IN THE SUPREME COURT OF FLORIDA

ERIC ALEXIS RANDALL,

Petitioner/Appellee,

v.

STATE OF FLORIDA,

Respondent/Appellant.

CASE NO, 80,320 & 80,358

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

ERIC ALEXIS RANDALL,	)	
Petitioner/Appellee,	)	
vs.	)	**Case Nos. 80,320 & 80,358**
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PRELIMINARY STATEMENT

In this brief, references to respondent's brief on the merits, filed October 9, 1992, appear as (AB[page number), for "answer brief." References to petitioner's brief on the merits appear as (IB[page number]) for "initial brief." Record references are as in the initial brief.

In its introductions to issues II-V, respondent asks this Court to decline to address each issue because it is beyond the scope of the certified question. Petitioner responds that each of these issues lies at the heart of the fairness of his trial and the reliability of the guilty verdicts. Though the First District Court of Appeal declined to address any of these issues, petitioner urges this Court to carefully examine each in turn,

Much more than the technical sentencing issue which confers jurisdiction on this Court, these concerns are the very reason Mr. Randall initiated an appeal.

ARGUMENT

11. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS A STATEMENT WHICH WAS MADE IN CIRCUMSTANCES SO DRASTICALLY DIFFERENT FROM THE PRECEDING STATEMENT THAT NEW CONSTITUTIONAL WARNINGS WERE REQUIRED TO COUNTERACT THE COERCIVE ATMOSPHERE.

Respondent consistently mischaracterizes petitioner s argument:

> In a nutshell, Randall maintains that new Miranda warnings are required every time there is a break in questioning, and the police ask a subject-if he or she is telling the truth. (AB8)
>
> Consequently, his complaint is really no more than his wishful thinking; that whenever questioning -- after a voluntary waiver of Miranda warnings -- becomes more focused or intense, new warnings are required. (AB12)
>
> Simply because the police detective did not lay all his cards on the table at the outset does not require re-advisement of Miranda rights every 15 minutes. (AB13)

Petitioner is less ambitious than the state portrays him. His argument on this point is fact-specific, as should be this Court's ruling. Petitioner again submits that the officer's actions in confronting him with the statement of Darryl Cummings, accusing him of lying, placing him under arrest and leaving the room for a short time created a fundamental change in circumstances, resulting in mental coercion only new Miranda warnings could dissipate. To reiterate from the initial brief and the opinion in Miranda: "Opportunity to exercise these rights must be afforded throughout the interrogation." (IB25) Moreover, the facts belie the first of the state's mischaracterizations (at AB8). The detective did not ask petitioner if he was telling the

truth. He told petitioner he knew he was lying. Respondent acknowledges this later in its brief. (AB10, 13)

In its assertion that petitioner has conceded this issue by failing to challenge a second suppression hearing, the state attacks a straw man. (AB9) What respondent depicts as a second suppression hearing is actually a 13-page proffer of testimony during trial by assistant state attorneys who were worried that the required finding of voluntariness had not been made in the first hearing. Defense counsel dutifully renewed his arguments from the earlier hearing. This is all recorded in the initial brief. (IB3) The state's notion of concession of error is fiction. Petitioner has contested the trial court's denial of the motion to suppress in the context of the facts and argument made in the much more substantial pretrial hearing. Respondent itself suggests the proffer and argument at trial changed nothing. There is no waiver here, and certainly no concession.

The state is either confused or just plain wrong in its contention that petitioner seeks to benefit from his own wrongdoing. (AB11) The claim is premised on an assumption neither the state nor the Court can make -- that the first statement to the detective was false. Moreover, even if it was false, that statement was not the intervening event. Rather, the intervening event was the detective's response to the statement. In this vein, petitioner will rely on the Court to give respondent's closing-argument-style remark in the first complete sentence on page 14 of the answer brief the weight it deserves.

Ballard v. Johnson, 821 F.2d 568 (11th Cir. 1987), may be instructive, as respondent claims, but it has nothing to teach us about this case. (AB11-12) Before the confession in Ballard which respondent likens to petitioner's second statement, Ballard was asked whether he'd been advised of his rights earlier and signed a waiver form, and he answered yes. Additionally, Ballard had confessed earlier, i.e., given the same information, vastly decreasing the probability his subsequent confession was the product of coercion. Petitioner had not incriminated himself before the second statement, and was not reminded of the Miranda warnings and his waiver before he made it.

Respondent is wrong in stating that petitioner had not raised the detective's violation of section 901.17, Florida Statutes, in the district court. (AB14) Petitioner discussed it at page 5 of the reply brief below, and respondent did not object at that time. To document this fact, petitioner has requested that this Court order that the record be supplemented with the briefs of the parties below.

The statement by respondent that nothing in the record reveals any signs of promises or inducements is also wrong. (AB13) Petitioner's testimony at the suppression hearing reveals an inducement of early release so he could see his sick mother if he accepted responsibility for the shooting and claimed self-defense. (IB6) Petitioner does not rely on this testimony herein, but will not let respondent's misrepresentations go unchallenged.

The error was not, as respondent claims, harmless. The evidence suggests that many of the state's eyewitnesses who fingered petitioner may have done so to exculpate themselves or one of their friends. The test of harm is not, as the state well knows, overwhelming evidence. There is more than a reasonable possibility admission of petitioner's statement affected the verdict. Thus, the error supplies grounds for reversal.

