IN THE SUPREME COURT OF FLORIDA

RICHARD BARRY RANDOLPH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. **74,083**

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

In addition to the specific summary of argument presented in the initial brief, the appellant argues herein that the issues presented on appeal were adequately presented to the trial court, which ruled on the merits of the claims.

Further, with regard to the capital sentence (Point X), the defendant did **not** concede, as contended by the appellee, that the statutory circumstance of **"extreme"** mental or emotional disturbance was not established. Evidence does exist to support this mitigating circumstance.

ARGUMENT

POINT I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION, BY EXCUSING FOR CAUSE, OVER DEFENSE OBJECTION, A JUROR WHO INDICATED THAT SHE COULD PUT THE DEATH PENALTY OUT OF HER MIND DURING THE GUILT PHASE AND COULD VOTE TO IMPOSE THE DEATH PENALTY IN AN APPROPRIATE CASE.

The state ignores much of the voir dire of Juror Hampton in its argument against the appellant's contention in Point I. The state claims that "Randolph's assertion that prospective juror Hampton 'stated clearly' that she could consider and vote to impose the death penalty is simply unsupported by the record . . . ." (Appellee's brief, p. 4) The state then picks and chooses certain portions of voir dire examination to set forth in its brief **(most of which involves the questioning of a different juror [Juror Travora]** whose excusal is not being questioned), completely skipping the state attorney's initial questioning of Juror Hampton. (Appellee's brief, pp. 7-8) The entire text of voir dire examination of Juror Hampton, including the portion omitted by the state's brief, is set forth in the Appellant's Initial Brief at pp. 23-26. While Juror Travora indicated that she could not follow the law and be an impartial juror because of her views on the death penalty, Juror

Hampton did not express such an unwillingness or inability to follow her oath.

That text of the voir dire shows that the prosecution did not meet its burden to establish exclusion for cause of the juror. Jury venireman Hampton responded clearly and affirmatively when she stated that she could put a potential death penalty out of her mind during guilt phase and that, although she had a personal distaste of the carnival atmosphere surrounding executions, she could consider imposition of the death penalty in an appropriate case. (R **940-941, 943, 957-959)** The state contends that Juror Hampton should not sit as a juror in the case simply because she has scruples and does not delight in the taking of a human life; she should be stricken because she would reserve the death penalty only for extreme murders. (Appellee's brief, pp. **9,** 11) The appellant thought that this was precisely the type of juror who is supposed to be seated in a capital case since the death penalty by law is to imposed only in those extreme cases, crimes "accompanied by such additional acts as to set the crime apart from the norm of capital **felonies."** State V. Dixon, **283** So.2d **1, 9** (Fla. **1973).**

The state misrepresents Juror Hampton's "true feelings about the death penalty" claiming that she "simply would not vote under any circumstances to impose death." [emphasis in original] (Appellee's brief, pp. 9, **13)** Miss Hampton only stated that she had some personal standards concerning the death penalty, that she **"couldn't** rejoice in somebody being electrocuted." (R **943,**

957-958) Nothing in her colloquy justifies her excusal for cause.

Rather, as argued in the initial brief, Juror Hampton's views came close to those expressed in Adams v. Texas, 448 U.S. 38, 50 (1980), which case was approved by the United State's Supreme Court's most recent pronouncement on the issue in Gray v. Mississippi, 481 U.S. 648, 658 (1987). (See Appellant's Initial Brief, pp. 21-23, 27-28) The appellee's brief fails to address these leading, highly relevant cases.

Instead, finding no legal support for its position on a thorough analysis of the text of the voir dire, the appellee resorts to the ruse of arguing that since the appellate court was not there and could not observe the venireman's demeanor, it must affirm.' However, the cases cited by the state do not hold that an appellate court is powerless to review excusals for cause, as the state would have us believe. Rather, the appellate court must be assured from the record that the state has met its burden of demonstrating to the trial court that the challenged juror will not follow the law in accordance with his oath and the

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'The state argues that the appellate court is limited by a cold record. (Appellee's brief, p. 4) Yet, the state seems to have no problem reading (and mischaracterizing) the "cold record" and evaluating the juror's demeanor and forthrightness by editorializing on numerous occasions as to Juror Hampton's "true feelings", "obviously half-hearted" responses, and "at best equivocal acknowledgment that she could impose the death penalty." (Appellee's brief, pp. 9, 11)

instructions of the court. Wainwright V. Witt, 469 U.S. 412, 423-424 (1985). See also Gray V. Mississippi, 481 U.S. at 658-659. Here, as documented by the appellant in his initial brief at pp. 23-27, the state has by the clear record failed to meet its burden. After the potential juror stated that she could vote to impose the death penalty (although she had some personal anxiety about the capital punishment scheme) and could be impartial during the guilt phase of the trial, the state chose not to further question the juror "to save her further embarrassment," simply characterizing her conscientiousness and confusion as to what would be required of her as vacillation about the death penalty. (R 940-941, 943, 957-959, 972-974)

The court erroneously excluded Juror Hampton for cause. Accordingly, the defendant was tried by an unconstitutionally seated jury. The defendant's judgments and sentences must be reversed and the case remanded for a new trial before a fair and impartial jury.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE BECAUSE OF THE PRETRIAL PUBLICITY AND THE MOTION FOR MISTRIAL AND FOR A NEW JURY VENIRE AFTER A JUROR INDICATED HEARING THAT THE VICTIM HAD BEEN "BRUTALLY MURDERED", THUS TAINTING THE JURY VENIRE AND DEPRIVING THE DEFENDANT OF HIS FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The state contends that the defendant failed to demonstrate the need for an individual voir dire. (Appellee's brief, pp. **14-16)** However, the comments made by Juror Trevora which formed the basis for the defendant's motion for mistrial (R **892-893, 895-896)** are precisely the reason the defendant was seeking individual voir dire in the case.

The appellee argues for the first time on appeal that a motion for mistrial by defense counsel, made a mere page after the offending comment, was untimely. The appellant submits that such an argument is baseless, placing too great of a burden on trial counsel. It is axiomatic that the purpose of an objection is to place the trial court on notice of the alleged error and give the court the opportunity to correct the error. The motion for mistrial here adequately served that purpose. The state did not object below that the objection/motion for mistrial was untimely. Further, the trial court ruled on the merits of the claim. As such, any objection as to the timeliness of the motion is waived. As has been repeatedly held, the state must argue at

the trial level the untimeliness of a defense objection; once the trial court rules on the merits of the claim with no timeliness objection, the state will be precluded from such an argument on appeal:

> We believe the record reveals that the appellant raised the challenge to [a juror] in timely fashion, and that the trial court considered the motion on the merits, rather than dismissing it as untimely. Moreover, the state's objection to the timeliness of the challenge was not made to the trial court, which entertained and decided the motion on its merits. The state cannot raise timeliness for the first time on appeal.

Herman v. State, 396 So.2d 222, 227 (Fla. 4th DCA 1981). See also McGee v. State, 438 So.2d 127 (Fla. 1st DCA 1983); State v. Giardino, 363 So.2d 201 (Fla. 3d DCA 1978); Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981); Smith v. Estelle, 602 F.2d 694, 708 n.19 (5th Cir. 1979).

The trial court should have granted the defendant's pre-trial motion designed to prevent this error from occurring. It should have also granted the motion for mistrial once the taint occurred. (See Initial Brief, pp. 29-31) Exposure of the entire jury panel to extra-judicial opinions concerning the crime is a clear abuse of discretion resulting in the deprivation of the defendant's right to trial by a fair and impartial jury. A new trial is required.

POINT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR REDUCTION OF THE SEXUAL BATTERY CHARGE FROM SEXUAL BATTERY WITH GREAT FORCE TO SEXUAL BATTERY WHERE THE VICTIM IS PHYSICALLY HELPLESS TO RESIST.

The state seems mesmerized by the concept of waiver. Here again, the state incants the mantra **"waiver",** hoping to invoke a spell on this Court, arguing that this issue was never presented to the trial court and is therefore waived. (Appellee's brief, p. **19)** However, the appellee must have gotten caught up in its own spell not to have noticed that this point was argued extensively to the trial court at pages **1401-1403.** The court addressed the issue on its merits and denied relief, allowing the jury to consider the count as charged, instead of reducing the charge, as requested. (R **1402-1403)**

POINT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE STATE SPECIFICALLY ELICITED TESTIMONY DURING THE GUILT PHASE OF THE TRIAL INDICATING THAT THE DEFENDANT DID NOT EXHIBIT REMORSE OVER HIS ACTIONS.

The state argues that its questioning during the guilt phase of the trial as to the defendant's alleged lack of remorsefulness was invited by irrelevant cross-examination by the defense. (Appellee's brief, pp. 29--30) However, this attack is baseless. The defendant attempted, during cross-examination, to show the defendant's state of mind at the time of the crime and the effect of drugs on his ability to form the necessary intent, certainly relevant to the premeditated nature of first-degree murder and to the specific intent crime of robbery, the basis for the felony-murder theory. **See** Cirack V. State, 201 So.2d 706, 709 (Fla. 1967); Linehan V. State, 476 So.2d 1262 (Fla. 1985). The state's contention that the defense invited inquiry into the lack of remorse by this relevant line of questioning is absurd. No mention was made by defense counsel during the guilt phase of trial of the defendant remorse.

Further, the state argues that the error was harmless since the defendant later **during the penalty phase** introduced evidence of the defendant's remorse. However, the state ignores the fact that this prosecutorial questioning on lack of remorse was presented during the **guilt** phase of the trial and the effect

this could have had on the jury during that phase. The defendant is seeking a new trial because of the improper testimony during the guilt phase which, it is submitted deprived him of his right to a fair trial and was "so inflammatory that [it] might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise." Lopez v. State, 15 FLW D248 (Fla. 3d DCA January 23, 1990); Blair v. State, 406 So.2d 1103 (Fla. 1981).

The introduction of lack of remorse at the guilt phase of the trial was irrelevant and inadmissible, serving only to prejudice the jury against the defendant. A new trial is required.

POINT VI

IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 17, OF THE FLORIDA CONSTITUTION, THE COURT ALLOWED THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL.

Again, the state claims waiver here, not of the entire issue on appeal, but only because of the constitutional grounds since trial counsel failed to utter the numerous constitutional provisions which the admission of gory, irrelevant autopsy photographs violate. (Appellee's brief, p.34) Trial counsel did object to the photographs, loudly and repeatedly (R 1651-1652, 1654, 1687-1696), and after they were shown to the jury, moved to strike the photographs. (R 1696-1697) Trial "counsel can scarcely be faulted for failing to enumerate all of the many constitutional rights that the state violated" when it introduced the improper photographs. Smith v. Estelle, 602 F.2d at 708 n.19, **approved** Estelle v. Smith, 451 U.S. at 468 n.12. The objection lodged herein is sufficient to preserve the issue since the trial court was presented with the general point as to the improper nature of the photographs and was given the opportunity to rule on the issues presented in this appeal. **See** Lamberti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

The language from cases cited by the appellee, such as Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), is not

controlling here since those cases state that gory photographs are nonetheless admissible to show the location of the body and the manner in which they were discovered. The cases do not apply to autopsy photographs which failed to show, as later accepted by the trial court (R **1687-1697),** anything relevant to the issues. (**See** Appellant's Initial Brief, pp. **41-42)**

The state also astonishingly claims that, after the court decided the photographs were indeed overly prejudicial and were not depicting what the state claimed would come from the medical examiner (R **1679, 1695-1697),** no error occurred since the court **"in** effect struck from the jury's consideration the photographs at issue." (Appellee's brief, p. **38)** The photographs had already been displayed to the jury during the medical examiner's testimony. The court, contrary to the state's claim, specifically refused to strike the photographs upon the defendant's timely request to do so. (R **1694-1698)**

The error is obviously preserved. A new penalty phase is required.

POINT VIII

THE APPELLATE REVIEW PROVIDED BY THE SUPREME COURT OF FLORIDA RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION, ESPECIALLY WHERE THE COURT DOES NOT REQUIRE THE JURY TO MAKE FINDINGS OF AGGRAVATING CIRCUMSTANCES.

