IN THE SUPREME COURT OF FLORIDA

GREGORY CAPEHART, :

Appellant, :

vs. : Case No. 74,231

STATE OF FLORIDA, :

Appellee. :

_____ :

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

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

## TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

## TABLE OF CITATIONS

TABLE OF CITATIONS (continued)



OTHER AUTHORITIES

## PRELIMINARY STATEMENT

Appellant, Gregory Capehart, will rely upon his initial brief in reply to the State's arguments as to Issues VI., VII., VIII., IX., XI. A., XI. B., XI. C., and XI. E.

## ARGUMENT

### ISSUE I

INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO ESTABLISH THAT IT WAS APPELLANT WHO PERPETRATED THE OFFENSES AGAINST MARLENE REAVES.

Appellee asserts that not all the evidence against Appellant was circumstantial because his so-called confession to Walter Harrison and his incriminating statements to others constituted direct evidence of Appellant's guilt. (Answer Brief of Appellee, pp. 1-2) However, any admissions Appellant made were subject to interpretation. They did not point directly and unerringly to Appellant's guilt of the offenses against Marlene Reaves, and so can properly be considered only as circumstantial evidence.

## ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT INADMISSIBLE HEARSAY TO BOLSTER THE OPINION OF THE STATE'S EXPERT ON FINGERPRINT IDENTIFICATION.

Appellee argues that the hearsay issue raised by Appellant was not preserved for appellate review by a specific objection below. (Answer Brief of Appellee, pp. 5-6) While it is true that Appellant's objection was not as specific as one would like, it appears from the trial excerpt quoted in Appellee's brief at pages five through six that both opposing counsel and the trial court understood the basis for the objection. After all, the prosecutor was able to argue that the defense opened the door to the testimony in question, and the court denied Appellant's objection for that reason. (R490-492) It is difficult to see how the argument could have been made and accepted if the ground for the defense objection was not obvious.

On page seven of its brief Appellee cites Jackson v. State, 359 So.2d 1190 (Fla. 1978) for the proposition that one cannot initiate error and then seek reversal based on that error, but fails to explain how Appellant initiated the error in question. Jackson is inapposite, as is Copeland v. State, 457 So.2d 1012 (Fla. 1984), which is also cited by Appellee at page seven of its brief. In Copeland, the objectionable testimony came in upon questioning by defense counsel; here it was elicited by the State.

Appellee argues on page seven of its brief that "the State was properly allowed to pursue questioning on redirect to

respond to the defense-initiated topic and to rebut the defense attack on the witness' competence." The defense question which allegedly opened the door to the improper testimony -- whether any fingerprints recovered from the crime scene were sent to FDLE -- hardly constituted an "attack on the witness' competence." Furthermore, whatever need the State had to respond to some "defense-initiated topic" did not justify its elicitation (by means of a blatantly leading question) of obvious hearsay.

Appellee contends at page seven of its brief that because there was no objection to the prosecutor's comments during closing argument that the FDLE "backed up" the State's fingerprint expert, any error in the prosecutor's remarks has not been preserved for appellate review. However, Appellant has not argued that the closing argument constituted a separate impropriety; rather it exacerbated the harm done by the earlier admission of the hearsay by calling it to the jury's attention. Also, in Rodriguez v. State, 494 So.2d 496 (Fla. 4th DCA 1986) the court indicated that once the defendant had sustained an adverse ruling on his objection to certain testimony, he was not required to later object to the prosecutor's closing argument which referred to this testimony, as this would have been fruitless.

Finally, at page eight of its brief Appellee says that the prosecutor's closing argument was proper comment on evidence received during the trial. It is self-evident that this argument can only apply where the evidence in question was legally admissi-

ble. Comments on the evidence cannot be validated where the evidence should not have been received.

## ISSUE III

THE TRIAL COURT ERRED IN PERMITTING STATE WITNESS TOM MUCK TO OFFER OPINIONS REGARDING THE EVIDENCE IN THIS CASE AND APPELLANT'S VERACITY WHICH INVADED THE PROVINCE OF THE JURY.

Appellee argues that the error in admitting Tom Muck's "editorial response" has not been preserved for appeal because Appellant made no further objections, etc. after the testimony came in, even though Appellant did properly object to the prosecutor's question that caused Muck to give his testimony. (Answer Brief of Appellee, p. 11) Apparently, Appellee would return the judicial system to the hypertechnical days of yesteryear when an "exception" to an adverse ruling was required to preserve the point for further review. Appellant's objection was sufficient to preserve his issue. It covered the response Muck gave.