III. PROSECUTORIAL MISCONDUCT IN ACTIONS THAT CULMINATED IN CHARGING A POTENTIAL DEFENSE WITNESS WITH PERJURY VIA INCONSISTENT STATEMENTS DEPRIVED APPELLANT OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE WITNESS'S **TESTIMONY.**

Respondent gets it wrong from the opening salvo: "[A] State witness who commits perjury through later statements that are somewhat exculpatory is not transformed into a defense witness. Petitioner's alchemy is not persuasive." (AB16) Alchemy or not, petitioner's argument is more credible than respondent's revisionism. The state did not call Rasheed Sanders to testify; petitioner attempted to do so, but was thwarted by Sanders' exercise of his Fifth Amendment rights, a direct consequence of the state's intimidation. Thus, at the time of trial, Sanders was a defense witness. The state did not seek his testimony. Petitioner did.

At page 18, footnote 3 of the answer brief, respondent claims that petitioner has not requested that this Court take judicial notice or provided the timely written notice to the state. Petitioner considered his reference to judicial notice at page 29 of the initial brief both a request to this Court and timely notice to opposing counsel. The parties fought this same skirmish below. Nonetheless, petitioner has filed a separate request that this Court order supplementation with the DCA record in Sanders, and has further requested that this Court take judicial notice of that record. This should put respondent's avowed concerns to rest,

The claim of error in this point reflects no assumptions, erroneous or otherwise. (AB18) The defect is in respondent's

perceptions. Sanders was in fact a defense witness. Defense counsel made every effort to obtain his testimony in the defense case, including a request to the state to offer him immunity and one to the court to compel immunity. Respondent states that trial counsel's claim that Sanders was listed as a defense witness is nowhere in the record, then refutes its own contention by citing to the portion of the record where defense counsel makes the claim. (AB19) If the state disputed the representation, the time to raise its claim was then. It should have requested a Richardson hearing. Instead, it now uses its waiver of that claim to assert that Sanders was not a defense witness. The facts show otherwise.

While depicting petitioner's statement that Sanders was a defense witness as conjectural, respondent asserts the "possibility" that Sanders' deposition testimony was the product of improper influence by petitioner. (AB20) If it's merely a possibility, doesn't that also make respondent's assertion conjecture? The state provides no record evidence of an attempt by the defense to improperly influence Sanders -- certainly nothing like the prosecutor's tactic of bringing perjury charges before trial. Respondent implies facts not in the record. This Court is not a fact-finder, though respondent treats it as such. The state hopes to convince this Court Sanders would not have testified favorably for petitioner. Why, then, did defense counsel want Sanders to testify?

Petitioner's argument does not hinge simply on whether the prosecutor committed misconduct, as perceived by respondent.

(AB20) Instead, the argument is that the prosecutor's actions in threatening and then filing a perjury charge after Sanders' deposition deprived petitioner of the material, exculpatory testimony of a crucial witness. The state contends that if the events leading to Sanders' taking the Fifth constituted error, it was harmless. There is more than a reasonable possibility that deprivation of the trial testimony of a defense eyewitness, who had previously stated under oath he didn't see how petitioner could have committed the crime, affected the verdict. The credibility of most if not all of the state's eyewitnesses was in question, for they had motive to deflect suspicion from themselves. Harm obviously ensued.

IV. THE TRIAL COURT ERRED IN EXCLUDING DEPOSITION TESTIMONY OF AN UNAVAILABLE DEFENSE WITNESS.

Respondent again overstates petitioner's argument. (AB24) Petitioner asserts only that a rule of criminal procedure may not deny a defendant the opportunity to present material, exculpatory evidence in the form of a deposition otherwise admissible as evidence.

Respondent persists in its unsupportable contention that petitioner had procured Sanders' deposition testimony by wrongdoing. (AB25) See Point III, infra. The deposition meets the requirements of section 90.804(2)(a) in that the state had the same motive and opportunity to cross-examine Sanders when he gave testimony exculpating petitioner in the deposition as it would have had when Sanders gave the same testimony at trial. The fact that the state chose to cross-examine Sanders more briefly than it might have done at trial does not detract from its motive and opportunity. Testimony may be developed by hostile cross-examination no less than by a friendly narrative.

Respondent next confuses constitutional error with harmless error. (AB28) The error was constitutional not because of its magnitude, but because of its denial of specific constitutional rights to due process and compulsory process.

V. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE TESTIMONY OF A WITNESS LOCATED BY THE STATE DURING TRIAL, RESULTING IN INSUFFICIENT TIME FOR DEFENSE COUNSEL TO INVESTIGATE ALLEGATIONS OF WITNESS TAMPERING MADE BY THE WITNESS.

Several speculative assertions by the state must be addressed.

First, respondent notes that defense counsel could not obtain Cummings' attendance at a deposition, despite the fact chat petitioner and Darryl Cummings were friends. (AB30) Petitioner suggests that Cummings' sworn accusation, thrown in petitioner's face shortly after the shooting, may have affected petitioner's access to Cummings. The state then asserts that, because Cummings testified petitioner had tried to discourage him from testifying, "petitioner [obviously] knew how to find him." (AB31) That is base speculation. Cummings did not testify that the contacts by petitioner had been recent. The state has no basis to claim that, at the time of trial, petitioner knew how to find Cummings. Moreover, contrary to the state's speculation, there is no record evidence (as opposed to argument) that Cummings remained unavailable because of petitioner's efforts.

Incredible as the state finds petitioner's argument, (AB31) petitioner finds it equally incredible that the state could not find Cummings despite good-faith efforts until defense counsel pointed the finger at Cummings in his opening statement. See pages 46-47 of the initial brief. This is what distinguishes this issue from Thompson v. State, 561 So.2d 1311 (Fla. 1990), on which respondent relies. Petitioner refers the Court to its analysis of Thompson at pages 45-46 of the initial brief.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court reverse his convictions and remand for a new trial; or, in the alternative, vacate his sentence on Count 11 and remand with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., 4th Fl. N.
Tallahassee, FL 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 3rd day of November, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER