IN THE SUPREME COURT OF FLORIDA

August 7, 1991

STATE OF FLORIDA,

Petitioner,

v. CASE NO: 78,084

PHILLIP EUGENE GUESS, JR.

Respondent.

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF RESPONDENT
PRELIMINARY STATEMENT

APPELLANT, PHILLIP EUGENE GUESS, JR., Defendant below, will be referred to as "Defendant", or "Respondent". The Appellant, STATE OF FLORIDA, will be referred to as the "Petitioner".

References to the record on appeal containing the legal documents filed in this cause will be made by reference to the appropriate page number preceded by the letter "R", all contained within parentheses. References to the record of appeal containing the transcript of the trial conducted October 5 and 6, 1989 will be made by references to the appropriate page number preceded by the letter "TR", all contained within parentheses.

STATEMENT OF THE CASE AND FACTS

RESPONDENT accepts Petitioner's Statement of the Facts with the following additions and corrections:

Even though R. claimed she did not want to involve other people, she called P. C. and Jim Guess to tell them about the incident. (T 152). In her written statement, R. indicated that Guess took off her shorts and panties, but in her testimony she stated he only pulled them down, (T 154). The transcript indicates that R. was unclear as to whether she did not invite Guess over, or whether she would not have invited him if she had known something like this would happen, (T 156). R. was untruthful with medical personnel about her bleeding because she stated, if she said she had been bleeding, they would make her take off a few days from work. (T 160). Roberson did not recall the date of Guess's arrest. (T 237). Roberson didn't ask Guess if he could read. (T 239). Guess appeared agitated and upset. (T 240). Roberson was aware that Guess' brother had threatened to kill Guess, (T 240). Counsel for Guess objected to not allowing Guess ta testify concerning the voluntarineas and other matters. (T 244). Only Roberson was present during Guess' interview. (T 257). Guess gave a waitress a photograph to give to R., and R. came over to him, (T 319). R. told Guess that she would be off at 11:00 PM, and he could come by if he wanted to and that she also talked about seeing her son. (T 321). Guess told R.'S mother R. had invited him over. (T 323). R.'s told Guess about the many recent problems in her life. (T 328). Guess stated the offices did not

seize a knife from him. (T 335). Guess said that during the questioning by Roberson, that Roberson would not give up on him and kept asking questions, and Guess told him if he wasn't going to believe him, to get him a lawyer. (T 337). Guess said it was consentual sex. (T 347).

SUMMARY OF ARGUMENT

PETITIONER argues that the decision in Fulminante v. Arizona renders the failure to allow the Defendant to testify outside the presence of the jury as to the voluntariness of a confession, subject to harmless error analysis, The decision in Fulminante did not address the well settled and voluminous body of law that the Defendant must be allowed to testify to voluntariness outside the presence of the jury.

The Fulminante decision addressed the evidentiary impact of an improperly introduced involuntary confession. The error which occurred in this case affects the Fifth and Fourteenth Amendment rights of the Defendant and is a structural defect in the trial mechanism. The failure to allow the Defendant to testify at a proffer put the Defendant in a Hobson's choice between not testifying at trial, and arguing the voluntariness of the statement introduced against him.

The burden to the State where a proper proffer is held is minimal and does not hinder effective police procedure. The difficulty for an appellate court reviewing the facts where an involuntary confession was introduced is significantly increased where no adequate proffer occurs.

In this case, the Defendant testified at trial before the jury. The Defendant may not have related the entire circumstance of his confession for fear of prejudice and opening the door to other unrelated allegations of sexual battery.

The circumstances of this case indicate the introduction of

the Defendant's statement without a proper proffer was not harmless error because there was no other evidence of guilt besides the unreliable and impeached testimony of the victim.

ARGUMENT

ISSUE I - WHETHER IN LIGHT OF THE SUPREME COURT OPINION IN ARIZONA V. FULMINANTE, THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

PETITIONER correctly states that under Florida Law a trial Court's failure to conduct a separate hearing on the voluntariness of a custodial statement, or confession outside of the presence of the jury is error of such proportions as to require a new trial. This procedural rule of protection still is and should be the law in Florida.

The Florida Procedural Rule is derived from the United States Supreme Court opinion in Jackson v. Denno 378 U.S. 368, 84 S.CT. 1774, 12 L.Ed. 2d 908 (1964). In federal court, Jackson was codified in 18 USC 3501. Jackson has been followed throughout the nation with each state establishing its own procedure to adhere to the due process requirements. The voluminous cases on the particularities of this hearing have created an entire body of law independent from any other aspect of coerced confessions.

In Florida, this court outlined the hearing procedure ta be followed and also held that the error was so prejudicial that a new trial was required, McDole V. State 283 So2d 553 (Fla. 1973), Land v. State 293 So2d 704 (Fla. 1974), McDonnell v State 336 So2d 553 (Fla. 1976), Green v. State 351 So2d 941 (Fla. 1971).

The opinion of the United States Supreme Court in Arizona V. Fulminante 111 S.CT. 1246, 5 FLW FED. S, 149 (U.S. March 26, 1991) did not address the significant and independent rule of law derived

from Jackson. The issue in Jackson was separate and distinct from the evidentiary impact of a coerced confession. Had the Supreme Court in Fulminante concluded otherwise it most likely would have spoken to the Jackson issue. The Petitioner's argument would have this court overrule a United States Supreme court decision that has provided constitutional protection to defendants since 1964, without any indication from that court that it should do so.

The Fulminante decision concluded that admission of an involuntary confession at trial was subject to a harmless error analysis. The court in Fulminante distinguished "trial errors" which are subject to harmless error from errors which create structural defects in the constitution of the trial mechanism. In this case the failure to allow the Defendant to testify during a Jackson hearing was a structural defect in the trial mechanism.

Under the Fulminante decision, an involuntary confession presented to the jury may be weighed against other evidence in the case and is subject to scrutiny under the appropriate harmless error analysis. The Fulminante court found the confessian had an evidentiary impact that is similar in both degree and kind to the erroneous admission of other types of evidence. In contrast, the failure to hold a Jackson hearing creates error which affects the entire framework within which the trial proceeds. The Defendant's fundamental right under the Fifth and Fourteenth Amendments are compromised for failure to hold a Jackson hearing. Without the opportunity to testify at a Jackson hearing, the Defendant must choose between his right to remain silent, or testify to the

involuntary nature of the confession in front of the jury. The trial procedure itself has unnecessarily restricted the defendant's rights, decisions and strategy. The prejudice to the Defendant in having to compromise his Fifth Amendment rights occurs regardless of the evidentiary impact of the introduction of the involuntary confession.

The Petitioner's argument that the mast adverse consequence of the trial court error was that an involuntary statement may have gone to the jury is erroneous. The most serious consequence was that the Defendant was forced, due to the nature of the trial mechanism into a Hobson's choice of choosing one right over another. The State erroneously cites Jackson for support that the only impact of the error was introduction of an involuntary confession. Further reading of Jackson at P. 923 Fn 16, states:

> "Further obstacles to reliable and fair determination of voluntariness under the New York procedure results from the ordinary rules relating to cross-examination and impeachment. Although not the case here, an accused may well be deterred from testifying an the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony of the facts underlining the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence." U.S. v. Carrignan 342 U.S. 36, 496 Led. 48, 72 S.CT. 97.

The error which occured affected the defendant throughout the course of the entire trial. The defendant may well have planned to not take the stand and argue the weakness of the State's case.