## ISSUE IV

THE TRIAL COURT ERRED IN UNDULY RESTRICTING APPELLANT'S CROSS-EXAMINATION OF STATE WITNESS DIANE HARRISON.

Appellee states at page 14 of its brief that the trial court noted that the question being asked of Diane Harrison by defense counsel in court was different than the question asked on deposition. This is inaccurate. Defense counsel asked Harrison at trial whether the answers she gave in court were different from the

answers she gave at her deposition. (R431) Before she could answer, a general State objection was "granted." (R431) The following discussion then occurred at the bench (R431-432):

> MR. IVIE [defense counsel]: I don't understand the basis of the objection, Your Honor. I am simply trying to establish whether the last time was different than this time.
>
> THE COURT: Uh-huh. Well that's apparent from the question but the question is you're asking her is it different. That's not right for her to say it's different. That's up to the jury to decide whether or not you have properly impeached her.

It is obvious that the court was not expressing his opinion that the question being asked in court differed from the deposition question; he was merely restating what defense counsel was asking the witness, "it is different [?]," that is, whether the witness' trial testimony was different from her deposition testimony.

## ISSUE V

> THE COURT BELOW ERRED IN ALLOWING STATE WITNESS DR. JOAN WOOD TO TESTIFY REGARDING THE RESULTS OF THE AUTOPSY THAT DR. JOHN GALLAGHER PERFORMED ON MARLENE REAVES WITHOUT THE AUTOPSY REPORT BEING ADMITTED INTO EVIDENCE.

Appellee's position is that an expert may testify by relying upon facts and data which are not introduced at trial if such facts and data "are of a type reasonably relied upon by the experts in the subject to support the opinion expressed." (Answer Brief of Appellee, pp. 16-17) Ehrhardt expresses the concept this way:

> In order for an expert to rely upon data which has not been admitted at the trial, it is necessary for a foundation to be laid which establishes that experts in the witness' subject matter customarily rely on this kind of data in forming their opinions and making their professional judgments in their work.

Ehrhardt, Florida Evidence, § 704.1 at 413 (2d ed. 1984).

Appellee does not argue, nor would the record support an argument, that this necessary predicate was established for the admission of Dr. Wood's testimony. There was no evidence concerning whether the data on which the witness relied was the type of data on which forensic pathologists customarily relied in forming their opinions and making their professional judgments, and the court made no ruling on whether the proper predicate had been established.

At page 20 of its brief the State cites the civil case of Santos Wrestling Enterprises, Inc. v. Perez, 367 So.2d 685 (Fla. 3d DCA 1979) for the proposition that an expert witness may properly render an opinion by virtue of his independent review of the evidence without treating a patient. However, in Santos, unlike here, hypothetical questions were used in examining the expert witness, which is the method defense counsel below argued should have been used in examining Dr. Wood after the autopsy report was in evidence. (R385)

Finally, Appellant would note that although the court below did not require the State to introduce the autopsy report into evidence, the court did say that he thought "it would be

better practice to put the entire medical autopsy report in," but he would "not second guess a State Attorney." (R385)

## ISSUE X

**THE TRIAL COURT ERRED IN GIVING APPELLANT'S JURY INSTRUCTIONS WHICH UNCONSTITUTIONALLY DIMINISHED THE JURORS' RESPONSIBILITY AND SUGGESTED THAT DEATH IS THE PENALTY FAVORED BY THE COURTS.**

Appellee seems to say at page 34 of its brief that Appellant is conceding that the Court cannot address Appellant's issue because no objection was lodged at trial to the jury instructions in question. Appellant has conceded only that there was no objection, not that appellate review of the erroneous instructions is thereby procedurally barred. It is difficult to imagine an error more fundamental than improper jury instructions which undermined the confidence one may have in the reliability of the jury's seven to five death recommendation. This Court can and should determine Appellant's issue on its merits.

