IN THE SUPREME COURT OF FLORIDA

ANDREA HICKS JACKSON,

Appellant,

v. **CASE NO. 93, 925**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant relies on her Initial Brief to reply to the State's Answer Brief, with the additional arguments presented in this Reply Brief concerning Issues I, II and III.

Undersigned counsel certifies that this brief has been prepared using 12 point, Courier New, a font which is not proportionally spaced.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN RESENTENCING JACKSON WITHOUT A HEARING AND IN DENYING JACKSON HER REQUEST TO BE PRESENT AT SENTENCING IN VIOLATION OF DUE PROCESS OF LAW.

The State argues that the nature of this Court's remand was limited -- something less than a resentencing that did not require a hearing or Jackson's presence when the trial court again resentenced her to death. To the contrary, this Court's previous decision in this case explicitly vacated the death sentence and remanded to the trial court for resentencing:

> Because the instant sentencing order does not meet that requirement, we remand to the trial court for a reweighing and resentencing to be conducted within 120 days. We direct the trial court to reweigh the aggravating and mitigating circumstances, and if the trial court again determines that death is the appropriate penalty, the court must prepare a sentencing order that expressly discusses and weighs the evidence offered in mitigation in accord with *Campbell, Ferrell,* and their progeny.
>
> * * * *
>
> For the reasons set forth herein, we vacate Jackson's sentence and remand to the trial court to reweigh the aggravating and mitigating circumstances and resentence Jackson in compliance with *Campbell* and its progeny.

Jackson v. State, 704 So.2d 500, 507, 508 (Fla. 1997).

Assuming for argument, that the remand was limited solely to the entry of an new order, this Court has recently held in Reese v. State,(II) 24 Fla. Law Weekly S100 (Fla. 1999), that a hearing with

an opportunity to be heard and the right of allocution is, nevertheless, required. The remand in this case is broader than the one issued in Reese. In Reese, this Court stated the remand as follows:

> We remand to the trial court, however, for the entry of a new sentencing order expressly weighing all mitigating evidence presented. The sentencing order shall be entered within thirty days of the issuance of this opinion.

Reese v. State (I), 694 So.2d 678, 685 (Fla. 1997). This Court expressly vacated Jackson's death sentence and remanded for a resentencing. Jackson's resentencing without a hearing and without her presence violated Jackson's due process rights.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN EVALUATING THE MITIGATING EVIDENCE, BASING FACTUAL CONCLUSIONS ON SPECULATION AND THE COURT'S PERSONAL OPINIONS WHICH CONTRADICTED WELL ESTABLISHED PSYCHOLOGICAL PRINCIPLES, AND REJECTING MITIGATING CIRCUMSTANCES WITHOUT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE DECISION TO REJECT THE MITIGATING FACTOR.

On page 20 of the answer brief, the State urges that Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993), is irrelevant to this case. Jackson cites Alamo Rent-A-Car, and the cases cited in that opinion, Romero v. Waterproofing Systems of Miami, 491 So.2d 600 (Fla. 1st DCA 1986) and Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984), for the principle that a judge can not rely on personal opinion or personal lay experience to reject the opinion of an expert witness without violating the due process rights of the litigants. As discussed in the initial brief, this is precisely what the trial judge did in this case. Initial Brief at 56-61, 66-68.

Recently, the Fourth District Court of Appeal reversed a criminal conviction because the prosecutor argued his personal opinion to the jury in asserting that a drug did not exist which would have explained the defendant's behavior. Jones v. State, 24 Fla. Law Weekly D704 (Fla. March 17, 1999). At trial, the defendant presented witnesses who testified that the defendant began acting strangely shortly after consuming a fruit punch drink at a party late in the afternoon. The defendant did not use drugs

or drink alcohol. Although the State did not present any evidence about there being no drugs which could have been slipped into the defendant's drink to explain his later behavior, the prosecutor argued, "There is no controlled substance, no prescription drug out there that causes anger." Ibid. at D705. Reversing for a new trial, the Fourth District Court held it was prejudicial error to allow the prosecutor to argue his personal opinion about the availability of any drug which could have caused the defendant's irrational behavior. The appellate court wrote:

> ...Absent from the evidence at trial is any testimony suggesting that there are no controlled substances or prescription medications that could cause the defendant's behavior. Despite that absence, the state opined that no such drug existed. It is reasonable to believe that the jury placed considerable weight upon the prosecutor's opinion resulting in prejudice to the defendant. Pacifico v. State, 642 So.2d 1178, 1184 (Fla. 4th DCA 1994). The objected to argument of the prosecutor clearly violates rule 4-3.4(e) of the Rules Regulating The Florida Bar....

Jones, 24 Fla. Law Weekly at D705. Just as a prosecutor is not free to argue his personal opinion about a subject to the jury, a trial judge is not free to rely on his personal opinion about a subject and substitute his opinion for that of the expert witnesses who testified at trial. See, Alamo Rent-A-Car v. Phillips.