The defendant's counsel may not have prepared direct examination adequately with his client. This left the defendant subject to impeachment on such matters as the nature of prior convictions or other pending allegations. The prejudicial impact that such error has on the defendant during the course of his trial is enormous. In contrast, the burden on the State is minimal. The requirement of a Jackson hearing in which the defendant be given the opportunity to testify may take fifteen(15) minutes, The hearing poses no threat to the prosecutor's case. Prohibiting the introduction of an involuntary confession under the exclusionary rule may curtail effective police procedure, whereas an adequate Jackson hearing does nothing to ultimately hinder an effective and fair determination of the true facts.

There is also another adverse consequence in refusing to allow the defendant to testify at a Jackson hearing. A defendant who is not allowed to testify at the hearing may or may not subsequently testify in front of the jury. If the defendant does not testify in the front of the jury, there will be an absent or incomplete record as to the voluntary nature of the confession. If the defendant does testify in front of the jury, an appellate determination will have to be made as to whether the defendant freely explained the circumstances of his confession. The appellate court would have to have two separate standards of review, one for defendants who testified, and one for defendants who did not testify in front of the jury. The State may argue the defendant who did not testify to the jury waived his right to a

determination of voluntariness. This argument is surely violative of the Defendant's Fifth Amendment rights. The defendant who is prejudiced by the introduction of an involuntary confession at his trial, and was not allowed to testify at a Jackson hearing would have to weigh the court's appellate review as part of his decision of whether or not to testify. This consideration bears no relevance to the ultimate truth of the matter, nor maintains the integrity and confidence in the judicial system. The defendant should be given an opportunity to develop the facts of the voluntariness of his confession in the trial court, not on appellate review, Cantrell v. Maxwell, 298 F. Supp 1061, 1063 (1969).

The Petitioner argues that Crane v. Kentucky 476 U.S. 683, 106 S. CT. 2142, 90 L.Ed.2d 636 (1986) is a case more factually similar to this case than Fulminante and one where the court found it subject to harmless error to not allow a defendant to testify to the jury as to the voluntariness of his statement. Crane had nothing to do with a Jackson hearing. An initial determination of voluntariness at a hearing was held. The defendant was not put in any compromising position. The decision of the trial judge to not allow testimony to the jury as to the confessions' voluntariness after a Jackson hearing was a trial error the same as prohibiting testimony on any matter because it was irrelevant, hearsay, immaterial, or otherwise objectionable. The Crane decision did not affect the trial mechanism the way the error in this case did.

It should be noted that the United States Suprema Court decided Crane in 1986. A full Jackson hearing has been required by the U.S. Supreme Court and by this Court for the five years since that decision, and no court has ruled that Crane makes a Jackson hearing error subject to harmless error analysis.

The Petitioner argues that in this case it is apparent no coercion was present. There is no way to know if coercion existed because the defendant was forced to testify before the jury and he may not have fully explained the circumstances surrounding the confession. Additionally, it has long been recognized that coercion may be mental as well as physical. Jackson at P.923. In the instant case, the defendant was confused and mislead because of other allegations he was being accused of simultaneously. This very tactic was criticized in Justice Douglas's concurring opinion in Carrignan. It is also very possible that because law enforcement officers were making other allegations of sexual abuse besides the instant charge, the defendant did not wish to fully detail the circumstances of the confession in front of the jury because of the prejudicial impact of having to testify and/or open the door to these other allegations.

Petitioner's appeal incorrectly states that both the motion to suppress and the argument of counsel during the mid-trial voluntariness hearing referenced only respondent's asserted confusion during the interrogation. The written motion filed indicates in paragraph (2) that the defendant was not properly advised of his constitutional rights, and in paragraph (3) that the

defendant may have made certain statements which were not freely, voluntarily, and intelligently made after a proper appraisal of his constitutional rights. (R 26). Defendant's counsel, in arguing the defendant's right to testify, said he would ask that the defendant be allowed ta testify concerning the voluntariness and other matters concerning the admissibility of purported statements (TR 244), and that the defendant was improperly denied access to counsel. (TR 246). The Petitioner's argument that there is no possibility the court would have found the confession voluntary is based on an inadequate record.

The statement in this case was a confession. The State introduced the statement to incriminate the defendant. Considering there was no evidence to support the allegation other than the victim's testimony, the statement, which was completely inconsistent with the defendant's explanation of consent, was probably the most damaging evidence against him. The Petitioner's argument that the statement is admissible because the confession was not one which the defendant systematically outlined culpable behavior is ludicrous. The Petitioner's logic would allow any statement, whether obtained through trickery, deceit, or even beatings to be admitted despite its impeachment potential, and regardless of its credibility as long as it didn't meet some layman's understanding of a confession.

The Petitioner argues the defendant in this case had to testify. This argument overlooks the fundamental principle that the State had the burden of proof in this case to prove the

allegations. The victim in this case admitted several times she was untruthful, once to law enforcement, and later to medical personnel. Her testimony was obscure and she was impeached by defense counsel. It is very possible that had the defendant's statement been thoroughly examined at a Jackson hearing and determined to be involuntary, the defendant would not have taken the stand and exposed himself to other prejudicial and irrelevant allegations of sexual battery.

In any event, the appellate court should not be in the position of guessing whether a defendant would or would not have taken the stand. A fifteen minute adequate Jackson hearing eliminates the need for speculation on a matter as important as rights under the Fifth and Fourteenth amendments.

ISSUE II - WHETHER UNDER THE CIRCUMSTANCES OF THIS OR SIMILAR CASES THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO TESTIFY OUTSIDE THE PRESENCE OF THE JURY AS TO VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

Contraryta the Petitioner's assertion, the facts establishing a sexual battery were not abundant. All of the circumstances the Petitioner outlined as indicative of rape are also consistent with the defendant's explanation that there was consentual sex, and that the victim became upset afterward because the defendant was going to talk to his brother, Jim, her ex-boyfriend and father of her child. R. admitted on the stand that she had been dishonest to both law enforcement and medical personnel, Her explanation for the deceit to law enforcement was that she did not want to involve P. Crowder and Jim Guess, yet she called both these persons the morning after the alleged attack. R. also was not entirely clear in her deposition testimony and her trial testimony as to whether she had been drinking that night. The explanation as to why a neighbor did not hear anything unusual in her trailer was that the neighbor's air conditioner was on. There was no evidence of physical restraint or injury. Guess and R. had met each other earlier and she had allowed him into her trailer to socialize with her and play with her child. R. gave a different accaunt in her deposition from her trial testimony as to whether Guess took off her clothes, or simply pulled them down. Had the jury not heard Guess' statement to Archie Roberson, they would have been left with only the impeached testimony of R. at the end of the State's case. The introduced statement farced Guess to take the stand and

address its voluntariness as best he could without opening the door to other aspects of the B. allegation. It is impossible to say that under the harmless error analysis this statement, beyond and to the exclusion of any reasonable doubt did not contribute to the jury's verdict. This is not a circumstance where the statement is in addition to other incriminating statements as in Fulminante. It is not a circumstance where the statement concerns some irrelevant matter. It is also not a situation where there was strong direct, or circumstantial evidence far which the statement was cumulative . The statement was introduced by the State for one purpose; to completely contradict the defendant's explanation that the sexual encounter was consentual. The Petitioner on page 39 of its' brief acknowledges the statement was directly inconsistent with the defense of consent and that the inconsistency between the statement and the defendant's claim of consent was clearly damaging to his credibility.

Under these circumstances, the error which occurred certainly cannot said to be harmless beyond and to the exclusion of any reasonable doubt and a new trial is necessary in this case.

CONCLUSION

For the reason set forth herein, the Respondent respectfully requests that the Court reverse the trial court and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to ROBERT BUTTERWORTH, Attorney General, to JAMES W. ROGERS, Assistant Attorney General, and to LAURA RUSH, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, Counsel for Petitioner an this 14 day of August, 1991.

_____

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