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IN THE SUPREME COURT OF FLORIDA

ERNEST D. SUGGS,

Appellant,

vs.

CASE NO. 80, 340

STATE OF FLORIDA,

Appellee.

_______________________________/

REPLY BRIEF OF APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, IN AND FOR WALTON COUNTY, FLORIDA.

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PRELIMINARY STATEMENT

References to the State's answer brief will be made by the designation (SB-page number).

STATEMENT OF THE CASE AND FACTS

The State does not controvert any fact set forth in the Statement of the Facts contained in Appellant's initial brief. Instead, the State criticizes Appellant for submitting to this Court a fair, accurate, and complete Statement of the Facts. While the State may not want to deal with all the facts, nevertheless the facts contained in Appellant's brief are the facts of this case and must be relied upon by this Court.

Rather than set forth with particularity those facts, if any, upon which the State disagrees, the State resorts to rewriting the facts, selectively putting forth a series of incomplete self-serving declarations that have little resemblance to the facts of this case. Illustrations of this tactic run throughout the State's brief. For example, the State alleges the following to be a "fact" of this case: "[T]he defense tried to portray the two inmate witnesses as 'incompetent' (Byars), or 'dishonest' (Taylor), but again fell flat . . . ." (SB-6). While the State is certainly entitled to its opinion as to the efficacy of the defense position, it is clearly improper to include these opinions in a Statement of the Facts that is submitted to this Court as the facts to be relied upon to uphold a criminal conviction.

More importantly, not only did the defense "try to portray" these witnesses in the manner suggested by the State, the defense actually proved that the witnesses were "incompetent" and "dishonest." Wallace Byars was declared incompetent by court order

at the time that he claims that Appellant "confessed" to him, based upon the reports of two court appointed psychiatrists who examined Byars and found him to be incompetent. (R-1058-63). The evidence showed that Taylor had twenty prior felony convictions, had twice escaped from custody, had violated his Walton County probation, and had admitted that he made a "great deal of money" committing crimes. (R-3574,3577-81,3584). Surely, this type of evidence would lead one to question Taylor's honesty. For the State to unabashedly state as a "fact" of this case that the defense "fell flat" trying to prove these two witnesses were "incompetent" or "dishonest" is unjustifiable.

The State's allegation that Ray Hamilton's and Steve Casey's alibis were "confirmed" by a pizza box stub and phone records is also incorrect. (SB-3). Ray Hamilton testified that he left the Teddy Bear Bar at 9:45 p.m., bought a pizza, and took it home to eat. (R-2796-2800). He gave the investigators a pizza box, but no investigation was conducted to confirm when or where Hamilton obtained the pizza box. (R-3069-72). There is no other evidence of Hamilton's whereabouts from 9:45 p.m. until the Sheriff's department transported him back to the Teddy Bear Bar approximately 1:00 that morning. (R-3069). Steve Casey's alibi was that he was home all night selling his truck; however, Casey did not know who he sold the truck to or how much he sold it for. (R-3681-83). It is also strange that some unknown person would be purchasing a vehicle at Casey's home so late at night. No investigation was conducted by the Sheriff's office to determine who purchased the

truck (or to otherwise eliminate the truck as the one that left the tracks on the road to the victim's body). (R-2761). Casey produced telephone toll records reflecting a long distance call on his phone at 8:49 p.m. that lasted forty-three minutes until 9:22 p.m. (R-2684). However, Pauline Casey was not discovered missing from the bar until 11:10 p.m. and Steve Casey's whereabouts from 9:22 p.m. until he arrived at the bar at 12:30 a.m. are unknown. (R-2220-23,2681).

The State also alleges that Appellant's statement that the money got wet when he fell off his dock while replacing some boards was negated because no new boards were found in or on the dock, and no tools were found. (SB-3). However, Appellant's mother testified that the dock was rotting, and that Appellant had replaced some of the boards with "treated lumber." (R-3919-20).

The State also claims that the defense tried to create confusion regarding the number of keys to the bar and that this "smokescreen" was ultimately removed by state witnesses. (SB-4). The State's record citation is to the testimony of one of the investigators who said that law enforcement could only "locate" three keys to this door. (R-2745). There was never any definitive testimony as to the exact number of keys that previously existed to the bar so as to establish that the key found in the bay could only have come from Pauline Casey.

The State also claims that the defense expert in serology was so "evasive as to his 'qualifications' that at one point the defense withdrew its proffer of the witness after a withering voir

dire." (SB-5). The defense offered Kopek as an expert without extensive questions relating to his qualifications, since other experts had not been voir dired. In the guise of voir dire, the State immediately began a blistering attack[1] on this professional witness. What the State refers to as the witness being "evasive" was actually the prosecutor repeatedly interrupting the witness. The court admonished the prosecutor with these comments: "Mr. Adkinson, if you will allow the witness to complete the response;" and "Well, allow him an opportunity to complete the response." The witness' comment, "One of us can talk at a time, okay," is illustrative. (R-3980,3996,3982). The defense request to withdraw the proffer was a result of this type of trial tactic. Defense counsel candidly told the court,

> I didn't go through twice that voir dire to establish his credentials because candidly it never occurred to me that the State would actually attempt to impeach the man. I'm not going to bring him in here unless he's qualified . . . [O]nce I was surprised to learn that the State was going to do that, that I could have asked the specific questions about many -- the many courses he's taken in blood and the work that he's done, specialized training, could have asked those particular questions and would be more than happy to do so. (R-3990).

When the prosecutor finally finished, the trial court declared Kopek a qualified expert in the field of forensic serology. (R-

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[1]It was this type of abusive cross-examination that caused the defense attorney to put on the record that the prosecutor was "yelling" and "hollering" at the defense witnesses, noting that the decibel level of the prosecutor's voice rose "as the answers are less and less favorable to the State," a charge that the prosecutor did not refute. (R-3834-35).

4006).

The State also claims that its serological expert did not perform a PCR test on the semen stain because "the 'PCR' test was not available in 1990 when Ginsberg tested the evidence." (SB-5). During cross-examination, Ginsberg was asked about the failure to conduct a PCR test. He commented that the PCR was a recent test and that he had performed his testing in 1990. (R-4317). Significantly, Ginsberg did not state that the PCR test was not available in 1990 as alleged by the State. Ginsberg did not even forward the sperm sample to the laboratory where the DNA (or PCR) analysis could be performed. (R-3227, 4318-19). Kopek testified that the PCR and DNA tests were "available" and should have been done. (R-4042). The State's brief claims that Kopek "misrepresented that ADA 2-1, over time, 'deteriorates into' ADA 1 and made other misstatements easily refuted by Mr. Ginsberg on rebuttal." (SB-5-6). In support of its claim, the State references pages 4290 to 4327 of the record, over thirty pages of testimony. Without more specificity, it is impossible to discern what "misstatements" the State is referring to. Even Ginsberg agreed that, if one of the bands that made up the ADA 2-1 enzyme was missing, then an ADA 2-1 would appear to be an ADA 1. He also agreed that the ADA enzyme was the one that degrades the fastest. (R-4314,4310).

The State also provided this Court with "additional facts" relating to the individual points on appeal that will be dealt with in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

On appeal, the State fails to distinguish any of the controlling authorities that mandate reversal of Appellant's conviction. Instead, the State resorts to rewriting the facts (without regard for the evidence below), misframes the issues, fails to address Appellant's arguments, and ignores established precedent.

Appellant urges this Court to decide the case based upon the law and the facts - not upon the myriad of inconsistent arguments, theories, and denials that have been formulated by the State on appeal. With all due respect to the State's attempt to salvage the conviction, this case must be decided based upon the application of established precedent. Appellant's conviction should be reversed and a new trial ordered.

ARGUMENT

POINT I

DURING THE GUILT PHASE, THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR IN FAILING TO CONDUCT A RICHARDSON HEARING, AND FURTHER ERRED IN PERMITTING ACTING CIRCUIT JUDGE LINDSEY TO TESTIFY.

In his initial brief, Appellant argued that there was a discovery violation by the State because the State had failed to provide the defense with the name of a witness, Judge Lindsey; that the trial court committed per se reversible error when it failed to conduct a Richardson hearing; and that the testimony of the witness, an elected county judge in the circuit of the trial, was inadmissible and should not be allowed on well-recognized policy grounds. The State responded with a series of multifaceted and inconsistent arguments designed to sidetrack this Court from the issue. For example, the State says that the defense had prior knowledge of Judge Lindsey's involvement because Judge Lindsey was the judge who sent Wallace Byars to Chattahoochee. (SB-6). However, Judge Lindsey was not on the state's witness list and was not called as a witness regarding Byars' trip to Chattahoochee. Judge Lindsey's July 1990 order finding Byars incompetent to stand trial and ordering him transported to Chattahoochee was not in issue and was not introduced into evidence. (R-2933-35,3458). The State called Judge Lindsey to testify on a totally unrelated matter: Byars' release from jail after he returned to Walton County from Chattahoochee, pled guilty, and received a three year sentence in the county jail. (R-3500 et seq.)

The State alleges that its announcement that Judge Lindsey

would be called as a defense witness was a response to the defense lawyer's "ambush" with a packet of untimely "reciprocal discovery." (SB-6). If the prosecutor was indeed "ambushed," he certainly did not voice that sentiment to the trial court. Instead, he simply moved in limine to preclude the defense from introducing two of the documents that referred to Steve Casey. (R-2108). Contrary to the State's brief, the State did not move to exclude this evidence on the basis that it was "false and misleading" (nothing on page 2108 remotely supports this allegation); but rather moved to exclude the documents as to Steve Casey because they were not relevant. (R-2108).

The State announced that Judge Lindsey would be called to testify because the defense attorney announced his intention to present evidence of the nolle prosequi filed by the State Attorney's Office in connection with Byars' arrest in Okaloosa County. The defense argued that the nolle prosequi showed that Byars was receiving "lenient treatment." (R-2120-21). It was at that point the prosecutor announced he was going to call Judge Lindsey and the defense immediately requested a Richardson hearing. (R-2121).