On page 22 of the Answer Brief, the State suggests that references to the authoritative articles and books in the field of psychology and psychiatry in the initial brief should be stricken because they were not referenced in the lower court. Jackson cites these authorities to demonstrate that the expert testimony

presented in the trial court was consistent with the recognized and authoritative research in the field of psychology and psychiatry and the trial court's personal opinions and views on the subject were inconsistent and contrary to the these authorities. Copies of the cited material were included in the appendix for this Court's convenience. David Finkelhor, The Trauma of Child Sexual Abuse, in Lasting Effects Of Child Sexual Abuse, edited by Gail Elizabeth Wyatt & Gloria Johnson Powell, Sage Publications copyright 1988, pp. 61, 72-73. (Initial Brief Appendix E); Trauma And Recovery, by Judith Lewis Herman, M.D., Basic Books copyright 1992, pp. 39-40. (Initial Brief Appendix F); Diagnostic And Statistical Manual Of Mental Disorders, American Psychiatric Association, copyright 1994, section 309.81, p. 428. (Initial Brief Appendix H); Bruce D. Perry, M.D.,Ph.D., in his work Memories of Fear, published as a chapter in Splintered Reflections: Images of the Body in Trauma, edited by J. Goodwin and R. Attias, Basic Books (1999)(Initial Brief Appendix G).

ISSUE III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Initially, the State relies on this Court's previous decision in Jackson's case concluding that the trial court did not abuse its discretion in finding CCP applicable. Jackson v. State, 704 So.2d 500, 504-505 (Fla. 1997). Answer Brief at 36-44. As Jackson

noted in the Initial Brief at pages 68-69, the trial court has imposed a new sentence on this resentencing. The trial court has made new and additional finding regarding the CCP factor. This is a new sentence now before this Court for review. E.g., Lucas v. State, 417 So.2d 251 (Fla. 1982). Previous decisions regarding whether an aggravating circumstance is applicable or inapplicable are not binding on a later new sentence imposed on a resentencing or on this Court's appellate review of the new sentence. See, Phillips v. State, 705 So.2d 1320, 1322 (Fla. 1997); Mann v. State, 453 So.2d 784 (Fla. 1984). The trial court's sentencing order on resentencing now reveals what was not apparent on the trial court earlier, less detailed sentencing order -- that the trial court did indeed abuse its discretion in finding the CCP circumstance applicable. See, Initial Brief at 71-81.

This Court's recent decision in Hardy v. State, 716 So.2d 761 (Fla. 1998), where this Court reversed a finding of CCP and reversed a death sentence as disproportionate, is on point. Sergeant James Hunt with the Palm Beach Sheriff's Office investigated at alarm call at a bank. He stopped four young men, Hardy and three others, and began to pat them down for weapons. Hardy was carrying a stolen .38 caliber pistol. Before Hunt search Hardy and while he searched one of the others, Hardy pulled his gun and shot Hunt in the head twice at close range. Hardy also took the officer's weapon. Hardy then fled and later shot himself in an attempt to commit suicide. This Court concluded that the finding

of CCP was improper because the evidence of Hardy's actions in shooting the officer were "just as likely that Hardy panicked and shot the officer as it is that his actions were the result of calm and cool reflection." Hardy, 716 So.2d at 766. In the opinion, this Court explained,

> With respect to coldness, the record establishes that on the night of the murder Hardy and his three companions were driving around until their car broke down. At that time, all four men exited the car. Hardy took with him a .38-caliber gun, which had been stolen from Joseph Ybarra's residence. He attempted to give the gun to one and then another of his companions, but both refused to take it. Shortly thereafter, Hardy and his companions were stopped by Sergeant Hunt. Glen Wilson, one of Hardy's three companions, described Hardy at this time as "paranoid" and "flinching." Hardy knew the officer would find the gun, and it appears that he made a spur-of-the-moment decision to shoot the officer. Moreover, immediately following the shooting, Hardy attempted to take his own life. Suicide is not an action characteristic of someone who reflected on his decision to extinguish the life of another. Accordingly, it is just as likely that Hardy panicked and shot the officer as it is that his actions were the result of calm and cool reflection.
>
> In finding the murder was calculated, the trial court relied primarily on the prior statement made by Hardy. This was a very general statement made several weeks before the murder in reference to what Hardy would do if he were involved in a situation similar to that of Rodney King, who was beaten by police officers. We cannot construe this as sufficient evidence of a cold, calculated, and premeditated plan regarding what Hardy would do if he were ever confronted by a police officer under the circumstances of the present case.

Hardy, 716 So.2d at 766. Hardy's death sentence was reversed as disproportionate because without CCP only one aggravating circumstance remained.

As in Hardy, the evidence in this case establishes that the homicide of Officer Bevel is just as likely a panicked shooting on the spur-of-the-moment as it is a product of calm and cool reflection. See, Initial Brief at 81-91. The trial court erred in finding the CCP aggravating circumstance. Additionally, as in Hardy, without the CCP circumstance, only one aggravating circumstance remains and Andrea Jackson's death sentence is disproportionate. See, Initial Brief, Issue IV.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Andrea Jackson asks this Court to reverse her death sentence and remand her case to the trial court with directions to impose a life sentence. Alternatively, she asks that her sentence be reversed and her case remanded for a new penalty phase sentencing before a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Carolyn M. Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32399-1050, and by U. S. Mail to Appellant, on this ____ day of June, 1999.

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