IN THE SUPREME COURT OF FLORIDA

JEROME M. ALLEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 79,003

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT III

IN REPLY TO THE STATE AND IN CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO DEATH-QUALIFY THE JURY AND DENYING ALLEN'S REPEATED REQUESTS TO SEAT SEPARATE JURIES WHERE THE STATE SOUGHT THE ULTIMATE SANCTION IN BAD FAITH.

Although defense counsel never used the magic words "bad faith" in describing the State's motivation for seeking the death penalty against his fifteen-year-old client, it is abundantly clear that defense counsel was contending that the State's quest for the ultimate sanction was both illegal and an attempt to gain a tactical advantage. Once this Court announces that the precedent is clear and the State's pursuit of the death penalty was a per se unlawful quest, the "bad faith" of the State will crystalize.

Appellant agrees that Florida law indicates that a trial judge lacks the authority to determine pretrial whether the death

penalty can be imposed. However, as noted in the initial brief, Allen raised the issue at the appropriate time in his motion for new trial filed after the guilt phase, but before the penalty phase. (R3852-55) This issue has clearly been preserved for appeal.

POINT IV

IN REPLY TO THE STATE AND IN CONTENTION THAT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THE GRAND JURY WAS NOT COMPOSED OF THE DEFENDANT'S PEERS.

The statutory requirement that a defendant may not challenge a grand jury panel after it has been impaneled and sworn [§§905.03, 905.05, Fla.Stat. (1991)], is unrealistic, illogical, and probably unconstitutional. Appellant fails to understand how one can challenge a grand jury panel that one may not even know is even considering a charge against that particular individual. The undersigned counsel almost feels compelled to challenge grand jury compositions around the state just in case one of them might be considering charging him with some unknown offense.

Nevertheless, Allen's assertion on appeal is that the systematic exclusion of juveniles is a violation of equal protection guaranteed by the Fourteenth Amendment. In essence, Allen contends that the grand jurors in his case were not selected according to law, i.e., in violation of the United States Constitution.

The Eleventh Circuit Court of Appeal held that young adults ages 18 to 29 were not a cognizable group for purposes of Sixth Amendment cross-section claims, because there was no internal cohesiveness to that age group as opposed to any other arbitrarily selected age groups. Willis v. Kemp, 838 F.2d 1510, 1516-17 (11th Cir. 1988). Such a conclusion clearly does not

apply to juveniles, i.e., people under age eighteen. Juveniles are clearly a cognizable group with internal cohesiveness, unique circumstances, and special considerations. See both amicus curiae briefs.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE ALLEN'S STATEMENTS TO THE POLICE, AS WELL AS THE SURREPTITIOUSLY TAPED CONVERSATION IN THE HOLDING CELL AFTER ALLEN HAD INVOKED HIS CONSTITUTIONAL RIGHTS.

The State denigrates the importance of Allen's statements to police prior to his invocation of counsel. See Answer Brief, p. 24. Those statements were more incriminating than the State leads this Court to believe. Allen admitted being with Roberson (a co-defendant also in custody) and a white boy. Although denying any knowledge of the crime, Allen also denied pulling the trigger and questioned the detective regarding the culpability of a nontriggerman. (R874-75)

The State also contends that Allen's mother did not even arrive at the police station until 3:00 p.m., right near the end of the interview. See Answer Brief, p. 25. Although it is not crystal clear from the record, it appears that Allen's mother arrived shortly after he was taken into custody. "Actually from the time he was arrested, it was only like thirty minutes or so. She was there shortly thereafter. It wasn't very long." (R2441) Further evidence bolsters the conclusion that Shirley Allen was denied access to her son and vice versa. She testified that, immediately upon arriving at the police station, she requested an opportunity to speak to her son. Police indicated that he was being questioned and that she could talk to him when they

finished. (R2502-5) Considering the record as a whole, it appears that Mrs. Allen was at the police station while Appellant was being interrogated.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY UPON THE LAW OF THE CASE.

C. Independent Act of Another

Appellee seems to contend that the requested instruction is inapplicable to a charge of felony murder. Such is not the case. In Rodriguez v. State, 571 So.2d 1356 (Fla. 2d DCA 1990), the defendant participated in an attempt to rob a store during which his co-defendant killed the clerk. It is thus clear that the requested instruction is applicable to Allen's case.

POINT XIV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IMPROPER PROSECUTORIAL ARGUMENT TAINTED THE JURY'S RECOMMENDATION AT THE PENALTY PHASE IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Appellee contends that defense counsel's relevance objection was insufficient to preserve the claim regarding the prosecutor's argument on lack of remorse. Appellant points out that relevance is the basis of this Court's ruling on the impropriety of this type of argument. See, e.g., Pope v. State, 441 So.2d 1073 (Fla. 1983). The fatal flaw in considering lack of remorse is grounded on the fact that such a concern is irrelevant to any aggravating circumstance. Hence, a relevance objection is more appropriate than the type of objection that the State contends should have been made by defense counsel.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, as well as those set forth in the initial brief, Jerome Allen requests that this Honorable Court vacate his convictions and sentences and remand for a new trial where life is the maximum possible sentence.

Respectfully submitted,

JAMES B. GIBSON
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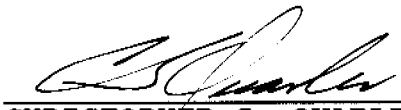
SEVENTH JUDICIAL CIRCUIT



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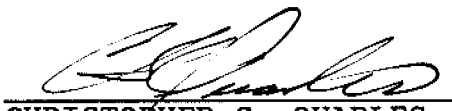
CERTIFICATE OF SERVICE

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, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Jerome M. Allen, #704007 (44-1232-A1), P.O. Box 221, Raiford, FL 32083, this 26th day of May, 1993.



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