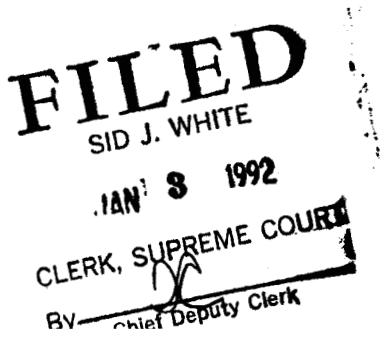
IN THE SUPREME COURT OF FLORIDA



ROBERT B. POWER, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER: 77,157

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

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SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT/ ANSWER BRIEF OF CROSS-APPELLEE

POINT I: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The State's version of the evidence contains several misstatements. The record does not support the statement that "a person fitting Power's description was in the Bare house at approximately 8:55 a.m." Answer Brief, p. 2. Additionally, although the medical examiner testified that death occurred around 9:15 a.m., he gave a range from 8:45 a.m. to 9:45 a.m. (R1137-8)

Power agrees that the circumstantial evidence rule does not require the jury to believe the defendant's version of the facts, where the State has produced conflicting evidence. See, e.g., Cochran v. State, 547 So.2d 928,930 (Fla. 1989). In their

brief, the State cites this proposition and then proceeds to reiterate the evidence which they claim establishes Power's guilt. Power submits that the evidence, even as set forth by the State in their brief, is legally insufficient. Also, the record clearly does not support the statement that parts from Deputy Welty's radio were found in Power's room. Answer Brief, p. 3. A look at the State's record citations in alleged support of this conclusion reveals only testimony about the source of the radio part. (R823,825,832,1201,1222,1577) The State never established who slept in the room where the radio part was found. Similarly, the State never proved who owned the sweatshirt from which hairs consistent with the victim's were recovered. Contrary to the State's assertion, the evidence did not prove who slept in the room where the sweatshirt was found.

The State relies heavily on Duckett v. State, 568 So.2d **891** (Fla. **1990)**. Duckett is clearly distinguishable from Power's facts. Duckett's victim was last seen in his company. No one could place Robert Power in the company of Angeli Bare. Numerous fingerprints belonging to the victim were found on the hood of Duckett's car, although he denied seeing her on the hood. Despite and exhaustive search of the crime scene and scrupulous examination of Bare's body, the State was unable to link Power through fingerprint comparison. In addition to hair comparison, Duckett's fate was sealed, in part, by his unusual tire tracks (Goodyear Eagle mud and snow tires designed for northern driving placed on two Mascotte police cars).

Although the State denies their heavy reliance on hair comparison evidence, a close review of the record indicates otherwise. Even if one eliminates Power's impeachment of the State's experts at trial, as this Court well knows, hair comparison evidence does not establish certain identification like fingerprints. See, e.g., Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988).

POINT 11: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR, DURING CLOSING ARGUMENT, POINTED OUT POWER'S FAILURE TO TESTIFY.

The State contends that the Prosecutors' explanation of circumstantial evidence was invited. Power begs to differ. The prosecutor made the objectionable argument during the initial portion of final summation. (R1982-3) Defense counsel had yet to utter one word of closing argument at the time that the prosecutor set forth the "invited" argument. The State seems to maintain that the prosecutor's argument was somehow "invited" by Power's request for a circumstantial evidence instruction. Answer Brief, p. 6. Appellant can find no case where a party's request for a jury instruction has been called an invitation to objectionable comment.

The State relies on cases that deal with prosecutor's comments on the absence of a defense or the uncontradicted nature of the evidence. Not only did Robert Power present two witnesses

on his behalf, he specifically contradicted the State's evidence. Robert Power had a defense at trial. Nevertheless, he exercised his constitutional right and declined to testify on his own behalf. This combination is what makes the prosecutor's comment so egregious in this case. Power disagrees with the State's conclusion that the error was harmless. In a case as close as this one, the State has failed to meet its weighty burden of proving the error harmless beyond a reasonable doubt.

POINT III: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING POWER'S NUMEROUS OBJECTIONS AND ALLOWING THE INTRODUCTION OF INCOMPETENT, IRRELEVANT, HEARSAY EVIDENCE THAT ERRONEOUSLY INDICATED THAT POWER STOLE WELTY'S RADIO.

The State concedes that Deputy Hulse was uncertain of the identity of the person who made the alterations to Exhibit #69. Answer Brief, p. 11. In light of this concession, Power maintains that the document is untrustworthy on its face. The State's harmless error analysis (Answer Brief, p. 12) makes absolutely no sense.

POINT IV: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUEST FOR A SPECIAL "FLIGHT" INSTRUCTION AND IN DENYING POWER'S REQUEST TO AT LEAST GIVE A LIMITING INSTRUCTION AS WELL.

Once again, the State mischaracterizes the evidence.

