IN THE SUPREME COURT OF FLORIDA

ALFRED L. FENNIE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,923

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING A CONTINUANCE AFTER THE LATE DISCLOSURE OF A MATERIAL STATE WITNESS WHICH DEPRIVED THE DEFENSE OF THE OPPORTUNITY TO INVESTIGATE POTENTIAL IMPEACHMENT EVIDENCE TO USE AGAINST THE WITNESS.

With regard to the initial argument that the trial court erred in denying Appellant's motion for continuance, the state argues first that since numerous continuances had been granted "there is less excuse for a party not being ready for trial." (Brief of Appellee at Page 22). This statement completely misses the point. Defense counsel was in fact prepared to go to trial based on the information that he had up to that point been given by the state. It was only when the state changed its case on the eve of trial by choosing to work

out a deal with a codefendant, that defense counsel became unprepared. To say that defense counsel was aware of the codefendant's involvement in the case and therefore could not be prejudiced by his testimony, also misses the point of the argument. Knowing that a codefendant is involved but is not going to testify against your client, is completely different from knowing a codefendant was involved and is going to offer incriminating evidence at trial against your client. Your trial strategy must naturally change. Given the nature and complexities of a capital case, it is simply unreasonable to expect trial counsel to completely alter his entire trial strategy virtually in the middle of trial. As defense counsel noted, without the codefendant's testimony, there is simply no way that the state could put the murder weapon in the hand of Appellant. To say that this new evidence is not substantial and did not significantly affect the outcome of the trial is incredibly naive. The fact that defense counsel may have videotaped the codefendant's trial again has no bearing on defense counsel's preparation for the instant case. Certainly at the trial of the codefendant, defense counsel did not have the opportunity to question the codefendant. A trial is not a substitute for pretrial discovery. Certainly in a discovery situation questions may be asked that may otherwise be inadmissible in a trial setting but nonetheless are vital to the preparation by defense counsel before trial. Defense counsel in the instant case did not have this luxury. Rather, he was forced

to do discovery while conducting the trial. It is simply unrealistic to expect any attorney to be effective given the unfair burden defense counsel had in the instant case.

With regard to the subsequent motion to exclude the testimony of Detective Kimball, the state argues that the court correctly overruled defense counsel objection. Once again, the argument ignores the double standard applied by the trial court in the instant case. On the one hand, the trial court said defense could not have been surprised by this evidence since they knew in advance that Frazier (the codefendant) had testified that the victim had stuck her fingers through a hole in the trunk. On the other hand, however, the trial court bought the idea that the state only just found out about this evidence during the deposition of Mr. Frazier. It cannot be both ways. If the state just found out about it, so did the defense. If the defense knew about it in advance, so did the state. Either way, the trial court's decision in allowing this testimony was error since defense counsel was denied the opportunity to rebut this testimony in any meaningful way. Once again, the situation could have been averted, simply by the trial court granting the continuance asked for when the state announced it had worked a deal with Michael Frazier. That Appellant was prejudiced by the denial of the motion for continuance and the denial of the motion in limine to exclude the testimony of Detective Kimball cannot seriously be disputed. If, as the state argued, such evidence was merely cumulative, one questions why the state even sought to

admit it. If, as the state argues, the error if any is harmless, once again one must question the motives of the state attorney in putting on such evidence. The bottom line in this matter is that Appellant was denied his constitutional right to due process and a fair trial. Appellant is entitled to reversal of his conviction and a remand for a new trial.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE LIMITING INSTRUCTIONS WITH REGARD TO THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS REQUESTED BY DEFENSE COUNSEL.

With regard to the requested instruction on heinous, atrocious and cruel the state argues that no error occurred since the requested instruction "does not differ in any significant way from the instruction actually given." (Emphasis in original, Brief of Appellee at Page 39). A mere comparison of the proposed instruction to the instruction given belies this statement. Paragraph 2 of the requested instruction does cover the same basic instruction as the one given by the trial court. However, both the third and fourth paragraphs are totally lacking from the instruction given by the trial court. These paragraphs were, without question, correct statements of the law and directly applicable to the case at bar. The jury should have been told that in determining whether a crime is heinous, atrocious and cruel they were to consider the victim's knowledge of her impending death. Even the state attorney below agreed that this was the correct statement of the law. (R2022) The fourth paragraph of the requested instruction informed the jury that any acts committed after the death of the victim were not to be

considered by them in determining whether the crime was heinous, atrocious and cruel. Contrary to the state's assertion, this was applicable to the instant case. The condition of the body at the time that it was found had been altered by the elements. Insects had started to eat away at the body. While this presents an extremely gruesome situation, this does not make the actual murder heinous, atrocious and cruel. The jury should have been informed of this. The standard jury instruction given was inadequate.