## ISSUE XI

THE TRIAL COURT ERRED IN SENTENCING GREGORY CAPEHART TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

D. The trial court erred in instructing the jury on, and in finding the existence of, the aggravating circumstance that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Appellee refers in its brief at page 39 to the trial court's finding that the victim was unconscious after three minutes. This finding does not enjoy record support. the medical examiner's testimony showed that Marlene Reaves would have remained conscious for only one to two minutes, not three minutes. (R396-397, 400)

The State's argument that the trial court properly found cold, calculated and premeditated because it took awhile for Reaves to expire confuses premeditation with the careful plan or prearranged design which is needed to support this aggravating circumstance. (Please see cases cited at page 84 of Appellant's initial brief). Acceptance of Appellee's argument would dangerously expand the parameters of this aggravator beyond those indicated in previous decisions of this Court. In fact, in Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990), which Appellant discussed at

pages 84-85 of his initial brief, this Court specifically rejected an argument similar to that which Appellee makes here.

Holton v. State, 15 F.L.W. S500 (Fla. September 27, 1990) is also instructive. In Holton this Court rejected cold, calculated and premeditated where the strangulation murder occurred during the commission of another crime, sexual battery, and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. In addition, an inmate testified that Holton stated he did not mean to kill the victim. Similarly, here the smothering of Reaves allegedly occurred during a burglary and sexual battery. And Appellant's statements to Walter Harrison indicated that he did not mean to kill the woman. (R445-446)

Finally, Appellee's apparent suggestion that all smothering deaths per se qualify as cold, calculated and premeditated (Answer Brief of Appellee, p. 40) runs afoul of the constitutional requirement that sentencing in capital cases be individualized (see, for example, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and cannot be adopted by this Court.

Appellant disagrees with Appellee's conclusion, expressed at page 41 of its brief, that the testimony of the two psychologists who testified for the State at penalty phase supports the court's finding of cold, calculated and premeditated. Dr. Merin opined that Appellant was not a particularly reflective sort of person. (R729) He and Dr. Sprehe both diagnosed Appellant as

suffering from an antisocial personality disorder. (R728, 730, 742) The testimony of these witnesses as a whole does not support a conclusion that Appellant was capable of the planning and calculation which inhere in this aggravating circumstance.

## ISSUE XII

THE COURT BELOW ERRED IN SENTENCING APPELLANT FOR THE NONCAPITAL FELONY OF BURGLARY WITHOUT REGARD TO A SENTENCING GUIDELINES SCORESHEET.

Appellee engages in pure speculation in stating that the trial court "undoubtedly" would have departed upward to the statutory maximum sentence for burglary had a sentencing guidelines scoresheet been prepared, based on Appellant's unscored conviction for first-degree murder. (Answer Brief of Appellee, p. 45)

In the recent capital case of Holton v. State, 15 F.L.W. S500 (Fla. September 27, 1990), this Court vacated Holton's sentences for the noncapital felonies of sexual battery and arson where no guidelines scoresheet had been prepared. The Court noted that Florida Rule of Criminal Procedure 3.701(d)(1) mandates that a sentence be imposed based on a sentencing guidelines scoresheet that has been reviewed by the trial judge.

In both of the cases cited by the State at page 45 of its brief, Rutherford v. State, 545 So.2d 853 (Fla. 1989) and Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), the defendants were sentenced on the noncapital felonies pursuant to scoresheets. In Rutherford the trial court initially did not prepare a scoresheet, but this Court relinquished jurisdiction "so that the proper procedure could be followed," 545 So.2d at 857, thus

underscoring the need for sentencing on noncapital felonies to be accomplished by reference to a guidelines scoresheet even in capital cases.

## CROSS-APPEAL

THE TRIAL COURT DID NOT ERR IN GRANTING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

Appellant would note at the outset that Appellee's notice of cross appeal was not timely filed. Pursuant to Florida Rule of Appellate Procedure 9.110(g), a notice of cross appeal is to be served within 10 days of service of the notice of appeal. Appellant's notice of appeal was served on April 24, 1989. (R923) The State's notice of cross appeal was not served until July 28, 1989 (R954), more than three months after Appellant's notice was served. However, the time for serving a notice of cross appeal is apparently not jurisdictional. Breakstone v. Baron's of Surfside, Inc., 528 So.2d 437 (Fla. 3d DCA 1988); Walker v. State, 457 So.2d 1136 (Fla. 1st DCA 1984); County Sanitation v. Ross, 389 So.2d 1247 (Fla. 1st DCA 1980); Agrico Chemical Company v. Department of Environmental Regulation, 380 So.2d 503 (Fla. 2d DCA 1980); Brickell Bay Club Condominium Association, Inc. v. Forte, 379 So.2d 1334 (Fla. 3d DCA 1980).

