IN THE SUPREME COURT OF FLORIDA

HOWARD S. AULT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC00-863
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_________________________	)	

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant will rely on his Initial Brief and add the following. He will use the symbol "AB" for the Answer Brief of Appellee and IB for his Initial Brief.

STATEMENT OF THE CASE

Appellant relies on the Statement of the Case as put forth in the Initial Brief.

STATEMENT OF THE FACTS

Appellant relies on the Statement of the Facts as put forth in the Initial Brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING MR. AULT'S MOTION TO SUPPRESS.

Appellee relies on Sapp v. State, 690 So. 2d 581 (Fla. 1997); State v. Guthrie, 692 So. 2d 888 (Fla. 1997) (which overruled State v. Guthrie, 666 So. 2d 562 (Fla. 2nd DCA 1997); and Hess v. State, 794 So. 2d 1249 (Fla. 2001) for its argument that the trial court was correct in denying Mr. Ault's Motion to Suppress his statements AB14-15. However, all of these cases are distinguishable from the current case. In Sapp, the defendant invoked his rights on an unrelated robbery case at first appearances and then was interrogated on a homicide case one week later. 690 So. 2d at 582. In Guthrie the defendant had invoked his rights at first appearances on an unrelated case seven hours before being interrogated on a sexual abuse case. 666 So. 2d at 562- 3. In Hess, the defendant contacted the police and requested to speak to them after invoking his rights on an unrelated charge. 794 So. 2d at 1259 fn. 12. In the present case the police approached Mr. Ault after he had invoked his rights IT20-22.

Appellee's claim that this error is harmless strains credibility AB15-18. Appellee argues that the error in admitting his statement is as the bodies in Mr. Ault's attic would have been discovered eventually. This argument is faulty in two

respects. (1) It ignores the fact that Mr. Ault's apartment had been previously searched and the bodies had not been found. (2) Assuming arguendo, that the bodies had been found it would have given the police no evidence as to how the girls died. The statement added numerous harmful details that the mere discovery of the bodies did not establish.

Officer Rhodes testified that the police had previously searched Mr. Ault's apartment and he expressed surprise when the police were taken back to Mr. Ault's apartment IXT1624. This is far from "inevitable" discovery. Assuming arguendo that the bodies would have been discovered the admission of the statement would still be harmful error. The statement was the only evidence as to how the homicide took place and was the only evidence of sexual battery. (There was no semen or DNA evidence.) The bodies alone would leave numerous gaps in both the guilt and penalty phases. The statement provided the primary proof of the murder and kidnapping charges and the only proof of the sexual battery charges. It provided the only proof of all of the aggravators except the prior violent felony aggravator. Reversal for a new trial is required.

POINT II

THE TRIAL COURT ERRED IN GRANTING THE STATE'S UNFOUNDED CAUSE CHALLENGE.

Appellee's response to this issue demonstrates how compelling this issue is. Appellee spends pages outlining

general principles which have little effect on the outcome of this case AB18-22. It then provides almost no discussion of the prospective juror's actual responses AB22-23. It makes no attempt to distinguish this Court's decisions in Chandler v. State, 442 So. 2d 171 (Fla. 1983) and Farina v. State, 680 So. 2d 392 (Fla. 1996) which Appellant relied on his Initial Brief. Finally, it asks this Court to adopt a harmless error rule without recognizing that such a rule would violate the United States Constitution. Gray v. Mississippi, 481 U.S. 648 (1987). AB 24-5.

The key to this issue is whether juror Reynolds could set aside her feelings regarding the death penalty and serve as an impartial juror. Appellee claims Reynolds could not set aside her feelings and could not be impartial. The record does not support Appellee's claim. Ms. Reynolds unequivocally indicated she could set aside any feelings she had and that she could be fair and impartial:

> DEFENSE COUNSEL: Now, we haven't even shared this idea yet, but I think you get the point of what has been happening.
>
> Now, instead of just explaining whatever you need to say to determine whether or not you -- if you find Steve guilty of these crimes, if you can put aside feelings that you have, legitimate feelings and be fair and impartial now is the time to come clean.
>
> Mr. Simmons?
>
> MR. SIMMONS: Yes.

DEFENSE COUNSEL: You can put all of your feelings aside?

MR. SIMMONS: Yes....