No person fitting Power's description was seen in the Bare household that morning. Power's hair was **not** found in the home and in the victim's pubic area. Rather, hair that was indistinguishable from Power's was found. Such a distinction is critical. Likewise, the victim's hair was not found on the sweatshirt where Power slept. Answer Brief, p. 13. Hair that was indistinguishable from the victim's was found on a sweatshirt in the Power household. Numerous members of the Power family lived in the household and the State never established which room Robert slept in. Although these distinctions may seem minor to the Office of the Attorney General, they are not.

POINT V: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ROBERT POWER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN A DEPUTY SHERIFF PREPARED TO "DRAW DOWN" ON THE DEFENDANT IN FULL VIEW OF THE JURY.

The State has completely failed to address the main thrust of Power's argument. The incident clearly created "the impression in the minds of the jury that the defendant is dangerous or untrustworthy." Holbrook v. Flynn, 475 U.S. 560,569 (1986). The trial court misdirected its focus and concluded that the incident was not necessarily threatening from the point of view of the jury. The focus should have been on the jury's perception of the defendant as a "particularly dangerous or culpable" individual. Id. The State has failed to address the heart of the argument.

POINT VI: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING OFFICER WELTY TO TESTIFY TO BLATANT HEARSAY INADMISSIBLE UNDER ANY EXCEPTION TO THE RULES OF EVIDENCE.

The State appears to focus on the relevance and the prosecution's need for the objectionable testimony. Answer Brief, p. 21. In spite of the State's needs, the testimony is still blatant hearsay and should have been excluded.'

POINT VII: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING SEVERAL MOTIONS TO DISMISS THE INDICTMENT BASED ON FLAWS IN THE GRAND JURY. AT THE VERY LEAST, THE COURT SHOULD HAVE GRANTED POWER'S REQUEST FOR AN EVIDENTIARY HEARING.

The State points out that the only basis on which to challenge a grand jury panel is that the grand jury was not selected according to law. Answer Brief, p. 26. This is the precise basis on which Power challenges the panel. See Initial Brief.

Although the State alleges that Mr. Miller was disabled (Answer Brief, p. 22), it does so without a record citation. While counsel may have missed the evidence establishing the disability, Power cannot remember any indication on the record to that effect. Appellant notes the above, for purposes of accuracy and clarification

POINT IX: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING POWER'S OBJECTION AND ALLOWING THE INTRODUCTION OF PHYSICAL EVIDENCE THAT WAS IRRELEVANT AND UNRELATED TO THE MURDER. THE ERROR WAS COMPOUNDED WHEN THE TRIAL COURT INAPPROPRIATELY COMMENTED ON THE IRRELEVANT AND PREJUDICIAL EVIDENCE.

Power finds the State's argument concerning the admissibility of the gun, gloves, and knives, to be extremely tenuous at best. Answer Brief, p. 34. Appellant fails to see how Power's possession of the items when he was hiding indicates his "method of operation." Id. At trial the State failed to establish sufficient relevance to introduce the items. The State still comes up short on appeal. The trial court's admission of the evidence was an abuse of discretion. The State argues that the error was harmless in light of defense counsel's argument. Answer Brief, p. 35. Defense counsel attempted to attack the physical evidence during closing argument. However, his words were merely argument and cannot carry nearly the weight that actual, physical evidence does.

POINT X: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF POWER'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT, THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF A KEY STATE WITNESS ABOUT A MATERIAL FACT.

The Attorney General apparently wants to require defense attorneys to note "exceptions" to a trial court's rulings

as was the practice many years ago. Fortunately, such placement of form above substance has been eliminated in our jurisprudence. Defense counsel repeatedly attempted to cross-examine Officer Welty. The trial court twice sustained the State's objections. (R855-6,877) The trial court also granted the State's motion to strike and instructed the jury to disregard defense counsel's question. (R856) The trial court had ruled and any further objection would have been a useless act by defense counsel.

POINT XIV: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN RESTRICTING POWER'S ATTEMPTS TO EXPLAIN DR. RADELET'S BIAS, AFTER THE STATE ELICITED TESTIMONY THAT RADELET PERSONALLY OPPOSED THE DEATH PENALTY.

Although the State may have objected to Dr. Radelet's testimony, Dr. Radelet was qualified as an expert without objection. (R2447-68) A proffer of the excluded testimony is unnecessary when, as here, one can easily ascertain the nature of the excluded evidence. Defense counsel clearly stated that he wanted to show how Dr. Radelet finally arrived, after years of study, at the conclusion that executions should be abolished. Defense counsel wanted Dr. Radelet to explain the reasonableness of his bias.

POINT XVI: IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT POWER DOES NOT HAVE EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW OF THIS COURT DUE TO THE UNRELIABILITY OF THE TRIAL TRANSCRIPT.

