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IN THE SUPREME COURT OF FLORIDA

HENRY ALEXANDER DAVIS, :

Appellant, :

vs. : Case No. 75,467

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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## ARGUMENT

### ISSUE I

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE STATE'S INJECTION INTO THE PROCEEDINGS BELOW OF SUGGESTIONS THAT APPELLANT HAD BEEN INVOLVED IN OTHER CRIMINAL ACTIVITIES APART FROM THE OFFENSES FOR WHICH HE WAS BEING TRIED.

#### A. Guilt Phase

With regard to the photopack that was shown to State witness Harold Brown, Appellee says that the prosecutor pointed out to the trial court that he had no idea where the police obtained Appellant's photograph that was used in the photopack, "and neither did the jury. (R716)" (Brief of Appellee, pp. 6-7) As a point of clarification, the prosecutor below did not specifically argue that the jury did not know where the police obtained the picture, as Appellee seems to suggest.

On page seven of its brief, Appellee says that "[t]he photospread itself was relevant as evidence so the jury could see that it was not a suggestive photospread." However, defense counsel never argued that the photopack was suggestive (R710-712, 715-716, 1127-1158, 1201-1213), and so there was no implication of suggestiveness that needed to be rebutted. And, obviously, if the testimony concerning Brown's identification of Appellant's picture in the photopack had not been admitted, there would have been no justification for the photospread itself to be viewed by the jury.

Appellee's statement on page eight of its brief that "the cases relied upon by the defendant all involve instances where

testimony was elicited or evidence presented which directly pointed to an earlier arrest" is inaccurate. In Messer v. State, 120 Fla. 95, 162 So. 146 (Fla. 1935), which Appellant cited on page 32 of his initial brief, this Court did not specify the offending statements the prosecutor made during his cross-examination, but did refer to "veiled innuendoes and suggestions of general criminality," 162 So. at 147, rather than anything that pointed directly to a prior arrest of the defendant. In Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985), also cited on page 32 of Appellant's brief, the prosecutor made the following statement at the outset of his cross-examination of the defendant: "Randy, I notice you have a nasty looking scar on your neck there...." whereupon there was an objection. 468 So.2d at 278. This clearly was not testimony or evidence "which directly pointed to an earlier arrest," yet the court of appeal found that the comment was "patently improper and had absolutely no relevance to the issues in the case. Its sole purpose was to insinuate that appellant has a criminal character or has engaged in violent or criminal conduct." 468 So.2d at 278. (The court ultimately denied Von Carter relief on this ground, finding the error to be harmless.) The impact of the testimony in the instant case regarding the photopack identification by Brown was of similar effect, in that it suggested that Appellant had engaged in prior criminal activity.

In its discussion of D'Anna v. State, 453 So.2d 151 (Fla. 1st DCA 1984) on page eight of its brief, Appellee seems to say that D'Anna permits "mug shots" to be introduced, as long as they are

"cropped" to show only the neck and face. Appellant does not so read D'Anna. That case does indicate that "cropping" may alleviate the prejudice to the defense when a photospread involving "mug shots" is used, but does not stand for the proposition that "cropped mug shots" are fully admissible. At any rate, any salutary effect that might have been achieved here by "cropping" the "mug shots" was negated by Brown's testimony that he went through several books of pictures at the police station (R710, 712), which clearly indicated to the jury that he had viewed photographs of people who were known to law enforcement authorities as at least criminal suspects, if not people who had actually committed other crimes.

On page nine of its brief, Appellee raises the specter of evidence of fingerprint matches being held inadmissible if this Court accepts Appellant's argument, "because the jurors might speculate that since police had the defendant's prints on file, he must have had a criminal record." The Court need not concern itself with this possibility. There is no substitute for fingerprint evidence, but in this case Harold Brown's in-court identification of Appellant rendered irrelevant his out-of-court selection of Appellant's picture from a photopack, as the trial court itself recognized. The trial court noted the "lack of probative value" of the line of questioning involving Brown's viewing of photographs, "in light of the fact that the witness was able to make a person [sic] identification apparently without the assistance of any further aids to identification." (R738)