DEFENSE COUNSEL: Ms. Reynolds?

MS. REYNOLDS: Yes, I would put the my feelings aside.

VT866 (emphasis added).

* * *

DEFENSE COUNSEL: Thank you sir.

Ms. Reynolds, I believe you said that you oppose the death penalty?

MS. REYNOLDS: Yes, I do.

DEFENSE COUNSEL: After everything has been discussed in this room, in tis courtroom, and you understand that you are in opposition and your feelings about the death penalty are important to you, but not in this process, are you a juror who can be fair and impartial in the guilt phase and the penalty phase of this trial?

MS. REYNOLDS: Yes, I can.

VT895.

A review of the potential juror’s actual answers in light of applicable caselaw demonstrates that reversible error occurred in the granting of the State’s cause challenge to juror Reynolds. Appellant laid out venireperson Reynolds’ entire colloquy in his Initial Brief IB38-42. Although Ms. Reynolds indicated that she was personally opposed to the death penalty, she consistently indicated that her views would not affect her in the guilt phase or the penalty phase IIT375, VT866, 895. She also consistently stated that she could put her personal

feelings aside and be fair and impartial as to both phases VT866,895.

The current case is significantly different from the cases relied on by Appellee. Appellee relies on Hannon v. State, 638 So. 2d 39 (Fla. 1994); Foster v. State, 679 So. 2d 747, 751 (Fla. 1996); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999); and Morrison v. State, 818 So. 2d 432, 442-443 (Fla. 2002) AB20-22. All of these cases are distinguishable. In all of these cases the prospective juror was equivocal as to whether he/she could impose the death penalty. In the present case Ms. Reynolds stated that she was personally opposed to the death penalty. However, she never expressed any doubts as to whether this would affect her verdict as to guilt or penalty.

Mr. Ault quoted extensively from this Court's opinions in Chandler and Farina in his Initial Brief IB44-49. Appellee makes no attempt to distinguish these cases. These cases control this issue.

Appellee recognizes that this Court has consistently held that this sort of error can never be harmless. Chandler; Farina. However, it urges this Court to reconsider this rule AB24-25. It fails to point out that the United States Supreme Court has explicitly held that such a rule would violate the United States Constitution. Gray v. Mississippi, 481 U.S. 648 (1987).

In Gray, the Court was asked to overrule Davis v. Georgia, 429 U.S. 122 (1976) and allow a harmless error test. The Court reaffirmed that Davis had created a per se rule of reversal.

> This Court in Davis surely established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under Witherspoon is eligible to serve, has been erroneously excluded for cause. See Davis, 429 U.S. at 123-124, 97 S.Ct. at 399-400 (dissenting opinion).

481 U.S. at 659.

The Court went on to reaffirm the per se reversal rule.

> Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury, Wainwright v. Witt, 469 U.S., at 416, 105 S.Ct., at 848, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S., at 23, 87 S.Ct., at 837. The right to an impartial adjudicator, be it judge or jury, in such a right. Id., at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge). As we stated in Witherspoon, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" 391 U.S., at 521, 88 S.Ct., at 1776, quoting Fay v. New York, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed.2d 2043 (1947).

481 U.S. at 668.

This Honorable Court correctly recognized in Chandler and Farina that the United States Supreme Court had mandated a per se reversal rule. Reversal for a new penalty phase is required.

POINT III

THE TRIAL COURT ERRED IN DENYING MR. AULT'S MOTION FOR PENALTY PHASE MISTRIAL.

Appellee relies on three cases for the general proposition that once a defendant has presented evidence of remorse, the State may present evidence of lack of remorse. Singleton v. State, 783 So. 2d 970 (Fla. 2001); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Walton v. State, 547 So. 2d 622 (Fla. 1989) AB 27. None of these cases control the current case. In Derrick this Court reversed for a new penalty phase due to the admission of an alleged statement to a jailhouse informer. Thus, the discussion of remorse was dicta. Both Walton and Singleton involve the admission of direct evidence of lack of remorse. In the present case the State used the admission of defense evidence of remorse to claim that the door was somehow opened to evidence of an alleged plot to kill a deputy and escape. The trial judge correctly recognized that this evidence had little if anything to do with remorse. It was also highly inflammatory.