Although several days passed before Judge Lindsey was called as a witness, there is no further reference in the record to the judge being a witness. No amended witness list was filed by the State. The State says that the defense openly accused Byars of obtaining his release from jail from the Sheriff (SB-7); however, Byars testified on two occasions before the jury that he was

released from jail on a medical release given him by Judge Lindsey: "Judge Lindsey gave me a medical release to go to the hospital" and "Judge Lindsey signed the order for me to go." (R-3418,3454). This testimony was never rebutted by the defense. Immediately following Byars' testimony, the State again announced its intention to call Judge Lindsey to testify. (R-3457). The defense objected again:

> So whether or not Judge Lindsey let him out of Walton County on that issue is highly prejudicial and beyond probative value. <u>He is not on the discovery list anywhere and a Richardson hearing wouldn't cure it.</u>
>
> But when the man who takes the robe takes the witness stand it has a tremendously tragic, powerful impact on the case. And in this case his proffered testimony would not be probative to an issue before the jury. (R-3459). [emphasis supplied]

It should be clear from the above that the defense did not "change its argument" (SB-7), but rather succinctly stated the grounds for the objection. As before, the defense attorney pointed out the discovery violation. His statement that a "Richardson hearing wouldn't cure it" is clearly a reflection that, even if the court conducted a hearing, the prejudice from the State's late discovery announcement could not be cured.

In his initial brief, Appellant provided this Court with ample authority that the failure to conduct a <u>Richardson</u> hearing was error <u>per se</u>, and the State has failed to rebut or distinguish any of the controlling authorities. If a <u>Richardson</u> hearing is held, then the trial court is supposed to determine "whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the

violation affected the defendant's ability to prepare for trial." Brown v. State, 515 So. 2d 211, 213 (Fla. 1987). The record before this Court contains no inquiry regarding the reason for the violation, and the only explanation of that reason is contained in the State's brief. Despite the State's frantic effort to find an excuse for not holding the hearing, none exists and reversible error occurred. Smith v. State, 500 So. 2d 125 (Fla. 1986).

The State totally mischaracterizes Appellant's argument that Judge Lindsey should not have been allowed to testify by saying that Appellant "incredibly tries to tell us that a judge can never be a witness in any proceeding, no matter the issue." (SB-19). Instead, Appellant's argument was clear and unmistakable: A sitting judge should not be called to testify regarding matters within the scope of his judicial responsibilities. This is especially true when the judge gives a "judicial testimonial" regarding the credibility of witnesses, testifies that he relied on hearsay, renders legal opinions, and otherwise instructs the jury on the law. With all due respect, the practical and legal effect of Judge Lindsey's testimony was to provide the State (and its witnesses) with an air of legitimacy and to let the jury unmistakably know that the judge is on the State's side. This Court should establish very stringent guidelines before judges may be allowed to testify regarding their thought processes in making decisions on matters within their judicial responsibilities.

Appellant's conviction should be reversed for a new trial.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM HIS ILLEGAL DETENTION.

The State's argument on Point II is obviously an attempt to salvage the unsalvageable. The State ignores the overwhelming case law directly on point which requires suppression of the evidence. In lieu thereof, the State tries to concoct theories to sustain the trial court's order that have no basis in the law or the facts of this case. The State does not (and cannot) distinguish Reynolds v. State, 592 So. 2d 1082 (Fla. 1992); Dunaway v. New York, 442 U.S. 200, 99 S. Ct 2248, 60 L. Ed. 2d 824 (1979); and Florida v. Royer, 460 U.S. 491, 103 S. Ct 1319, 75 L. Ed. 2d 229 (1983), cases that clearly control and mandate reversal.

Amazingly, the State does not even reference Reynolds, this Court's controlling precedent. The State pays "lip service" to Royer, citing it for the unremarkable proposition that the "police have the right to approach, detain and question a civilian to a limited extent." (SB-21). No attempt is made to distinguish Royer, or otherwise demonstrate that the principles of that case do not apply sub judice. The only attempt to distinguish any of these controlling authorities is the State's argument that, in Dunaway, the police admitted that Dunaway would not have been allowed to leave while, in the case at bar, the police testified that Appellant could have left. Although the officers testified that Appellant was free to leave, they never communicated that crucial fact to him:

A. He could have left, yes, sir.

Q. Okay. Did you tell him that?

A. I did not. (R-886).

* * * * *

Q. Did you advise him that he had the right to get up and leave?

A. I did not, no. (R-890).

This is identical to the situation confronting Dunaway, who likewise was not told that he was free to go: "Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go[.]" Dunaway v. New York, 442 U.S. at 212. Frankly, the self-serving statements of the police in this case regarding Appellant's "freedom to leave" cannot distinguish or otherwise dilute the clear message of Dunaway: "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." Id. at 218.

Having failed to distinguish the controlling authorities, the State turns to various theories that are not factually or legally valid. For example, the State theorizes that, because Appellant apparently knew that he did not have to consent to the searches, his illegal arrest, lacking in probable cause, was excusable. The State cites no authority for this proposition and overlooks the

considerable authority to the contrary. See Reynolds, 592 So. 2d 1082.

In Reynolds, the police officers specifically advised the defendant of his right to refuse the search. Despite Reynolds' actual knowledge of his right to refuse and his dual consents to the search, this Court suppressed the evidence as a product of Reynolds' illegal detention. In many respects, the facts in the case at bar are even more compelling then those in Reynolds. Reynolds' illegal detention occurred on the street at the location of the stop, while in Appellant's case, the officers refused to discuss the matter with him at the location of the stop, insisting that Appellant accompany them to the Sheriff's office. (R-885). Appellant was then transported to the Sheriff's office where he was questioned for hours until he finally relented and gave his consent to the searches.

Another one of the State's theories is that there was some kind of "negotiation" ongoing between Appellant and the police officers. The State cites no authority for this novel approach to an otherwise patent violation of the Fourth Amendment. More importantly, what the State calls "negotiation" consists of the officers repeatedly requesting consent to search while telling Appellant "anything" in order to get his signature on the consent forms. Appellant finally gave in to these improper tactics after a prolonged detention. Denehy v. State, 400 So. 2d 1216 (Fla. 1980). The officers used every tactic in the book to secure Appellant's consent, including telling Appellant that if he would

consent to a search they could "eliminate him from the incident at the Teddy Bear Bar;" "My concern is for the disappearance of this young lady." (R-880,911). Appellant was told that he was the last one seen with the missing girl, an obvious attempt to intimidate him into granting consent. (R-875). Additionally, Appellant testified that the officers told him, "Well, if you haven't anything to do with it, you know, let us look in the house and the jeep." According to Appellant, "They kept on." (R-922). Never was there any "negotiation." Rather, there were repeated requests for consent to search during hours of questioning (without the benefit of Miranda rights) while Appellant denied any involvement with the girl's disappearance. (R-890-91,896,900).

Another of the State's theories is that the initial officer (Townsend) "could have arrested Suggs for the apparent and obvious traffic infractions and detained him for probable violation of parole." (SB-20). As this Court is well aware, a traffic infraction is non-criminal and such a violation does not subject an individual to arrest. Townsend never testified that Appellant was under the influence of alcohol and never claimed that he had probable cause for a DUI arrest. The question of Appellant's violation of parole never came up. More importantly, before the trial court, the State (and the police officers) took the position that Appellant was not under arrest for any offense. (R-876). The State, on appeal, is trying to refashion the facts to its liking, but to borrow a phrase, it "fell flat" in doing so.

The State argues that this case is "more akin" to Florida v.

Bostick, 501 U.S. ____, 111 S. Ct 2382, 115 L. Ed. 2d 389 (1991). However, Bostick was a simple police encounter on a bus and clearly did not involve transporting the defendant to a police station, as occurred in Dunaway and the case at bar. Furthermore, even if the principles of Bostick are applied, it is clear that "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Bostick, 115 L. Ed. 2d at 402. Certainly, a reasonable person in Appellant's shoes would have concluded that he was not free to leave. Consider this overwhelming evidence: Appellant was stopped by a uniformed patrol officer using blue lights (R-854-55); Four patrol cars and five or six officers surrounded Appellant at the scene (R-887); Appellant was never given any option other than to go to the station with the police officers (R-907-08,920); he was never given any option other than to allow the police to drive his car to the station (R-907); the police kept his driver's license, car keys and car title (R-858,890); he was transported in the cage of a marked police car (R-888); he was taken to the sheriff's office and informed that he was the last one seen with a missing girl (R-875); and, he was repeatedly told that the police needed to eliminate him from their inquiries. (R-880,895-97).

The State has offered this Court no authority to sustain this obviously illegal search. In all due respect, the State's theories do not hold water. This case is directly controlled by the established precedent of Dunaway, Reynolds, and Royer and it should

be decided by application of that precedent.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL RESULTING FROM THE PROSECUTOR'S STATEMENT THAT APPELLANT HAD BEEN IN PRISON.

The facts regarding this issue are fairly set forth in Appellant's initial brief, despite the vicious protestations of the State. The prosecutor said what the transcript indicates he said and, after the trial judge listened to the tape of the prosecutor's comments, she confirmed the clear import of his words:

> However, the question before the Court is whether or not those words with those pauses create an impermissible inference that Mr. Suggs has a prior record or, specifically, was in prison with Mr. Taylor. Candidly, gentlemen, that's a close call. Since it is such a close call for me, my judgment, therefore, is that a reasonable person might infer that the Defendant was in prison with Mr. Taylor. (R-2198).

Since the trial court made these findings, this Court need only decide whether or not the error entitles Appellant to a new trial, his motion for a mistrial having been denied by the trial court. The State tries to create the impression that a "compromise" between the State and Defense is what caused the motion for mistrial to be denied. (SB-11). In fact, Appellant's motion for mistrial had been denied the day before and both counsel told the court that a cautionary instruction would only "highlight" the error. (R-2198-99,2200-03). However, the trial judge was so concerned about the error, that she addressed the matter again the next day, and asked defense counsel if he would withdraw the motion for mistrial: "THE COURT: Are you willing to withdraw your motion for mistrial? MR.KIMMEL: No, ma'am." (R-2349-52,2639-51). In an

effort to satisfy the trial court's repeated concerns, the defense agreed to allow the prosecutor to read a statement to the jury, but again refused to withdraw the motion for mistrial: "But I absolutely know what my ethical responsibility is to not withdraw the motion [for mistrial]." (R-2644).

The State argues that the cases cited by Appellant are irrelevant because they deal with statements by witnesses who inferred that the defendants had been in prison, whereas sub judice, it was only the prosecutor who gave this highly improper information to the jury. The State's remarkable attempt to distinguish Appellant's authorities on the ground that, in this case, improper argument was admitted instead of improper evidence fails miserably.

The cases cited by Appellant clearly establish that information transmitted to the jury regarding prior prison sentences is harmful, prejudicial and inadmissible. Appellant's jury heard the same type of irrelevant and prejudicial evidence, although significantly, the jury heard it not from a lay witness but from an assistant state attorney charged with knowledge of the rules of evidence and procedure. The State argues that since opening statements are not evidence, any subject of discussion is fair game, regardless of whether the comments relate to admissible evidence or not. The State cites no cases to support its position that it is perfectly proper for a prosecutor to tell the jury that a defendant has been in prison before, while a witness who is not an officer of the court can cause a mistrial with an inadvertent

comment to the same effect. In the process, the State ignores scores of cases where reversible error occurred due to improper statements by the attorney. See, for example, Peterson v. State, 376 So. 2d 1230 (4th DCA 1979), cert. denied, 386 So. 2d 642 (Fla. 1980) and State v. Wheeler, 468 So. 2d 978 (Fla. 1985).

Appellant submits that it is not the source of the prejudicial information that creates the error, but the substance of the matter told to the jury. Here, the jury was essentially told that Appellant had been in prison in Alabama.

The law regarding the prejudice resulting from such a comment is adequately covered in Point III of Appellant's initial brief. The application of that law to arguments and statements of prosecutors is likewise adequately covered in Point IV. Appellant's motion for mistrial should have been granted by the trial court and his judgment and sentence should be reversed.

POINT IV

THE CUMULATIVE EFFECT OF THE IMPROPER ARGUMENT AND TACTICS OF THE PROSECUTOR DEPRIVED APPELLANT OF A FAIR TRIAL.

The State's responses to the arguments made by Appellant in this section of the brief fall into two main categories. First, the State points out that most of the errors were not preserved for appellate review by objection or motion. This is true and was recognized by Appellant in his initial brief. Appellant took pains to point out whether the conduct drew an objection or not, and presented the facts necessary to allow this Court to determine whether fundamental error occurred. Appellant's position is that, because this was a "close case," the "unpreserved" errors, when considered with the "preserved" errors, create a situation where the cumulative effect of all the errors deprived Appellant of a fair trial.

The State's second approach is to try to convince this Court that it should approve of the multitude of improper prosecutorial arguments and tactics that occurred below. In the process, the State makes some incredible arguments. For example, the State actually contends that the prosecutor's argument, "I don't know how many of you have ever lost a close family member and had to bury one" was not a Golden Rule Argument. Unbelievably, the State insists that the comment was nothing more than "abstract usage" of the pronoun "you," and that the prosecutor was not trying to curry sympathy from the jury when he used that pronoun. (SB-29). No person with even the slightest familiarity with the English language could accept such an argument.

In a similar vein, the State's brief mischaracterizes the "missing witness" arguments made by the prosecutor. These statements are quoted verbatim in Appellant's initial brief and are not taken out of context as alleged by the State. (SB-31). Unabashedly, the State argues that the following statements were "not an appeal for sympathy or an effort to inflame the jury." (SB-31): "While she can't talk to us today, she did leave enough to name her murderer." (R-4380); "As to the only witness that could actually say she was taken out of the bar it was her. But she can't talk, she cannot talk verbally to us today." (R-4407). The cases cited by Appellant clearly condemn these arguments. The State has feebly attempted to destroy their context and diminish their prejudice with rhetoric.

Regarding the prosecutor's repeated references to Appellant's failure to testify and "explain" the prosecution's evidence, the State argues that, once a defendant calls a witness to testify, the prosecutor can comment on the defendant's failure to testify with impunity. This is clearly not the law, but is the only explanation offered by the State to justify these arguments: "No explanation why he [Appellant] would have fifty-five one-dollar bills in his pocket. (R-3294); "No evidence" that Appellant dropped hamburger juice on his shirt; "No other explanation for that ADA enzyme 1. None." (R-4400-01); "They didn't give you one bit [of evidence] that she was in that jeep." (R-4406); "No explanation of why she was there." (R-4507); "We don't know what he [Appellant] did during that six-day period." (R-4493); "Where is the evidence that he

[Appellant] cashed a check and got fifty one-dollar bills?" (R-4499).

The State argues that the prosecutor was within his rights in arguing that the defense attorneys were trying to create a "diversion" and a "smokescreen" because the defense attorneys pointed out that Casey and Hamilton both had the motive and the opportunity to commit the crime. If this were the law, prosecutors could engage in personal attacks on defense counsel in virtually every case.

With all due respect, the State simply cannot justify the prosecutor's tactics which were deliberately designed to tip the scales of justice in this "close case." Fundamental error has been described as error which "reaches into the very heart of the proceeding" and deprives the defendant of a fair trial, Peterson v. State, 376 So. 2d 1230, 1234 (4th DCA 1979) cert. den. 386 So. 2d 642 (Fla. 1980). Appellant is well aware of the impediments to review imposed when no objection is made at trial. It is also true, however, that a conviction cannot stand in our system of justice when that conviction is founded upon fundamentally unfair proceedings, notable for the free rein given to a runaway prosecutor, and where there is equivocal evidence of guilt against the accused and an abundance of suspicion directed toward other, uninvestigated suspects. The cumulative effect of the errors, which in this case amounted to a catalog of prosecutorial abuse like that in Peterson, rose to the level of fundamental error. A new trial should be granted.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR KIDNAPPING.

On appeal, the State claims that Appellant is arguing the sufficiency of the evidence on the kidnapping conviction "de novo." (SB-36). This is clearly incorrect. At the close of the State's case, Appellant moved for a judgment of acquittal and argued, inter alia:

> MR. KIMMEL: Judge, we would move for judgment of acquittal in the failure of the State to establish the essential elements of all three crimes. The tying of Mr. Suggs to either of the scenes, either of the locations, the bar or where the body was found, are tenuous at best. There must be a proof in the kidnapping, for example, as to the essential elements of forcibly, secretly, by threat, and so forth.
>
> At best, the evidence is that this woman left a well-lighted bar. And if the, if the State is relying on Wally Byars saying that he held a knife to her throat when he walked out the bar, based on what we know about Mr. Byars testimony, in effect, we're relying on a confession when there is no other evidence to tie him to that scene.
>
> The kidnapping case is the strongest case to argue failure of the essential elements because there's, there's just nothing to indicate she was taken out of the bar by force or by threat. Instead, the lack of a struggle, the lack of any evidence of a struggle at the scene goes to the contrary, goes to the reverse conclusion.
>
> *　　　*　　　*　　　*
>
> And if, in fact, if, if an interpretation of Dr. Kielman's testimony might imply that there was a struggle, or even Mr. Byars, that struggle at the scene of death does not establish forcible taking for a kidnapping. It's not a kidnapping if she's killed where

she stands, if they struggle there in one place. (R-3637-38).

How the State can claim that Appellant is raising this issue de novo boggles the imagination. Appellant clearly raised the issue and succinctly stated his point which is unmistakable - that the essential elements of the crime of kidnapping were not proven; in particular, the State did not prove a forcible taking of the victim. The evidence clearly established that there were no signs of struggle at the bar and there was no physical evidence that the victim was forcibly removed from the bar.

On appeal, the only fact the State can cull from the record to suggest a forcible taking is that "Suggs confessed to Wallace Byars that he took Pauline from the bar at knife-point." (SB-36). The State cites page 3400 of the record for this proposition but a close reading of the transcript indicates that Byars was confused about this aspect of his testimony (as he was about most of it). The transcript reflects:

Q. Did the defendant tell you how he got her out of that bar?

A. Yes, sir. He took her out there before. He put a knife to her throat and drug her out of the bar.

(R-3400).

What Byars meant by the statement "He took her out there before" is not clear from the record and Byars' allegation that Appellant said he "drug her out of the bar" is inconsistent with the physical evidence to the contrary.

Furthermore, a confession cannot be used to establish the

essential elements of an offense when the State is unable to prove the corpus delicti of the offense absent the confession. Burks v. State, 613 So. 2d 441 (Fla. 1993). It does not matter whether the Appellant's statements are characterized as a confession or an admission against interest. Id. at 443-44. Before Appellant's statements to Byars could properly be considered, the State "must at least [have shown] the existence of each element of the crime." State v. Allen, 335 So. 2d 823, 825 (Fla. 1976).

As was pointed out in Appellant's initial brief, the essential elements of the kidnapping charge contained within the indictment sub judice were that Appellant kidnapped the victim using "force or threat." (R-11). Significantly, the indictment did not allege that Appellant "secretly" committed the offense. Thus, even if there were evidence from which the jury could believe that Appellant transported the victim to an isolated area, that evidence would not support Appellant's conviction for kidnapping. Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991), cert. denied, ____ U.S. ____, 112 S. Ct 1773, 118 L. Ed. 2d 432 (1992).

Appellant's motion for judgment of acquittal as to the kidnapping charge should have been granted. The jury was improperly instructed that they could find as an aggravating circumstance that the homicide was committed while Appellant was engaged in the crime of kidnapping, when the evidence on that charge was insufficient as a matter of law. (R-4721-22). The judgment of conviction as to Count II should be reversed and Appellant should be granted a new sentencing hearing.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE THE IN COURT IDENTIFICATION OF APPELLANT BY RAY HAMILTON.

The State purports to quote page eighty-two of Appellant's brief as follows:

> The Appellant's sixth point on appeal is a claim that Ray Hamilton's identification of Mr. Suggs was 'tainted' because of an unduly suggestive photo - ID procedure employed by the police. This theory is supported by a claim that Mr. Hamilton 'had never saw or even looked at the person in the bar.' (Brief at 82). (SB-37).

If this Court will review page eighty-two of Appellant's initial brief, it will quickly see that Appellant did not make the claim alleged in the State's brief. The language the State purports to quote from Appellant's brief is not on page eighty-two or any other page. What is patently obvious is that the State is trying to set up a straw man and then knock him down, a tactic that the State repeats throughout its brief. Fortunately, the rules of this Court and principles of fair play preclude this attempt to refashion the facts to suit the State.

In his brief, Appellant candidly recounted the background facts upon which this point on appeal is predicated. Simply put, the facts surrounding the opportunity that Ray Hamilton had to observe the person he identified leave doubt as to the independent basis upon which the subsequent identification was made. When the law enforcement officers took Hamilton into custody, under circumstances where Hamilton thought he was being arrested ("I thought they were gonna book me" (R-1367)), and then showed him a

single photo of Appellant that developed right in front of Hamilton's eyes, there was little doubt that Hamilton would identify the person in the photo. Notably, this was not a situation where there was any urgency that would justify the police action. At the time, Appellant was in custody at the Sheriff's substation.

The fact that Hamilton said there was something white in the back of Appellant's jeep and a red and white cooler was found there, only goes to show that Hamilton may have correctly picked out the vehicle that was at the bar that night. It does not amount to an independent basis for Hamilton's identification of Appellant.

Appellant submits that this Court should not condone the manner in which law enforcement deliberately set out to make a case against him without regard for any semblance of proper police procedure. Frankly, it is inconceivable that any experienced law enforcement officer would expect an identification conducted in this manner to hold up in court. In the past, this Court has not hesitated to exercise its supervisory powers to disapprove of police identification procedures that were fraught with the potential for error and abuse. Stokes v. State, 548 So. 2d 188 (Fla. 1989). Appellant submits that the identification procedure sub judice was deliberately used by the law enforcement officers to ensure that Hamilton would identify Appellant. This conduct should not be sanctioned by this Court. At a minimum, this Court should suppress the identification and remand the case for a new trial.

POINT VII

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE BOOK, DEAL THE FIRST DEADLY BLOW.

Either the State has never seen the book Deal The First Deadly Blow or the State did not bother reading the testimony in the record regarding the book; otherwise the State would not make the unsupported allegation that the book is an "instruction manual on killing people" and a "blueprint for murder." (SB-40,41). The book is neither. It is a "guide for instructors to use to prepare themselves to conduct training of soldiers in the art of instinctive rifle bayonet fighting. It explains the uses of rifle bayonet techniques and describes the basic techniques, positions and training facilities necessary for safe and realistic training." (R-4633). Simply put, the book is a training manual for the military - not some outlaw publication designed to be used for the indiscriminate killing of innocent persons, as the State would lead this Court to believe.

Out of the approximately 160 pages in the book, the prosecutor selected only page 99 to highlight. From the four photographs on that one page, the prosecutor claimed that two depicted wounds similar to those suffered by the victim. (R-4589,4699). The State did not present any evidence (from the medical examiner or anyone else) to establish that the wounds depicted in the book were, in fact, similar to those of the victim. The only attempt the State made to substantiate its claims came when the prosecutor attempted to solicit an opinion from one of the law enforcement officers, an obviously unqualified witness, that the wounds appeared similar.

(R-4629-30). The State made no other claim that anything else about the book had any relevance to this case.

As pointed out in Appellant's initial brief, there was nothing to link Appellant to the book (no fingerprints, etc.); indeed there was no evidence that Appellant had ever read the book. The notebook with Appellant's name in it found on the same shelf (along with a lot of other books) in the living room of Appellant's home cannot establish a link given the fact that Appellant shared the home with his parents, particularly his father who is retired military. (R-4632). Moreover, other than having his name in it, the notebook was not otherwise linked to Appellant for there was no handwriting or fingerprint analysis, or other evidence to establish that Appellant made the notes in the notebook or had otherwise seen or read it. (R-4604).

The State tries to distinguish Mendyk v. State, 545 So. 2d 846 (Fla.), cert. denied, 493 U.S. 984, 110 S. Ct 520, 107 L. Ed. 2d 521 (1989) on the basis that only book "titles" were read to the jury in Mendyk, whereas in the case at bar, the book was introduced. This convoluted logic cannot stand muster. The point of Mendyk is that the introduction of this type of printed material will be closely scrutinized. Such evidence must be excluded even from the penalty phase if not relevant particularly where, as here, the potential confusion and unfair prejudice outweigh the probative value of the evidence.

In a similar vein, in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), this Court held it was error to introduce hearsay during the

penalty phase when the defendant did not have the opportunity to confront and cross-examine the witness. This court explained, "[I]f Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself." Rhodes, 547 So. 2d at 1204. Despite this Court's admonition in Rhodes, the State in the case at bar tells this Court that "Mr. Suggs had the opportunity to deny ownership of the book, knowledge of its contends[sic] of[sic] authorship of the notebook." (SB-41). Thus, the State takes the position (totally contrary to Rhodes) that Appellant could rebut this evidence by taking the witness stand. Neither the Fifth Amendment, nor this Court's prior decisions, require a defendant to testify to rebut otherwise inadmissible evidence.

This case is different from Hitchcock v. State, 578 So. 2d 685 (Fla.), vacated, ____ U.S. ____, 112 S. Ct 3020, 120 L. Ed. 2d 892 (1992). In Hitchcock, the defendant testified during the penalty phase, denying that he committed the crime. For impeachment purposes, the State offered a letter that Hitchcock admitted writing in which he confessed to the crime. Unlike Hitchcock, Appellant never took the stand and therefore the State had nothing to impeach. Deal The First Deadly Blow was not authored by Appellant and therefore is not an admission. Simply put, the book was not relevant and should not have been admitted. Nevertheless, the prosecutor argued to the jury about the book and the trial court found aggravating circumstances based upon it, resulting in reversible error that requires a new sentencing hearing.

POINT VIII

DURING THE PENALTY PHASE, THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES AND IN INSTRUCTING THE JURY ON AGGRAVATING CIRCUMSTANCES THAT WERE NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

A. UNCHARGED AND NONVIOLENT CRIMES.

The prosecutor deliberately injected evidence of two other crimes into the sentencing hearing. The prosecutor's question, "Now, he asked you about what else you saw in the house there and this book being in regards to firearms. Did you find --," (R-4635) was clearly calculated to convey to the jury that Appellant was in possession of firearms. Fortunately, the defense attorney objected to the question, but the prosecutor's intentions were abundantly clear because he told the judge, "I was gonna ask him did he find any firearms in that house." (R-4636). The State tries to justify this highly prejudicial tactic on the basis that the question was withdrawn by the prosecutor. (SB-43). However, the judge never instructed the jury to disregard the question. The prosecutor also elicited testimony that the notebook (which was never offered into evidence) had "details about how to rob someone" (R-4635), when there was no other evidence to establish what those "details" were or their relevancy. Thus, the jury received evidence of nonstatutory aggravating circumstances, contrary to the law. Robinson v. State, 487 So. 2d 1040 (Fla. 1986).

B. WITNESS ELIMINATION.

The State cites page 4625 of the record for the proposition that "Suggs flatly confessed to this factor" and told Taylor that "he was captured in Alabama because he left a living witness." (SB-

44). If this Court will review page 4625 (or any other part of Taylor's testimony), it will be obvious that neither of these assertions is correct. Taylor testified, "He said the case in Alabama he was stupid but this case he was not because he didn't leave a damn witness, . . ." (R-4625). It is clear that Taylor never said that Appellant told him "he was captured in Alabama because he left a living witness." More importantly, Appellant's statements, without more, do not prove "beyond a reasonable doubt" that the "dominant or sole motive for the murder was the elimination of witnesses." Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct 1332, 94 L. Ed. 2d 183 (1987).

The State does not even address Appellant's argument that the prosecutor was the source of additional "evidence" when he told the jury "facts" about the Alabama case that were never presented through the witnesses. On appeal, the State has repeatedly argued that a prosecutor's statements and questions are not evidence, yet this is precisely the "evidence" that the jury heard to establish this aggravating factor. It was clearly error for the prosecutor to testify to the jury and provide details of the Alabama case that are "dehors" the evidence, thus guaranteeing that the jury would find this aggravating factor to exist. The State does not and cannot distinguish Riley v. State, 366 So. 2d 19 (Fla. 1978) or Dufour, 495 So. 2d 154. This aggravating factor was not proven with evidence beyond a reasonable doubt.

C. HEINOUS, ATROCIOUS AND CRUEL.

The State does not dispute that there were only two stab wounds of any consequence in this case. Instead, the State tries to sensationalize those two wounds in order to justify the HAC factor. The State cites the medical examiner's testimony for several "facts" that need to be clarified. First, the doctor did not testify that one of the stab wounds "severed her 'breathing muscle' (R-3377), which kept her from breathing," nor did he say that it "took anywhere from five to ten minutes to slowly choke and bleed to death." (SB-46). What the doctor actually said was that one of the stab wounds "penetrated" the diaphragm. His testimony regarding the time was as follows: "[O]nes life span is very short. Five or ten minutes at the very most." (R-3377-78).

Because virtually all first degree murders involve some sort of injury to the internal organs of the victim, the HAC factor is limited to those cases where the offense is "extremely wicked" or "designed to inflict a high degree of pain;" factors which the evidence failed to establish in this case.

In an effort to salvage this aggravating circumstance, the State cites Sochor v. State, 619 So. 2d 285 (Fla. 1993), for the proposition that "fear and emotional strain can support an 'HAC' finding." (SB-46). There is no evidence, however, that the victim was in "fear" or suffered "emotional strain."

D. COLD, CALCULATED AND PREMEDITATED MANNER.

To justify this aggravating factor, the State goes completely outside the record to make the allegation that "Suggs studied and

kept a notebook containing everything from diagrams of knives to notes on 'how to' commit robbery," and "Suggs studied Deal The First Deadly Blow and murdered Pauline 'by the book.'" (SB-47). There was no evidence that Appellant "studied" anything. There was no evidence that he ever saw or read Deal The First Deadly Blow. The only evidence to link Appellant to the notebook was the fact that his name was mentioned in it; however, the notebook was not introduced into evidence and there is no indication in the record that the things described by the investigators as being in the notebook had anything to do with this case. Thus, there is simply no evidence of a careful and prearranged plan to kill as required by case law. In fact, the State's evidence from Wallace Byars was that Appellant only killed the victim when "[s]he put up a struggle," (R-3400), thus negating the prearranged plan to kill required for this aggravating circumstance.

E. CUMULATIVE EFFECT.

This case involves a seven to five jury verdict for death. In light of the prosecutor's conduct and the lack of evidence on many of the aggravating factors, it is clear that the jury (and judge) improperly considered aggravating circumstances that were either not provided by statute or that were not proven with evidence. Once the improper aggravating circumstances are eliminated, proportionality review should result in a life sentence. In the alternative, a new sentencing hearing should be ordered.

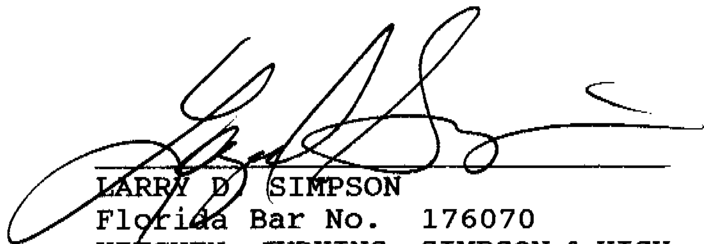
CONCLUSION

This case must be decided based upon the application of established precedent to the facts in the record. The State has failed to distinguish any of the controlling authorities and should not be permitted to rewrite the facts. Based upon the arguments set forth by Appellant, the conviction must be reversed and the case remanded for a new trial.

In the alternative, the death sentence should be vacated and a life sentence imposed or a new sentencing hearing ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to Mark Menser, Assistant Attorney General, Office of the Attorney General, Legal Section, The Capitol, Tallahassee, Florida 32399-1050, this 15th day of September, 1993.



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