The defendant filed a pre-trial motion seeking specific jury findings of aggravating factors; he renewed his motion at the charge conference. (R 125-126, 1797-1798) On appeal, the defendant claims that these findings are required since they must, under the Eighth Amendment, be used by the reviewing court in determining the appropriateness of the jury recommendation and the imposition of the death penalty. The eighth amendment argument is one concerning the review given by this Court because of the failure to require factual findings by the jury. Hence, it is an argument which can be presented to this Court for the first time since it involves the unreliability of the death sentence and this Court's involvement in that unreliability.

Therefore, the appellee's contention that it cannot be presented to this Court is without merit. **See** Trushin V. State, 425 So.2d 1126, 1129 (Fla. 1983) ("The facial validity of a statute, including an assertion that the statute is infirm because of overbreadth, can be raised for the first time on appeal even though prudence dictates that it be presented at the

trial court level to assure that it will not be considered waived.")

POINT X

THE APPELLANT'S DEATH SENTENCE IS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh The Aggravating Factors, If Any

2. Defendant Was Under the Influence of Mental or Emotional Disturbance, Especially When Coupled With the Defendant's Crack Cocaine Addiction, and Other Contributing Non-Statutory Factors

The state erroneously states that the appellant has "candidly conceded . . . on appeal [that] there was no evidence adduced to support the finding of the statutory mitigating circumstance that he was under the influence of extreme mental or emotional disturbance at the time of the offense." (Appellee's brief, p. 66) The appellant does not concede this issue and did not do so in its initial brief. The appellee's contention to the contrary is patently false, and the appellant strenuously objects to it.

The appellant merely pointed out in the initial brief that Dr. Krop, a defense witness, did not use the judicial

statutory term **"extreme"** to describe the defendant. Dr. Krop indicated that he would use the word **"extreme"** only where the patient was so **"out** of touch with reality . . . that he has difficulty again conforming to the requirements of the law." (R 1726) Hence, Dr. Krop's view of **"extreme"** mental disturbance is equivalent to insanity, rather than to the legal definition of this statutory mitigating circumstance. See State V. Dixon, 283 So.2d 1, 10 (Fla. 1973), which clearly distinguishes insanity from this statutory mitigating circumstance.

Therefore, even though Dr. Krop did not use the term (since he had a different, incorrect legal definition of it), the appellant still maintains that his mental disturbance was extreme so as to fall under the statutory definition of this mitigating factor. (See Appellant's Initial Brief, pp. 69-73) As argued in the initial brief, "Dr. Krop's diagnosis meets this [Section 921.141 (6) (b), Florida Statutes] standard (although the doctor, apparently not understanding the legal definition of the circumstance, did not believe **so)."** (Appellant's Initial Brief, pp. 69-70)

Richard Randolph's death sentence is disproportionate to his crime and his character. The evidence is strong: the trial court impermissibly found three aggravating circumstances, which are not supported by the law or the facts. The trial court rejected and/or ignored a plethora of mitigating factors. This Court must reverse his death sentence with directions to the trial court to impose life.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief, the appellant requests that this Honorable Court reverse the judgments and sentences and grant the following relief:

1. As to Points I, II, and IV, remand for a new trial;

2. As to Point III, remand for imposition of the lesser charge of sexual battery on one physically helpless to resist;

3. As to Points V - XI, remand for imposition of a life sentence or, in the alternative, a new penalty phase trial.

Respectfully submitted,

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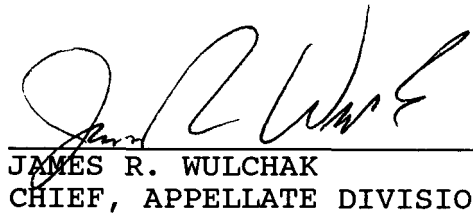
CERTIFICATE OF SERVICE

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 Ave., Fourth Floor, Daytona Beach, FL 32114, and mailed to: Mr. Richard Randolph, Inmate Number 115769, P.O. Box 747, Starke, FL 32091, this 6th day of February, 1990.



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