Appellee relies on Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995); Wuornos v. State, 644 So. 2d 1000, 1009 n. 5 (Fla. 1994); and Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) for the

proposition that the introduction of good character evidence can open the door to collateral crimes evidence. However, all of these cases are distinguishable from the current case. In Valle, the defense introduced evidence that he would do well in prison. This Court held that this evidence opened the door to evidence of specific acts of misconduct in prison. 581 So. 2d at 46. In Wuornos this Court held that the fact that a confession to the charged crime included expressions of a lack of remorse did not render it inadmissible. 644 So. 2d at 1009 n. 5. In Johnson, this court held the introduction of testimony that the defendant was loving towards her opened the door to cross-examination of her concerning violent arguments. Valle and Johnson both involved the admission of evidence that directly rebutted the proposed mitigation. Wuornos involved material intertwined with a confession to the crime charged. These cases are a far cry from the highly tenuous "door opening" claimed here.

Appellee's attempt to distinguish Geralds v. State, 601 So. 2d 1157, 1160-2 (Fla. 1992) is unpersuasive AB 31-2. Geralds is very similar to the current case. In Geralds the defendant had put on a neighbor to say that he had not been violent or confrontational. 601 So. 2d at 1161. This Court held that this did not open the door to his prior felony convictions. Id at 1162. This Court stated:

> The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. 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.

601 So. 2d at 1161-63.

This is precisely what happened here. In the guise of rebutting remorse the State introduced "vague and unverified information" regarding an alleged collateral crime. The trial judge correctly recognized that this was improper. However, as in Geralds a mistrial was required. In Geralds this Court also pointed out how a curative instruction is inadequate to cure such prejudicial material.

> Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that the defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court. See Malcolm v. State, 415 So. 2d 891, 892 n.1 (Fla. 3d DCA 1982) (labeling such an instruction as being "of legendary ineffectiveness").

601 So. 2d at 1169.

This Court has followed the rule of Geralds on several occasions to order a new trial or new penalty phase due to the erroneous admission of collateral bad acts in the guise of "door

opening", impeachment and/or rebuttal. Hitchcock v. State, 673 So. 2d 859 (Fla. 1996): Ruiz v. State, 743 So. 2d 1, 7-8 (Fla. 1999); Perry v. State, 801 So. 2d 78, 89-92 (Fla. 2001).

Appellee asserts that the error in the admission of this testimony was harmless "based on the facts of the case" AB33-35. This argument is refuted by this Court's opinion in Hitchcock. Hitchcock also involved an allegation of a strangulation following the sexual abuse of a young girl. In Hitchcock the jury recommended death by a vote of 12 to 0. In this case the vote was only 9 to 3. This Court in Hitchcock relied on Geralds and ordered a new penalty phase. 673 So. 2d at 861-2. Additionally, the defense introduced substantial mitigating evidence in this case IB10-25. This included evidence of having been physically and sexually abused as a child, growing up in a dysfunctional, alcoholic home, having organic brain damage and numerous other mental problems IB10-25. His mother drank heavily while she was pregnant with him XIIT2245. Given the fact that three jurors voted for life despite the introduction of such inflammatory evidence and that there was substantial mitigation upon which a juror could have based a life recommendation; this error can not be considered harmless beyond a reasonable doubt. A new penalty phase is required.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO ALLOW A DEFENSE EXPERT TO EXPRESS HIS OPINION AS TO THE APPLICABILITY OF A STATUTORY MENTAL MITIGATING FACTOR.

Appellant relies on the argument put forth in Point IV of his Initial Brief.

POINT V

THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF HEARSAY EVIDENCE AT THE PENALTY PHASE.

Appellant relies on the argument put forth in Point V of his Initial Brief.

POINT VI

THE TRIAL COURT ERRED IN DENYING MR. AULT'S REQUEST TO DISCHARGE PENALTY PHASE COUNSEL.

Appellee claims that Mr. Ault only made "generalized grievances" concerning his penalty phase counsel AB46-7. However, in his motion he specifically stated that his counsel had failed to "make adequate investigation" and preparation for the penalty phase SRIII413. He also stated that his counsel had failed to contact a psychologist for the penalty phase SRIII414. These are not "generalized grievances". They are very specific complaints. At the hearing, Mr. Ault specifically reaffirmed both of these complaints VSR457-9. He continually reaffirmed his concern about the failure to retain a psychologist and the judge never inquired into this VSR457-9. He also reaffirmed

that she would not be ready on time and the judge never inquired into this issue VSR457-9.