Turning to the merits of the State's issue, the State's position essentially is that the trial court erred in suppressing Appellant's confession because, while Appellant accepted the appointment of counsel at his first appearance hearing in Orange County, he did not specifically invoke his right to counsel during

custodial interrogation. The State seeks to burden an accused's exercise of his right to counsel with requirements that have not been sanctioned by any state or federal court. The State's issue must fail.

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the Supreme Court set forth the following general principles applicable to this case:

> ...[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [Footnote omitted.] We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

68 L.Ed.2d at 386. In Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), the Court explained that Edwards "sets forth a 'bright-line rule' that all questioning must cease after an accused requests counsel. [Emphasis in original. Citation omitted.]" 83 L.Ed.2d at 495. Appellant requested counsel at least twice prior to being questioned by the detectives from Pasco County. When he was initially booked in at the Orange County Jail, he signed a form indicating that he could not pay a lawyer and wanted to be represented by a public defender. (R995) Later, at

his first appearance hearing, Appellant again requested a lawyer, and one was appointed by the court. (R1015-1016)

The narrow approach to the application of the right to counsel the State urges here was rejected by the High Court in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In Jackson the Court held that

> if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

89 L.Ed.2d 642. Appellant's first-appearance hearing must be considered a proceeding "similar" to arraignment, in light of the fact that he had already been indicted on the instant charges. When the detectives questioned Appellant after he had requested and been appointed counsel at this proceeding, they violated his rights under the Fifth and Sixth Amendments.

It is of no moment that Appellant did not invoke his right to counsel during custodial interrogation. In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) the Court noted that there can be no questioning if the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking." 16 L.Ed.2d at 707 (emphasis supplied). And in Jackson the Court noted that it was required "to give a broad, rather than a narrow, approach to a defendant's request for counsel," 89 L.Ed.2d at 640, and rejected the State's suggestion that the "respondent's requests for counsel

should be construed to apply only to representation in formal legal proceedings [footnote omitted]," 89 L.Ed.2d at 640-641, which is an argument very similar to, if not identical with, the argument the State is making in the instant case. In a footnote the Court agreed with comments the Michigan Supreme Court had made in its opinion in the case, including:

> "The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries single-handedly." 421 Mich, at 63-64, 365 NW2d, at 67.

89 L.Ed.2d at 641, footnote 7. See also Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (suspect's request for counsel raises presumption that he considers himself unable to deal with pressures of custodial interrogation without legal assistance).

United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987) is also instructive. Espinoza was arrested on a weapons charge. He was represented by counsel at his arraignment on that charge. Subsequently, the police questioned Espinoza about a murder, with no counsel present, and obtained a confession. The court held that Espinoza's acceptance of counsel at arraignment on the weapons charge constituted an invocation of his Fifth Amendment right to counsel on the murder charge. The court rejected the government's position that Espinoza's invocation of his right to counsel at arraignment on the weapons charge was limited to his Sixth Amendment right as the accused in that prosecution as a too

narrow interpretation of Espinoza's invocation of his constitutional rights. His confession should have been suppressed.

State decisions provide further support for Appellant's position. In State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984) the court noted that the right to counsel guaranteed by Article I, Section 16 of the Florida Constitution provides even greater protection than its federal counterpart. In Florida the right to assistance of counsel attaches at least as early as the defendant's first appearance (the State's contention at page 47 of its brief that the first appearance hearing "is not a critical stage that requires the appointment of counsel" notwithstanding). Douse, 448 So.2d at 1185. See also Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984). Douse was represented by retained counsel at his first appearance hearing. One day later, before an information had been filed against Douse, a police officer posing as a friend of a codefendant telephoned Douse in order to obtain information relating to the arrest. The trial court suppressed the taped telephoned conversations between Douse and the police detective, and the district court of appeal affirmed, finding a violation of Douse's state constitutional right to assistance of counsel. Appellant's right was similarly violated when the detectives questioned him after counsel had been appointed at first appearance.

The questioning of Appellant by Detectives Muck and Caruso after Appellant had twice invoked his right to counsel violated his rights under both the United States and Florida

Constitutions. The trial court was eminently correct in suppressing Appellant's confession, and his decision in this regard must not be overturned.

## CONCLUSION

Appellant, Gregory Capehart, respectfully renews his prayer for the relief requested in his initial brief. In addition, he asks the Court to affirm the order of the court below suppressing his confession.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of November, 1990.

Respectfully submitted,

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

RFM/an