proving this element because (under the state's argument) proof of the felony substituted for proof of the premeditated design, just as in

Mullaney proof of intent and unlawfulness substituted for proof of malice.

11. PENALTY ISSUES

A. Consideration of Mitigation and Defense Issues

2. Waiver of mitigation

The state argues at footnote 16 of its brief that Mr. Henry's trial counsel was engaged in "defensive lawyering," which somehow explains his waiver of the attorney-client privilege and his conflict-of-interest. This amounts to a concession that counsel's actions were contrary to prevailing norms for professional conduct. Standard 4-5.2(c), ABA Standards for Criminal Justice (The Defense Function) provides that in the event that defense counsel feels it necessary to engage in such defensive maneuvers, the attorney is to do so "in a manner which protects the confidentiality of the lawyer-client relationship." The commentary to this Standard suggests that this be done by a note in the file or a letter to the client. It is curious indeed for the state to assert that its "defensive lawyer" waived significant constitutional issues right and left, answer brief, passim, but then found it necessary to waive the attorney-client privilege to protect himself.

Most amazing, the state has not shown why its "defensive lawyer" did not comply with his ethical duty to present mitigation. So long as he was on the case, counsel had a duty to present mitigating evidence. Standard 4-8.1, ABA Standards for Criminal Justice (The Defense Function) unequivocally provides that counsel should present mitigation to the sentencer.

B. Consideration of Aggravating Circumstances

1. Statutory circumstances found by the court

a. Felony murder

To the extent that the state relies on Ruffin v. State, 397 So.2d 277 (Fla. 1981) as to the double jeopardy issue, its reliance is misplaced, Ruffin simply does not discuss double jeopardy, and the opinion does not reveal whether the jury was instructed on felony murder as a theory of guilt.

As to the constitutionality of the felony murder circumstance, this Court's discussion regarding the premeditation aggravating circumstance in Porter v. State, 15 FLW S353, S354 (Fla. June 14, 1990) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates Zant v. Stephens by turning the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance to every first degree felony murder. Accordingly, it is unconstitutional.

b. Cold, calculated and premeditated

The state presents as fact its speculation that Mr. Henry "worked his way into a position of trust at Cloth World and decided

not to repeat the mistakes of his failed Super-X crime." To the extent that the state relies on the "Super-X crime" it violates Mr. Henry's constitutional rights as discussed below at paint II.G of this brief. It does not, and it cannot, say that the jury's consideration of this factor was not likely flawed because of the prosecutor's argument and the incorrect jury instruction, or that the judge's findings were speculative.

c. Avoid arrest

Again, the state relies on the Super-X episode to establish this circumstance. Again, it violates Mr. Henry's constitutional rights as set out below.

d. Financial gain

Without denying that this circumstance applies only where the murder is an integral step to some sought-after specific gain under Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988), and while arguing, at page 56 of its brief, that the killings were unnecessary to the robbery, the state argues for application of this circumstance. The illogic of its position is obvious.

e. Especially wicked, evil, atrocious or cruel

The state's argument on this point is mere speculation.

G. Confrontation Clause

Although it is less than clear, the state apparently addresses this issue at page 65 of its brief, arguing that, by requesting the PSI and reviewing it, the "defensive lawyer" waived Mr. Henry's rights under the Confrontation Clause. The state contends that this issue is therefore not subject to appellate review.

There is a strong presumption against the waiver of the fundamental rights of cross-examination and confrontation. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (conviction vacated where record did not establish that defendant, who emphasized in open court that he was not pleading guilty, had knowingly and intelligently waived right to confront and cross-examine witnesses, although his attorney agreed to "prima facie trial" in which defendant did not have right to confrontation and cross-examination). The rights of cross-examination and confrontation apply to capital sentencing proceedings. Rhodes v. State, 545 So.2d 1201 (Fla. 1989). Cf. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (enhanced sentencing proceeding),

Admittedly, defense counsel did not make a specific hearsay or confrontation clause objection to these materials. He argues, however, that under the teachings of Brookhart the record does not establish a knowing and intelligent waiver of his rights of confrontation and cross-examination. Mr. Henry certainly was not agreeing that the trial court should impose the death penalty or even that the prosecutor's assertions formed a basis for imposition of the death penalty. There was no inquiry as to whether Mr. Henry was waiving his rights to confront and cross-examine his accusers.

Procedures that tend to undermine the reliability of capital sentencing determinations are unconstitutional. Beck v. Alabama, 447 U.S. 625, 638 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (citing cases). See also Proffitt v. Wainwrisht, 685 F.2d 1227, 1253 (11th

Cir. 1982) ("The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decisionmaking.... Reliability in the factfinding aspect of sentencing has been a cornerstone of these decisions.").

Professor Wigmore has described the fundamental importance of cross-examination in our system of justice:

> §1367. Cross-examination as a distinctive and vital feature of *our* law. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that teat, has found increasing strength in lengthening experience.
>
> Not even the abuses, the mishandlings and the puerilities which are so often found associated with cross-examination have availed to nullify its value, It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.....

5 Wigmore, Evidence §1367 (Chadbourn rev. 1974).

Since the judge phase of the sentencing proceeding was conducted without cross-examination and confrontation, it lacked the most fundamental requirements of due process. It lacked the one element -- cross-examination -- that our law considera most important to ensure the reliability of factual determinations. Insofar as the contemporaneous objection rule authorizes such a procedure by barring appellate review, it institutionalizes

unreliability in factfinding in capital cases and is therefore unconstitutional.

The state's use of the PSI information in its brief highlights the unconstitutionality its use. The state uses factual claims presented only through the PSI, and not through witnesses, concerning the alleged theft at the Super-X store to shore up or establish its efforts to refute the mitigating evidence of: Mr. Henry's being a hard worker, answer brief, page 50; his positive intelligence and personality traits, id.; and hie lack of a significant criminal record, id. 51. The state further uses the assertions about the Super-X claim to shore up or establish its arguments for the aggravating circumstances of: cold, calculated, and premeditated killing, id. 55; and avoiding arrest, id. Thus the state in its brief underscores the violation of the Confrontation Clauses of the state and federal constitutions.

Further, reliance on the Super-X incident violates the Cruel and Unusual Punishment and Double Jeopardy Clauses of the state and federal constitutions. When the criminal case involving the Super-X incident came up for trial on February 7, 1990 in the fifteenth judicial circuit, it was dismissed with prejudice for failure of the state to prosecute it. Conformed copies of the relevant documents are attached to this brief.[9] Hence the state's reliance on the "facts" of this alleged incident is improper. See, e.g., Preston v. State, 15 FLW S337 (Fla. June 7, 1990).

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[9] Needless to say, the prosecutor's knowledge of this is attributed to the Attorney General. See Antone v. State, 355 So.2d 777 (Fla. 1978).

CONCLUSION

This Court should vacate Mr. Henry's convictions and sentences and remand this cause for a new trial or grant such other relief as it deems appropriate,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served by mail on Mark C. Menser, Assistant Attorney General, at the Department of Legal Affairs, the Capitol, Tallahassee, Florida, 32399-1050 this 4 day of September, 1990.

Richard B. Greene

Of Counsel