Finally, with regard to the issue of prejudice accruing to Appellant as a result of the testimony in question, Appellant would note that the prosecutor referred to the photopack testimony in his final argument to the jury, thus exacerbating the harm. (R1165)

B. Penalty Phase

Appellee claims at page 11 of its brief that, when he asked Appellant's sister the question concerning Appellant allegedly becoming involved in cocaine, the prosecutor "had hard evidence that, at least at the time of the murder, the defendant was using and indeed smoking cocaine, presumably not for the first time." To what "hard evidence" can Appellee be referring? In arguing to the court that he had a good faith basis for asking the question, the prosecutor below referred only to the fact that cocaine supposedly was found in the bent Coke can that was recovered from Joyce Ezell's car, and that Appellant was "known to the law enforcement community as a person who used cocaine." (R1322) Defense counsel did state that the lab report indicated that the can contained "cocaine residue" (R1319), although there was no evidence introduced to this effect. But it must be remembered that the State's own witness, Detective Farrel Hendrix, testified that there was evidence that Joyce Ezell's car had been occupied recently by three persons. (R941-942) One of the others could have been smoking cocaine. The prosecutor could not give the trial court any specifics to support his statement that Appellant was known to law enforcement as a cocaine user; he said he "would have to ask the detectives specifically." (R1322) This can scarcely be character-

ized as "hard evidence" that Appellant was involved in using cocaine. Furthermore, as mentioned in Appellant's initial brief at page 35, the assistant state attorney did not even argue that he had any reason to believe that Appellant's sister, Alma Sheppard, was aware of Appellant's alleged drug use. (R1314-1317, 1319-1327)

Finally, Appellee argues that the question, even if improper, probably would not have affected the jury's penalty phase vote. (Brief of Appellee, p. 12) It is beyond dispute that drug usage is a highly emotional issue that strikes a responsive cord with many people. That being so, the jurors may well have been influenced to vote against a life sentence for Appellant by even the suggestion that cocaine use may have caused or contributed to his criminal behavior.

## ISSUE II

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND FAILING EVEN TO GIVE A CURATIVE INSTRUCTION AFTER THE PROSECUTOR MADE A HIGHLY INFLAMMATORY GOLDEN RULE ARGUMENT WHICH TAINTED THE PENALTY RECOMMENDATION OF THE JURY.

Appellee seems confused as to whether defense counsel requested a curative instruction after the prosecutor made his Golden Rule argument. The only fair reading of the colloquy between the court and counsel, which is reproduced on pages 13-14 of the Brief of Appellee, is that counsel <u>did</u> request such an instruction, but maintained that the taint of the improper argument could not thereby be cured. Counsel was not, as Appellee suggests at pages 14-15 of its brief, merely objecting to the form of the

instruction proposed by the court. The remarks of the trial court clearly show that he understood that the defense was asking for an instruction, but he ultimately declined to give one. Appellant's issue has been preserved for this Court to review.

With regard to the cases cited on page 16 of Appellee's brief, Appellant does not agree that the prosecutorial comments in those cases were "far worse" than the Golden Rule argument made below. Golden Rule arguments have been universally condemned precisely because their impact on the jury is so devastating. In State v. Wheeler, 468 So.2d 978 (Fla. 1985), this Court noted the "highly prejudicial" nature of the Golden Rule argument. 468 So.2d at 981. Similarly, in Adams v. State, 192 So.2d 762 (Fla. 1966), the Court observed that it was "beyond question" that remarks violating the Golden Rule "have been held to be prejudicial and inflammatory and do constitute sufficient grounds for reversal and new trial...." 192 So.2d at 763.

Furthermore, the cases relied upon by Appellee on page 16 are distinguishable on their facts. In Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), there was no objection to the prosecutor's remarks. This Court found the remarks to be improper, but declined to reverse, noting that "in light of the aggravating evidence presented in connection with the murder of the female victim none [of the prosecutor's remarks] are so egregious as to fundamentally undermine the reliability of the jury's recommendation. [Citation omitted.]" 496 So.2d at 803. The "aggravating evidence" to which the Court referred showed a crime much more heinous than the one

presently before the Court. As explicated in Pope v. State, 441 So.2d 1073 (Fla. 1983), the victim was shot from the rear with exploding bullets,

> had attempted to flee the attack, and had been shot twice with the gun pressed close to her abdomen. The wounds caused by the explosion of the bullets at impact would have been extraordinarily painful without causing unconsciousness or death. When this had failed to kill her, she had been clubbed over the head with the gun barrel. When the gun barrel broke before the murderous end had been achieved, the defendant dragged his still-living victim to the canal where he threw her to drown.

441 So.2d at 1077.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court similarly relied upon the strength of the aggravating evidence presented in concluding that the prosecutor's remarks did not "taint the validity of the jury's recommendation." 476 So.2d 133. The victim in that case was raped, strangled, beaten, and stabbed repeatedly with two knives; therefore the evidence in aggravation was much more compelling than that presented to the jury in Appellant's case.

Likewise, in Jackson v. State, 522 So.2d 802 (Fla. 1988), the aggravation which resulted in the Court finding harmless error was much stronger than that presented herein. Unlike Joyce Ezell here, the victim in Jackson was subjected to a protracted ordeal in which he was shot and required to get into a laundry bag and lie on the back floor of Jackson's car. He remained conscious for some time, begging for his life and pleading to be taken for medical treatment.

Appellee's citation to Garron v. State, 528 So.2d 353 (Fla. 1988) for "the types of egregious comments warranting reversal" (Brief of Appellee, p. 16) is rather ironic, as one of the prosecutorial comments which caused this Court to reverse was a Golden Rule violation. In Garron the Court stated: "When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." 528 So.2d at 359. The effect of Golden Rule arguments is exactly that: to inject elements of emotion and fear into the jury's deliberations.

The injection into the proceedings below of the irrelevant elements of fear and emotion can only undermine confidence in the jury's sentencing recommendation, and must lead this Court to conclude that the need for heightened reliability in the determination that death is the appropriate punishment, see Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), has not been met, and that, accordingly, Appellant's death sentence cannot stand.

## ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE INSTANT HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

## ISSUE IV

THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER HEREIN WAS ESPECIALLY WICKED, EVIL, ATROCIOUS AND CRUEL.

With regard to Issue III, in Green v. State, 583 So.2d 647 (Fla. 1991), the defendant killed his landlords. This Court rejected the trial court's finding of the aggravating circumstance of committed to avoid arrest, reiterating that "the state must show that the elimination of witnesses was at least a dominant motive." 583 So.2d at 647. Thus the Court indicated once again that the mere fact that the victim(s) knew the defendant will not support application of this aggravating factor.

Appellee's argument in support of the especially wicked, evil, atrocious, and cruel aggravating circumstance that Joyce Ezell scratched Appellant around his eyes, and "was very much aware that she was being attacked and tried to defend herself" (Brief of Appellee, p. 23) supports Appellant's argument under Issue III that the evidence is susceptible to the interpretation that this homicide was not committed for the purpose of eliminating a witness, but was instead a robbery that got out of hand.

## ISSUE V

THE RECORD HEREIN DOES NOT CLEARLY REFLECT THAT THE SENTENCING COURT GAVE PROPER CONSIDERATION TO ALL MITIGATING EVIDENCE THAT WAS PRESENTED AT APPELLANT'S TRIAL.

Appellee argues that Campbell v. State, 571 So.2d 415 (Fla. 1990) cannot be applied to Appellant's case, as the sentencing order herein was filed before Campbell was decided. (Brief of Appellee, p. 25) However, the principles expressed in Campbell appeared in cases decided long before the death sentence herein was imposed. See cases cited in Appellant's initial brief and Santos v. State, 16 F.L.W. S633 (Fla. September 26, 1991) (requirements pertaining to trial courts' consideration of evidence in mitigation announced in Rogers v. State, 511 So.2d 526 (Fla. 1987) were continued in Campbell).

## CONCLUSION

Appellant, Henry Alexander Davis, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ralph Barreira, Department of Legal Affairs, Suite N921, 401 N.W.2nd Avenue, Miami, FL 33128, on this 18th day of October, 1991.

Respectfully submitted,

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