With regard to the requested instruction on cold, calculated and premeditated, the state argues that the issue somehow is not preserved for appeal. Appellant is at a complete loss to understand this argument. By requesting an expanded instruction on cold, calculated and premeditated, defense counsel was telling the judge that the standard instruction was in fact inadequate to apprise the jury of what is necessary to support this aggravating circumstance. To require defense counsel to additionally file some document attacking the vagueness of the aggravating circumstance itself is unnecessary. If proper instructions are given this aggravating circumstance need not be considered vague. It is only without adequate limiting instructions that the aggravating circumstance becomes constitutionally infirm. The issue on appeal is whether the trial court erred in denying the requested instruction. Appellant is not arguing on appeal that the aggravating circumstance is indeed vague. Appellee does not question the

legal correctness of Appellant's requested instruction on cold, calculated and premeditated. Rather, she seems to indicate that because the trial court found this aggravating circumstance to apply, the standard jury instruction was somehow sufficient. Such a quantum leap in logic is untenable. That the standard jury instruction is insufficient is not seriously debatable in light of the United States Supreme Court's remand in Hodges v. Florida, 113 S.Ct. 33 (1992).

Given the importance of these two aggravating circumstances both to the jury's consideration as well as in the final analysis by the trial court, the failure to give the requested instruction cannot be deemed harmless error. A new penalty phase is required.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND DENYING HIS MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED DURING HIS CLOSING ARGUMENT IN THE PENALTY PHASE ON APPELLANT'S FAILURE TO TESTIFY.

Appellee argues that no error occurred initially because defense counsel prematurely objected. (Brief of Appellee at Page 58). This of course, is ludicrous. Defense counsel objected when the offending words of the prosecutor were uttered. Appellant cannot help but wonder had defense counsel waited until the conclusion of the remarks of the prosecutor before he objected, would the state then be arguing that his objection came too late? Appellee's contention that Appellant's argument is pure speculation seems incredible. The statement objected to was that "with regard to Mr. Frazier's recommendation for life, Mr. Frazier told you that he testified before his jury. They had his testimony to consider when they decided to --" (T2100) What this emphasizes to the jury is that Mr. Frazier did not exercise his right to remain silent but instead chose to testify in his trial. This in turn highlights the fact that Appellant chose to exercise his right to remain silent and not to testify in his trial. However, the jury did in fact have Appellant's own statements before them. Thus, this statement by the prosecutor

could have indeed had the effect of telling the jury that because Frazier testified at his trial, his testimony was more believable than Appellant's.

Appellee also argues that the objection was properly overruled since "the trial court did not interpret the prosecutor's remark to be an improper comment on Fennie's right to remain silent but as a fair comment, based on the documents put into evidence and two prior recommendations, that there should be a distinction made and the life recommendations of the co-defendants should not be considered a mitigating factor." (Brief of Appellee at Page 56). To this assertion, Appellant says, "So what?" The fact that the trial court did not interpret the prosecutor's remark as a comment, in no way means that the jury did not interpret the comment that way. In assessing this issue, this Court's focus must be on whether the comment could have been interpreted by the jury as a comment on the right to remain silent. State v. Kinchen, 490 So.2d 21 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979).

Contrary to Appellee's assertion, there was in fact another way for the state to make its point. In arguing that these life recommendations should not be considered a mitigating factor in Appellant's case, the state attorney could have merely argued that those life recommendations could have been based on the jury's conclusion that the codefendants were not the triggermen. By making the point that way, no implication on anyone's decision to testify or not to testify is involved.

However, the state sought to embellish this fact by unconstitutionally referring to Appellant's failure to testify. This cannot be countenanced. Rather, Appellant is entitled to a fair trial free of any unconstitutional comments by the prosecutor. A new penalty phase is required.

CONCLUSION

WHEREFORE, based on the reasons and authorities presented herein as well as in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the relief requested in the Initial Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Alfred L. Fennie, #B-490989 (44-2164-A1), P.O. Box 221, Raiford, FL 32083, this 14th day of January, 1994.

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