IN THE SUPREME COURT OF FLORIDA

KEYDRICK JORDAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 84,252

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

KEYDRICK JORDAN, Appellant,	)	
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ARGUMENT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ALLOWING IRRELEVANT, PREJUDICIAL, AND INCOMPETENT EVIDENCE TAINTED THE JURY'S RECOMMENDATION OF DEATH.

Appellee is correct in pointing out that in Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), this Court stated that the purpose of a penalty phase is to engage in a "character analysis of the defendant." This Court did **not** hold that a penalty phase should be allowed to degenerate into a wholesale **character assassination** of the defendant. Evidence that would not be admissible during the guilt phase may properly be considered in the penalty phase. Hildwin v. State, 531 So.2d 124, 127 (Fla. 1988). However, this Court has not given prosecutors *carte blanche* in the introduction of **any** evidence at the penalty phase. See, e.g., Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996). In Hitchcock, this Court remanded for resentencing because evidence portraying Hitchcock

as a pedophile was erroneously made a feature of his penalty phase.

> We have held that, to be admissible in the penalty phase, the State's direct evidence must relate to any of the aggravating circumstances. [Citation omitted] Evidence necessary to familiarize the jury with the underlying facts of the case may also be introduced during the penalty phase. [Citation omitted] Additionally, the State may introduce victim-impact evidence pursuant to section 921.142(8), Florida Statutes (1993). [Citation omitted]

Hitchcock, 21 Fla. L. Weekly at S139. This Court held that unsubstantiated charges that Hitchcock was a pedophile became a feature of his penalty phase.

Hitchcock is directly on point in this Court's consideration of Jordan's initial point on appeal. In presenting the testimony of Brown and Strang, and the prosecutor's improper argument based on that testimony, the State **featured** Keydrick Jordan as a sociopath who experiences euphoria from his aggressive behavior. In Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992), this Court noted:

> ...Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Similarly, the testimony of Brown and Strang, although not relating to prior felonies, was the epitome of "vague and unverified information" that Ann Mintner was in "abject terror"

and that as a result thereof, Keydrick Jordan experienced euphoria. Appellant attempts to make a case that the murder was heinous, atrocious or cruel and thus the evidence was admissible to prove that aggravating circumstance. However, Appellant has already lost this battle at the trial level. The gunshot murder of Mintner during an attempted robbery is categorically and legally **not** heinous, atrocious or cruel. Contrary to Appellee's assertion, the question is the **admissibility** of the testimony, not the **weight** given to the evidence. In fact, in ruling that the State failed to meet even a threshold level of proving the heinousness factor, the trial court called the basis of Brown's testimony to be **so deficient** that it had no weight. (T2588-93)

Appellant still maintains that the testimony of Ms. Brown and Dr. Strang was irrelevant, prejudicial, without proper predicate, and invaded the providence of the jury. Additionally, the testimony became a feature of the trial. The evidence is analogous to the "pedophile profile" testimony condemned in Gay v. State, 607 So.2d 454 (Fla. 1st DCA 1992). See also Hadden v. State, 21 Fla. L. Weekly D405 (Fla. 1st DCA February 14, 1996), and Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996).

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE GRANTING OF THE STATE'S PETITION FOR WRIT OF CERTIORARI PREVENTED KEYDRICK JORDAN FROM ESTABLISHING THAT THE PROSECUTOR'S DECISION TO SEEK THE DEATH PENALTY IN THIS CASE WAS BASED, AT LEAST IN PART, ON RACIST MOTIVES.

Appellee claims that Jordan's claim is procedurally barred. Appellee asserts that after the Fifth District Court of Appeal granted the State's Petition for Writ of Certiorari and denied Jordan's Motion for Rehearing, Jordan could have and should have appealed to this Court. The Florida Rules of Appellate Procedure provide no right of direct appeal to this Court in such a situation. Very limited discretionary review was the only avenue available to Jordan after his loss in the Fifth District Court of Appeal. This Court no longer has jurisdiction to entertain an extraordinary writ of certiorari. Under the circumstances, Jordan was not required to pursue a futile act in an attempt to gain review from this Court.

Appellee appears very concerned about Appellant's contention that Jordan's guilty plea in the Reed case had no bearing on the resolution of the Mintner case. The plea in the Reed case had no bearing on the **resolution** of the Mintner case at the trial level. Jordan tried to plead guilty to both cases in a "package deal" that would have netted him consecutive life sentences. The State rejected that offer and Jordan chose to plead guilty as charged to one of the murder counts. The State picked the Reed case (black victim) to offer life, while still seeking death in the

Mintner case (white victim). In pointing out the lack of connection between the resolution of the two cases, Appellant was taking issue with the opinion of the Fifth District Court of Appeal. The State agreed in its reply to Jordan's Motion for Rehearing that, indeed, the plea resolution of the Reed case had no bearing on the resolution of the Mintner case. (SR171-76) Now the State seems to have inappropriately and contradictorily backed away from that conclusion. This makes no sense.

The State also attempts to make much hay out of the fact that, following an evidentiary hearing, the trial court concluded that Appellant did not meet the threshold level of proving racism in the State's decision to seek the death penalty. Appellant wishes to emphasize that the trial court reached this conclusion only after the Fifth District Court of Appeal had curtailed Jordan's discovery on the issue. As a result of the appellate ruling, the trial court felt that its hands were tied and, as a result, limited Jordan's presentation of the evidence. (R514-17) For this reason, Appellant framed this point on appeal as one taking issue with the opinion of the Fifth District Court of Appeal. The trial court ended Jordan's discovery only as a result of the appellate ruling.

This Court will not be the only court wrestling with a decision concerning racism and selective prosecution. On February 26, 1996, the United States Supreme Court heard oral arguments in Armstrong v. United States, which was decided adversely to the defendants in United States v. Armstrong, 21

F.3d 1431 (9th Cir. 1994). Armstrong deals with harsher penalties for and selective prosecution of black defendants dealing in "crack" rather than powder cocaine. This Court may wish to keep an eye on a pronouncement from the United States Supreme Court on the issue.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE PROSECUTOR.

The State contends that the wording of Jordan's taped confession about being "tore up" concerns matters properly raised in rebuttal. The State argues that their rebuttal challenged Dr. Phillips' conclusion that Jordan was intoxicated when he murdered Ann Mintner, and therefore, that the shooting was unintentional. (Answer Brief, p. 63) As Appellant pointed out in the Initial Brief, John Parks' testimony was not proper rebuttal in that Dr. Phillips testified that the shooting was **not planned** rather than **unintentional**. The murder was incidental to the robbery and resulted from Jordan's explosive personality disorder. (T2483-87) Defense counsel objected vehemently to the State calling John Parks in rebuttal. Appellant also renewed his motion to disqualify Ashton. The trial court denied the motion, overruled the objection, and allowed the tape to be played. (T2456-57,2482-95) Appellant contended that Jeffrey Ashton spoke the first "no" in answer to his own question as to whether or not Jordan did any other drugs or drank any alcohol after 2:00 a.m. (R1240; T2490, 2501-8,2761-62; Defense Exhibit #5) Even during closing argument, Ashton objected to defense counsel's argument on this very issue. (T2762-63) The trial court ultimately sustained Ashton's objection. This was the culmination of Jeffrey Ashton's personal involvement in the case. It

crystallizes the clear necessity of disqualifying Jeffrey Ashton. Appellee writes, "...even if the trial court did error [sic] in failing to disqualify the prosecutor, it would be harmless beyond a reasonable doubt, because a different prosecutor would have had the exact same evidence...". (Answer Brief, p. 64) Although a different prosecutor **would** have had the exact same evidence, a different prosecutor might have offered a plea to life, conducted a less "bitter" prosecution, and could not have personally vouched for what he did or did not say during his interrogation of Keydrick Jordan. That is the difference.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF SAM TORY WHERE APPELLANT LATER EXPLAINED THAT HE DID NOT INTEND TO KILL THE VICTIM.

Even if this Court accepts the State's argument on this point, Professor Ehrhardt's analysis appears to be based primarily on **fairness**. On Sunday morning, Jordan told Tory that he had "popped" somebody. The following night, Jordan again told Tory that he had "popped someone," but explained that the gun "just kept going off" and that he did not intend to kill Ann Mintner. Jordan made the same statement to Tory approximately thirty-six hours apart. In the second statement, Jordan repeated and expounded upon his original statement that he "popped someone." It appears to this writer that the exclusion of the exculpatory portion of Jordan's second statement is extremely artificial and very unfair. Under a proper analysis, the trial court should have allowed the testimony. Johnson v. State, 653 So.2d 1074 (Fla. 3d DCA 1995), is indistinguishable. Johnson gave two statements to the police that were clearly separated in time. As in this case, "standing alone, the earlier statement left the jury without a complete picture of the defendant's behavior." Johnson, 653 So.2d at 1075.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE THAT FUTURE LEGISLATION MIGHT RESULT IN JORDAN'S RELEASE FROM PRISON IF JORDAN WERE SENTENCED TO LIFE.

Appellant offered evidence that, in all likelihood, Keydrick Jordan would never be released from prison if the trial court sentenced him to life. Over defense objection, the State elicited testimony that "all laws" are subject to change in the future. (T2466-68) The trial court should have sustained Appellant's objection that the testimony was "speculation." The jury and the trial court were sentencing Keydrick Jordan for first-degree murder under today's law. Future action by the legislature would have no effect on Keydrick Jordan's sentence.

The objectionable testimony is analogous to the improper argument that this Court recently disapproved in Hitchcock v. State, 21 Fla. L. Weekly S139 (Fla. March 21, 1996). Hitchcock claimed that he was prejudiced by the State's argument that if given a life sentence, he would be eligible for parole after twenty-five years. Because the resentencing occurred so close to the expiration of the twenty-five year sentence, the State's argument unfairly prejudiced Hitchcock. Hitchcock, at S140. This Court directed the State not to make a similar argument upon remand.

The objectionable testimony in Jordan's trial was fanciful and speculative. The trial court compounded the error by

sustaining the State's objections when Appellant attempted to argue that Jordan would never be released from prison if he were sentenced to life. (T1663-66,2778-82) The trial court also erred in denying Jordan's request for a jury instruction on this issue. (T2583-86) The cumulative effect of these errors resulted in a tainted jury recommendation for death.

CONCLUSION

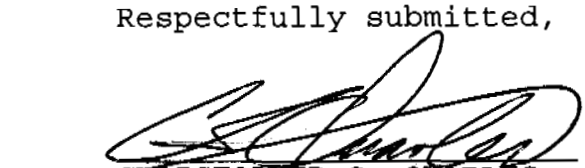
Based upon the foregoing cases, authorities, policies, and arguments, as well as those set forth in the Initial Brief, Appellant requests the following relief:

As to Points III, IV, V, and VI, vacate the convictions and sentences and remand for a new trial;

As to Point II, vacate the death sentence and remand for further discovery on the issue of racism; and

As to Points I, VII, VIII, and IX, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, remand for a new penalty phase.

Respectfully submitted,



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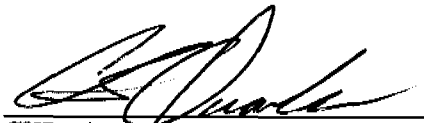
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Mr. Keydrick Jordan, #138294 (43-1192-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 18th day of April, 1996.



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