Power vehemently disagrees with the Attorney General's conclusion that the editorial error "jumps from the page." Answer Brief, p. 56. The undersigned counsel has read hundreds of trial transcripts in the last eleven years. Counsel has seen many a cooperative prosecutor agree to a juror's excusal where that juror has a potential vacation conflict. The undersigned sincerely doubts that this "blatant" error in the transcript would have been discovered absent the Assistant Attorney General's familiarity and knowledge of Mr. Townes (the prosecutor). If the error had been as blatant as the State maintains, undersigned counsel would not have spent countless hours and extreme effort in researching and writing the original point contained in the first Initial Brief filed on October 22, 1991.

CROSS APPEAL

ARGUMENT

POINT I: THE TRIAL COURT DID NOT ERR IN EXCLUDING THE EVIDENCE OF COLLATERAL CRIMES FROM THE GUILT PHASE.

The trial court's ruling comes to this Court clothed with a presumption of correctness. Medina v. State, 466 So.2d 1051 (Fla. 1985). A magistrate's determination should be accorded a presumption of correctness and not disturbed absent a clear demonstration that the issuing magistrate abused his discretion. State v. Prize, 564 So.2d 1239,1241 (Fla. 5th DCA 1989). If a trial court's ruling can be affirmed on any basis, the reviewing court should affirm. Combs v. State, 436 So.2d 93,96 (Fla. 1983). The trial court did not abuse its discretion in excluding the evidence of collateral crimes.

The State's laborious analysis of the possible theories on which the trial court excluded the evidence reveals, in and of itself, a myriad of possibilities on which the trial court based its ruling. The numerous dissimilarities between Angeli Bare's murder and the other rapes were thoroughly set forth at the trial level. Appellant will not rehash that particular aspect of this argument in this brief. The trial court heard all of the evidence and arguments on this issue and ruled adversely to the State's position. Undoubtedly, the trial court realized that, if admitted, the evidence of the collateral crimes would have undoubtedly become a feature of Robert Power's trial. Recognizing that the resulting unfair prejudice would substantially outweigh

the slight probative value of the evidence, the trial court made the correct ruling.

POINT 11: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. RADELET TO TESTIFY AT THE PENALTY PHASE.

The State initially complains that the trial court granted, only in part, its motion to exclude evidence and argument about residual doubt. The court expressed its willingness to exclude any evidence dealing with Power's innocence, but ruled that defense counsel could argue the evidence already presented in the guilt phase, even though that argument might relate to lingering doubt. Power points out that the State failed to object to any argument Power made or any evidence Power presented on issue. Power does not believe that defense counsel attempted to introduce any evidence or make any argument that dealt with residual doubt. Certainly, the State fails to point out any such occurrence in its brief.

The gist of Dr. Radelet's testimony was that Robert Power would die in prison, even if he received a life sentence in this case. In Jones v. State, 569 So.2d 1234,1239 (Fla. 1990), this Court recognized that evidence and argument on a similar issue was admissible at a penalty phase. The Jones trial court improperly prevented defense counsel from arguing that Jones could be sentenced to two consecutive twenty-five-year prison terms on the murder charges should the jury recommend life sentences. This Court held that the potential sentence is a

relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering. Dr. Radelet's testimony dealt precisely with this issue.

The other aspects of Dr. Radelet's testimony of which the State complains were only minor aspects of the evidence. The State relies on Hitchcock v. State, 578 So.2d 685 (Fla. 1990) in arguing that the trial court erred in admitting certain portions of Dr. Radelet's testimony. Answer Brief, p. 73. In Hitchcock this Court held that the trial court did not abuse its discretion in excluding Dr. Radelet's testimony concerning deterrents, costs, lingering doubt, prison conditions, and level of premeditation. At Power's trial, Dr. Radelet referred to only two of the aforementioned items: prison conditions and the cost of execution versus imprisonment.

This Court can very easily hold that Power's trial court did not abuse its discretion in allowing Dr. Radelet's testimony. Additionally, Power points out that the State seems to rely completely on the trial court's denial of its motion in limine. In its brief, the State does not point out the portions of the record where the State specifically objected to certain portions of Dr. Radelet's testimony of which now they complain. Power submits that the State has failed to preserve this issue for appellate review. Even if error did occur, it was clearly harmless in light of the unanimous death recommendation and the death sentence imposed.

CONCLUSION

WHEREFORE, based upon the cases, authorities, policies, and arguments cited herein and in the Initial Brief, Appellant requests that this Honorable Court grant the following relief:

As to Point I, reverse his convictions for murder, sexual battery, burglary, and kidnapping, vacate the sentences thereon, and remand for discharge;

As to Points I through XIII, reverse his convictions and remand for a new trial;

As to Point XIV, vacate his death sentence and remand for a new penalty phase;

As to Point XV, vacate his death sentence and remand for imposition of a life sentence or, in the alternative, for reconsideration of sentence by the trial court;

As to Points XVI and XVII, vacate his death sentence and remand for the imposition of a life sentence or, in the alternative, 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 and mailed to Mr. Robert B. Power, #072550, P.O. Box 747, Starke, Fla. 32091 on this 30th day of December, 1991.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER