

IN THE SUPREME COURT OF FLORIDA  
CASE NO: SC15-391

*(Lower Court Case No:09-004654 CF10A)*

JAMES HERARD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

---

**SUPPLEMENTAL  
INITIAL BRIEF OF APPELLANT  
JAMES HERARD**

---

**ON APPEAL FROM THE CIRCUIT COURT OF THE  
17<sup>th</sup> JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA  
CASE NO. 09-004654 CF10A  
HONORABLE PAUL BACKMAN, CIRCUIT JUDGE**

---

LAW OFFICES OF RICHARD ROSENBAUM  
Richard L. Rosenbaum, Esq.  
Fla. Bar No: 394688  
315 SE 7<sup>th</sup> Street, Suite 300  
Fort Lauderdale, FL 33301  
Telephone (954) 522-7007  
Facsimile (954) 522-7003  
Primary Email: Richard@RLRosenbaum.com  
Secondary Email: Pleadings@RLRosenbaum.com

## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Citations and Authorities	ii
Preliminary Statement	1-3
Summary of Argument	3-5
Arguments:	
I.    THE TRIAL COURT REVERSIBLY ERRED BY REFUSING TO SUPPRESS JAMES HERARD'S STATEMENTS PURSUANT TO THE 5th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION AND <i>MIRANDA v ARIZONA</i> AS THEY WERE NOT VOLUNTARY, WERE MADE AFTER HE REQUESTED COUNSEL, AND SUBSEQUENTLY AFTER HIS COUNSEL INVOKED HIS RIGHT TO COUNSEL AND TO REMAIN SILENT	5-10
Conclusion	11
Certificate of Type, Size, and Font	12
Certificate of Service	12

## TABLE OF CITATIONS AND AUTHORITIES

### Page

#### **Cases**

<i>Brancaccio v. State</i> , 773 So. 2d 582 (Fla. 4th DCA 2000) .....	6
<i>Brewer v. State</i> , 386 So. 2d 232 (Fla. 1980).....	5
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1995) .....	11
<i>Jacobs v. Singletary</i> , 952 F.2d 1282 (11th Cir.1992).....	6
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455 (2012).....	11
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	in passim
<i>Ramirez v. State</i> , 739 So. 2d 568 (Fla. 1999) .....	5
<i>United States v. Nash</i> , 910 F.2d 749 (11th Cir.1990) .....	6

#### **Other Authorities**

Rule 9.045, Fla.R.App.P.....	12
Rule 9.210(a)(2), Fla.R.App.P.....	12
Section 934, Fla.Stat.....	9
Rule 2.520, Florida Rules of Judicial Administration.....	12
Rule 2.520(a), Florida Rules of Judicial Administration.....	12

## **PRELIMINARY STATEMENT**

This Supplemental Brief supplements the arguments previously lodged in support of Issue I of the Amended Initial Brief.

Immediately before Oral Argument was scheduled to be conducted before this Honorable Court, counsel for the State and defense determined that James Herard's statements to law enforcement, introduced by the State at trial, were not correctly transcribed by the Court Reporter.

The Supplemental Trial Transcripts prepared contains corrected transcripts of a portion James Herard's statements introduced at trial by the State. Specifically, a transcript of State Exhibit 39 is contained in pages 332 – 534. A transcript of State Exhibit 41 is contained in pages 535 – 622. References to the Supplemental Trial Transcripts shall be indicated by "STT" followed by the appropriate page number (STT \_\_\_\_).

The following symbols, abbreviations and references will be utilized throughout this Amended Initial Brief of Appellant:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, James Herard.

The term "Appellee" shall refer to the prosecution in the Circuit Court, the State of Florida, and the Office of the Attorney General, on appeal.

The Record in this appeal consists of eight (8) volumes of pleadings contained in pages 1-1417. A Corrected Supplemental Record has also been prepared containing pages 1776-3023. References to the original Record and Corrected Supplemental Record shall be indicated by an "R" followed by the appropriate PDF page number (R ).

References to the transcripts of the trial court proceedings, including transcripts of the pre-trial hearings, trial, penalty phase, *Spencer* hearing and sentencing consist of volumes 9-57, contained in pages 1 – 3382. References to the transcripts shall be indicated by a "T" followed by the appropriate PDF page number. (T ).

References to the Exhibits introduced at trial are contained in Volume 58 contained in pages 1570 – 1775 and shall be designated by "EX#" followed by the page number (EX#\_\_\_)

The corrected supplemental trial transcripts are contained in pages 1-259 and shall be referenced by "TT" followed by the appropriate page number (TT \_\_\_).

References to the Amended Initial Brief shall be indicated by an "IB" followed by the appropriate page number.

All references to the Amended Answer Brief of Appellee, State of Florida, shall be referenced to as “AB” followed by the appropriate page number (AB ).

All emphasis indicated have been supplied by Appellant unless otherwise specified herein.

### **SUMMARY OF ARGUMENT**

I. The trial court reversibly erred by refusing to suppress James Herard’s statements which were not freely, knowingly, and voluntarily made in contravention of 5th and 14th Amendments to the United States Constitution, applicable portions of the Florida Constitution and *Miranda v. Arizona*. Specifically, the defense objected to admission of statements James Herard made to various law enforcement officials from December 2, 2008, through December 4, 2008.

At the suppression hearing, it became clear that the DVD of the interrogation was started and stopped on many occasions during the questioning of witnesses. From the Record, it is impossible for this Court to determine which portions of the DVD the witnesses or counsel were referring to at the time. Thus, the statements of James Herard read as “gobbley gook.” When initially interrogated by the Lauderhill Police, James

Herard invoked his right to counsel and stated that he wanted an attorney. Nevertheless, the officers went forward with questioning once they claimed it appeared that James Herard did not want to wait for his attorney.

Further, when the Lauderhill detectives finished questioning the Defendant, he was transported to the Broward Sheriff's Office via a Sunrise Police Department patrol car, and thereafter was questioned by a variety of detectives throughout the early morning and afternoon of December 3, 2008. A videotaped statement taken of James Herard, approximately 12 hours in length, was admitted into evidence. The detective entered and re-read the Defendant his *Miranda* warnings and James Herard allegedly agreed to speak with law enforcement. Shortly thereafter, James Herard asked to speak with his cousin. The call was made, the conversation put on speaker mode, and James Herard's cousin told him that he should speak to the detective.

The officers did not answer the door of the interrogation room when James Herard knocked on two occasions, and James Herard was forced to urinate in a McDonald's cup as he was not let out of the interrogation room to go to the bathroom. Finally, after defense counsel invoked James Herard's rights to counsel and to remain silent at James Herard's Initial

Appearance, he was again interviewed and another statement obtained. Based upon the totality of the circumstances, the statements made by James Herard were involuntary, made under coercive circumstances, and should not have been admitted at trial. The detectives questioning James Herard utilized the controversial "Reid Technique" known for prompting false confessions, and error occurred warranting reversal and remand for new trial.

## ARGUMENTS

- I. **THE TRIAL COURT REVERSIBLY ERRED BY REFUSING TO SUPPRESS JAMES HERARD'S STATEMENTS PURSUANT TO THE 5<sup>th</sup> AND 14<sup>th</sup> AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *MIRANDA v ARIZONA* AS THEY WERE NOT VOLUNTARY, WERE MADE AFTER HE REQUESTED COUNSEL, AND SUBSEQUENTLY AFTER HIS COUNSEL INVOKED HIS RIGHT TO COUNSEL AND TO REMAIN SILENT**

### **Standard of Review**

"The State bears the burden of proving that the waiver of the *Miranda* rights was knowing, intelligent and voluntary." *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999). Likewise, the State has the burden to show, by a preponderance of the evidence, that Appellant's oral confession was freely and voluntarily made. See *Brewer v. State*, 386 So. 2d 232, 236 (Fla. 1980). [T]he ultimate issue of voluntariness is a legal

rather than factual question." *Ramirez*, 739 So. 2d at 575. Therefore, the appellate Court has *de novo* review of these legal issues. See *Brancaccio v. State*, 773 So. 2d 582, 583 (Fla. 4th DCA 2000).

In the federal context, a district court's findings of fact regarding a motion to suppress statements is to be respected unless clearly erroneous, but the application of law to those facts is reviewed *de novo*. *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992); *United States v. Nash*, 910 F.2d 749, 752 (11th Cir. 1990).

### **Facts**

The Supplemental Trial Transcripts in this case reflect portions of State Exhibits 39 and 41 introduced at trial. Originally, the Record on Appeal contained an incorrect transcript of the exhibits. That was a result of redactions to James Herard's statements to law enforcement which were later used at trial. The exhibits at issue were introduced through the lead detective in the case, Det. Trevor Goodwin.

James Herard raises a number of issues associated with his claims surrounding the State's use of James Herard's statements at trial. James Herard contends that the statements were not voluntary, were made after

he requested counsel, and subsequently after his counsel invoked his right to counsel and to remain silent.

James Herard asserts that the trial court erred when it denied his Motion to Suppress Statements made to various police agencies, arguing that the statements were not voluntary. He also contends that he invoked his *Miranda* rights and did not reinitiate contact with the police and further argues that the police were required to give him another full *Miranda* warning and waiver of his rights before the interview proceeded if he did reinitiate contact. He also contends that a formal in-court Invocation of Rights prohibited law enforcement from initiating contact and interrogating him, in custody, after the invocation.

At issue is a videotaped interrogation of James Herard by law enforcement. At the beginning of his interrogation by Det. Ericka Williams, James Herard does not contest that he was informed of his rights per *Miranda* before the questioning began. When the detective asked James Herard if he wanted to speak to her without an attorney, James Herard specifically stated "I don't agree to that." The detective stated "that's fine" and was preparing to leave when James Herard asked how long he had to wait to see an attorney. The State contends that at approximately the 54

minute mark on the DVD James Herard said he wanted to talk to law enforcement.

In the Supplemental Trial Transcripts, Exhibit 39, Det. Trever Goodwin was on the witness stand and the State in the midst of publishing a DVD of James Herard's statement to law enforcement. At the point the DVD was started, the detective was questioning James Herard concerning the Sunrise Police Department. (STT 337-43) James Herard repeatedly denied being the individual with a shotgun who jumped over the counter and took the money. (STT 343). The detective constantly talked over James Herard as he was trying to respond to questioning. James Herard asked to take breaks in the questioning. (STT 344).

Det. Link entered the interrogation room and Det. Goodwin stated that he and James Herard were done talking about Sunrise and began asking questions concerning the Tamarac robbery (STT 346). The officers allowed James Herard to try to call his girlfriend in Gainesville, FL. (STT 350). He was unable to get through to her.

James Herard denied being involved in the Tamarac case. He told the detectives that he wasn't there. (STT 351). He admitted that his car was there, but he wasn't. (STT 352). He was adamant that he was not the killer.

(STT 360). (I ain't kill nobody") He didn't know the type of ammunition used in the crimes. (STT 369). He stated "[T]his isn't my work." (STT 371). (I wouldn't do that") (STT 373).

Further, James Herard was asked whether he shoots people and responded that he had never shot anyone in a robbery. (STT 381). He denied being in Delray at the time of the crimes. (STT 389). He denied knowing anything about a 7-11 robbery. (STT 406). He called the officers' questions "crazy." (STT 401). He said that everything he said earlier (when he confessed) "was a lie." (STT 410). He claimed he and his alleged accomplices were "set up." (STT 417). Nevertheless, law enforcement continued to ask James Herard about his – and others – involvement in robberies and murders. (STT 427). During the statement, the defense renewed it's objection to the recording under Section 934, Fla.Stat. (STT 483).

When Det. Brena entered the interrogation room, she told James Herard that she was investigating the Tamarac Dunkin Donuts case. (STT 520).

Exhibit 41 was also published to the Jury. (STT 536). Det. Hardy was questioning James Herard concerning events in Lauderhill, FL. (STT 537).

James Herard advised that he knew nothing about that robbery/murder. (STT 537-538). James Herard told the detective that to say he was involved would be a lie. (STT 540; 543).

Subsequently, other detectives came in and out of interrogation asking James Herard questions. (STT 552; 592-593). His version of events was somewhat inconsistent with his previous statements. (STT 564). At other times, he admitted being the gunman. (STT 567). And not. (STT 576; 585; 589). After approximately 22 hours of questioning, the officers left. (STT 621).

**Argument:**

The Supplemental Trial Transcripts recently filed with the Court change the statements of James Herard introduced to the Jury to a slight extent, the Appellant maintains that the law and argument submitted with and contained in the Amended Initial Brief are applicable to this Supplemental Initial Brief, and incorporates the same herein by reference.

The Appellant relies on previous argument and authority previously submitted to the Court as to the issues contained herein.

## CONCLUSION

Death is indeed different. *Harmelin v. Michigan*, 501 U.S. 957 (1995); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012). It is unwarranted in this case. The jury recommended imposition of the death penalty by a vote of 8-4, and this case is in the “pipeline” of cases wherein, at a minimum, re-sentencing is required.

Based upon the foregoing cases, authorities, policies and arguments, the Appellant, James Herard, respectfully requests this Honorable Court vacate the sentence of death and remand with directions that the trial court dismiss the charges or order a new trial as to Issue I, order a new trial as to Issues II and III, and vacate the sentence of death and remand with directions that the Appellant receive a Life sentence or re-sentencing as to Issue IV.

**CERTIFICATE OF COMPLIANCE WITH RULE 9.045, FLA. R. APP. P.  
AND RULES 2.250 AND 2.50(a),  
FLORIDA RULES OF JUDICIAL ADMINISTRATION**

Pursuant to Rule 9.045, Fla.R.App.P. and Rules 2.520 and 2.520(a), Florida Rules of Judicial Administration, the Appellant certifies that this document is typed in 14 point, Arial.

This document complies with the type-volume limit of Rule 9.045, Fla.R.App.P. because, excluding the parts of the document exempted by Rule 9.045, Fla.R.App.P. this document contains 2,025 words from the Statement of the Case to Conclusion.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on **July 31<sup>st</sup>, 2023**, I electronically filed the foregoing with the Clerk of the Court using the eDCA system and forwarded an electronic copy via email to Office of the Attorney General (CrimAppWpb@myfloridalegal.com).

Respectfully submitted,

LAW OFFICES OF RICHARD ROSENBAUM  
Primary Email: Richard@RLRosenbaum.com  
Secondary Email: Pleadings@RLRosenbaum.com

**S/RICHARD L. ROSENBAUM**

Richard L. Rosenbaum, Esq.  
Fla. Bar No: 394688  
315 SE 7<sup>th</sup> Street  
Suite 300  
Fort Lauderdale, FL 33301  
Telephone (954) 522-7007  
Facsimile (954) 522-7003