IN THE SUPREME COURT OF FLORIDA

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DONALD GUNSBY,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 73,616

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

DONALD GUNSBY, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 73,616

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

Appellant relies on the Statement of the Case and Facts set out in his initial brief but wishes to point out the following exceptions to the State's recitation contained in the Answer Brief.

Appellee's statement that "Both witnesses immediately identified appellant from a photo line-up ..." (AB1)[1] gives the impression that the witnesses identified Gunsby immediately after the shooting. This is simply not the case. The record reveals that Corporal Thomas Newfeld showed both witnesses a photographic line-up on April 22, 1988, the day after the shooting.

[1](AB) refers to Appellee's Answer Brief.

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT GUNSBY WAS DENIED A FAIR CROSS-SECTION OF THE COMMUNITY THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE TRIAL JUDGE ALLOWED MEMBERS OF THE VENIRE TO EXCUSE THEMSELVES WITHOUT JUST CAUSE AND WITHOUT SUFFICIENT INQUIRY.

Appellee states that the trial court "liberally excused veniremen who affirmatively stated that they would be unable to discharge their duty as jurors." (AB8) Appellant would not object to such a procedure if that had, in fact, occurred. The trial court explained the process of voir dire, read the indictment, and explained the bifurcated nature of the proceeding before asking:

> Given the nature of this case do any of you feel that it would be better if you did not serve on this particular case.
>
> (Prospective Jurors Michael and Durchak were excused)

(R11) Jurors Michael and Durchak never stated that they would be unable to discharge their duty as jurors. They simply excused themselves when the trial court gave them the slightest opportunity. Jurors Howell and Nelson were excused in a similar manner. (R13-14) Jurors Cooper Dix and Rice excused themselves after the trial judge asked if anyone had feelings about the death penalty that would prevent impartiality. (R12-13)

Appellee correctly points out that the test for determining jury competence is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law. Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). The problem in Gunsby's case is that the record is woefully insufficient to determine this very question.

Darden v. Wainwright, 477 So.2d 168 (1986) is completely distinguishable from the case at bar. The trial court in Darden repeatedly asked each individual veniremen if they had "such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence...." This detailed question is a far cry from Gunsby's trial court's question that, "given the nature of this case do any of you feel that it would be better if you did not serve on this particular case?" (R11) The veniremen that were excused in Gunsby's case were never informed of the correct legal standard regarding death-scrupled jurors under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). The excused veniremen also heard no explanation that the ultimate sentencing responsibility rested with the trial judge. Nor did they hear that the jury's advisory verdict would be by a simple majority with no need for unanimity. The trial court's peculiar method of jury selection resulted in fundamental error.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Appellee contends that the State's objection was properly sustained since the defense counsel's question was beyond the scope of direct examination. (AB14) The prosecutor failed to object on that basis below and, in fact, argued only relevance. The State should not now be permitted to argue these grounds for the first time on appeal. Harmon v. State, 527 So.2d 182 (Fla. 1988); Phillips v. State, 476 So.2d 194 (Fla. 1985). In order for an argument to be cognizable on appeal, it must have been the specific contention asserted below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Additionally, appellant contends that the State's failure to object to the earlier testimony that a marijuana cigarette had been found in the victim's pocket opened the door for the propounded question. The State waived any objection when the prosecutor failed to object to that previous testimony. Thus, the door was opened.

Appellant maintains that the evidence defense counsel sought to elicit was relevant to his theory of defense. A similar situation was presented in McCrae v. State, 14 FLW 2394 (Fla. 3d DCA, October 10, 1989).

> Finally, we agree with appellant's contention that the court erroneously precluded defense counsel's introduction of evidence alleging that Griffin, the State's sole witness and the alleged "victim" of the crime charged, was a drug dealer, who, in fact, may have been shot by a third party with whom he had had contact in connection with a drug deal, and that his trial testimony was an attempt to conceal that fact by blaming the shooting upon the defendant.
>
> We have considered the State's view that this testimony was solely intended to establish Griffin's bad character, and, therefore, should have been excluded. We disagree. The evidentiary rule of "limited admissibility" recognizes that evidence inadmissible for one purpose may, however, be admissible for another, ...

McCrae, 14 FLW at 2395.

This Court should adopt a broad rule of admissibility concerning a capital defendant's presentation of evidence. This is especially true in light of Hitchcock v. Dugger, 481 U.S. ___, (1987) and its progeny. Appellee argues that any error is harmless in light of the direct, eyewitness testimony presented by the State. Appellant points out that eyewitness testimony is not infallible. This Court should be extremely cautious in allowing the exclusion of evidence supporting a theory of defense presented in a capital case.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVER-RULING APPELLANT'S TIMELY HEARSAY OBJECTION THEREBY ALLOWING THE STATE TO IMPROPERLY INTRODUCE TESTIMONY WHICH RESULTED IN A DENIAL OF GUNSBY'S CONSTITUTIONAL RIGHTS RELATING TO CONFRONTATION OF WITNESSES AND TO DUE PROCESS OF LAW.

The State contends that the objectionable testimony is not hearsay since Brown could have observed other people watching Gunsby and also noticing the gun under Gunsby's clothing. The State disputes Appellant's contention that these other people necessarily must have communicated the fact that they saw the gun also. The State argues that Brown's testimony could have been something that she personally observed and was therefore not hearsay. (AB17)

Appellant maintains that the inescapable inference from Brown's testimony is that a non-testifying witness communicated evidence of Gunsby's guilt. In a similar scenario, the Third District, citing Collins v. State, 65 So.2d 61 (Fla. 1953), found error:

> We reject the trial court's wooden application of the hearsay rule and the confrontation clause of the Sixth Amendment. We hold that where, as in the present case, the inescapable inference from the testimony is that a non-testifying witness has furnished police with evidence of the defendant's guilt, the testimony is hearsay and the defendant's right of confrontation is defeated, notwithstanding that the actual

> statements made by the non-testifying witnesses are not repeated. In so holding, we announce no novel rule.

Postell v. State, 398 So.2d 851, 859 (Fla. 3d DCA 1981) (emphasis supplied). Brown's testimony contained a clear inference to inadmissible hearsay.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT FUNDAMENTAL ERROR OCCURRED WHERE THE TRIAL COURT INACCURATELY INSTRUCTED THE JURY, THEREBY RESULTING IN A DEPRIVATION OF GUNSBY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

Contrary to Appellee's assertion, Mills v. Maryland, 100 L.Ed.2d 384 (1988) does not appear to require an objection below. Appellee's attempt to stretch the evidence to support a felony murder theory is ludicrous. The evidence supports only a theory of premeditated murder.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT DURING THE PENALTY PHASE, THE TRIAL ERRED IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING IMPROPER WILLIAMS RULE EVIDENCE RESULTING IN A DENIAL OF GUNSBY'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND RESULTING IN CRUEL AND UNUSUAL PUNISHMENT CONTRARY TO GUNSBY'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

Appellant submits that evidence that he routinely carried firearms constitutes evidence of a substantially serious collateral crime, especially in light of the circumstances of the instant murder.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT GUNSBY'S DEATH SENTENCE IS DISPROPORTIONATE THUS VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

While the United States Supreme Court refused to recognize a constitutional bar to the execution of mentally retarded persons, this Court can employ the Constitution of the State of Florida to erect a higher more enlightened standard.

Appellee discounts Gunsby's portrayal as a misguided avenging angel who saw himself as a protector of the black community. The State points out that Gunsby's delusions related to his mission to rid the community of drugs and drug users. The State contends that this murder had nothing to do with drugs. (AB26) Appellant points out the argument contained in Point II where defense counsel was precluded from developing the theory of defense which would have established that the victim was a drug user and dealer. See Point II, supra. Gunsby also disputes the State's contention that there was no evidence that Gunsby was aware of any "racial tensions" that existed between the

Awadallahs and the predominately black neighborhood. (AB26) Gunsby contends that the record supports the conclusion that these tensions were common knowledge in the neighborhood. Additionally, Gunsby stated that he was going to "teach those Irans not to mess with the Blacks." (R902) The death sentence imposed is disproportionate to the offense and to its application to Donald Gunsby.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF APPELLANT'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH WHICH IS NOT JUSTIFIED IN THAT IT IS BASED UPON AN INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

A. The Trial Court Erred In Finding That The Murder Was Committed in a Cold, Calculated, and Premeditated Manner Without Any Pretense of Moral or Legal Justification.

Appellee points to several holdings of this Court indicating that Section 921.141(5)(i), Florida Statutes (1987) is not present if the record discloses at least a colorable claim that the murder was motivated out of self-defense. (AB30-31) This Court held that such facts establish a "pretense" of moral and legal justification. Christian v. State, 14 FLW 466 (Fla. September 28, 1989); Banda v. State, 536 So.2d 221 (Fla. 1988)

and Cannady v. State, 427 So.2d 723 (Fla. 1983). The State then argues that the record reveals no evidence that Gunsby acted in self-defense.

The plain language of the statute setting forth this aggravating circumstance does not limit the "pretense" of moral or legal justification to one involving a colorable claim of self-defense. Any type of pretense suffices. Appellant submits that such a limitation by this Court calls into question the constitutionality of the entire Florida capital sentencing procedure. It is clear from the trial court's written findings that Donald Gunsby acted under a pretence (albeit misguided) of moral justification. "Before going to the store defendant told witnesses he was going to 'teach those Irans not to mess with the Blacks.'" (R902) The aggravating factor in question does not require a legitimate moral or legal justification. It requires only a pretense.

C. The Trial Court Erred In Its Consideration Of The Mitigating Evidence.

The State suggests that Dr. Conley's opinion should be discounted due to the doctor's disagreement with the conclusion that retardation and schizophrenia are mutually exclusive according to the Diagnostic and Statistical Manual of Mental Disorders. The State points out that Dr. Conley acknowledged this authority as the universally accepted treatise on the subject, but disagreed with the conclusion. (AB36) This

conclusion is not supported on the record. The prosecutor asked Dr. Conley if he would agree that the manual does not allow for the mutual existence of both mental retardation and the diagnosis of schizophrenia, paranoid type. (R646) The doctor replied, "No sir. I don't agree with that." (R646) He then went on to explain his answer. Clearly, the doctor disagreed with the prosecutor's interpretation of the manual. In fact, when the prosecutor later showed Dr. Conley the manual to which he was referring, the doctor pointed out that the prosecutor was not consulting the latest edition. (R648) The prosecutor ultimately backed off and Dr. Conley won that confrontation. (R647-649)

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT NUMEROUS ERRORS THROUGHOUT THE PROCEEDINGS HAD THE CUMULATIVE EFFECT OF DENYING GUNSBY HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant does not believe that the grouping of these issues in his initial brief renders the points any less worthy of consideration by this Court. The State's attempt to diminish their importance in this matter should be ignored.

Additionally, the record does not support the State's contention that the witnesses leased by the State were never subpoenaed by defense counsel. Defense counsel specifically stated:

> Your Honor, since we are putting things on the record I would also put on the record that the State has done the same to the defense. I subpoenaed numerous State's witnesses which they excused and I don't have available to me today because I can't find them and these people were served with the subpoenas.

(R477-478) Evidently, the witnesses mistakenly believed that they did not need to appear where the State had contacted them, excused them from the State's subpoenas, and told them that they need not appear at trial. This was a logical conclusion by the witnesses who, undoubtedly, failed to realize that they were required to honor the defense's subpoena. It appears that the State secured the non-appearance of these witnesses as a result

of convenient, omission, or even subterfuge.

Appellant's counsel apologizes for the incorrect record citation contained in the last paragraph of this Point. Defense counsel requested permission to approach the bench at page 476 rather than page 466. This request was made evidently to place an objection on the record. (R466) The trial court denied defense counsel's request resulting in a denial of Gunsby's constitutional right to effective assistance of a counsel.

CONCLUSION

Based upon the foregoing cases, argument, and policies and those in the initial brief of appellant, this Court is respectfully requested:

As to Points I, II, III, IV, and IX, vacate the conviction and sentence of death and remand for a new trial; as to Points V, VI, VII and VIII to vacate the sentence of death and remand the cause for imposition of a life sentence, or alternatively remand for a new sentencing proceeding; and as to Point X, to declare Florida's death penalty statute unconstitutional.

Respectfully submitted,

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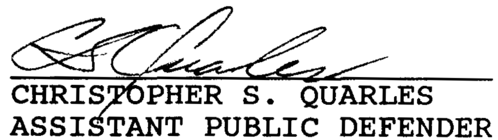
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fla. 32114 in his basket at the Fifth District

Court of Appeal and mailed to Mr. Donald Gunsby, #020985, P.O. Box 747, Starke, Fla. 32091 on this 17th day of November, 1989.



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