Appellee never responds to one of the significant errors in the trial judge's handling of this issue. The judge never questioned trial counsel about any of these issues IB73-76. It is well settled that it is reversible error to fail to question both the defendant and counsel concerning allegations of ineffectiveness. Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991), disapproved of on other grounds in Heuss v. State, 687 So. 2d 823 (Fla. 1996); Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992); Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992); Jones v. State, 658 So. 2d 122 (Fla. 2d DCA 1995); Burgos v. State, 667 So. 2d 1030 (Fla. 2d DCA 1996). The trial court completely failed to question counsel in this case. Reversal for a new penalty phase is required.

Appellee also claims that a defendant must specifically object to the trial judge's failure to inform him of his right to proceed pro se AB49. This argument strains credulity. How can a defendant be expected to object to the judge's failure to explain a right that he doesn't even know exists? Appellee cites no cases supporting this proposition.

POINT VII

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (FLORIDA STATUTES 921.141(5)(d)) IS UNCONSTITUTIONAL.

Appellant relies on the argument put forth in Point VII of his Initial Brief.

POINT VIII

THE DEATH SENTENCE VIOLATES APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S.Ct. 2348 (2000).

Appellee consistently asserts that Appellant is arguing that Ring v. Arizona, __ U.S. __, 122 S.Ct. 2428 (June 24, 2002) requires jury sentencing AB55. However, Mr. Ault never made such an argument IB80.

Appellee relies heavily on the jury's recommendation of death to claim that Ring v. Arizona, __ U.S. __, 120 S. Ct. 2428 (June 24, 2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) were not violated.

This argument ignores the explicit holding and rationale of both Apprendi and Ring. The teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death is required by the Sixth Amendment to be found by a jury in the same way, and for the same reasons, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime. As Ring states: "Apprendi repeatedly instructs . . . that the characterization of a fact or circumstance as an `element' [of

a crime] or a `sentencing factor' is not determinative of the question `who decides,' judge or jury." Ring, 122 S. Ct. at 2441.

Is Appellee seriously arguing that this Court could sustain a first-degree murder conviction based solely on a judge's written finding of premeditation or felony-murder, simply because a jury sat through the guilt trial and, at the end of the trial, before the judge retired to make his or her findings and convict the defendant, the jury rendered an advisory verdict saying that "the defendant should be found guilty".

- without the jury making any finding of premeditation or felony murder (or of any other fact), and
- without the jury being charged that it needs to make any specific finding of fact in order to recommend conviction, and
- the jury has been specifically charged that its verdict is only advisory and will not result in the defendant's conviction, and
- there is no evidence the jury was able to achieve unanimity with respect to any single basis for its fact-free advisory verdict?

That proposition cannot survive scrutiny.

Assuming arguendo, that a jury's advisory recommendation can ever satisfy Ring, it must be unanimous. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in non-capital felonies must be by at least

nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979),the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. Appellant would argue that a non-unanimous recommendation violates the Federal Constitution in a capital case.

Florida law requires a unanimous verdict. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1957); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992); Fla.R.Crim. P. 3.440. The non-unanimous recommendation is in violation of this rule.

Appellee also claims that Ring was satisfied in that the jury's guilt verdict contained a finding of contemporaneous felonies which would arguably satisfy the felony murder aggravator, AB57-58, and that the judge found the prior violent felony aggravator which would arguably satisfy the recidivism exception of Almedarez-Torres v. United States, 523 U.S. 224 (1998). However, Florida law requires more than the finding of an aggravator for death eligibility. The aggravator must be

sufficiently weighty to call for the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Fla. Stat. 921.141 requires that there be sufficient aggravating circumstances prior to a person being eligible for the death penalty. This Court emphasized this requirement in upholding the constitutionality of the Florida statute. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Neither the judge nor the jury found that felony-murder aggravator and/or the prior violent felony aggravator are sufficiently weighty alone to call for the death penalty.

It must also be noted that the validity of the recidivism exception is in question. Justice Thomas provided the crucial fifth vote in Almendarez-Torres. In Apprendi, he stated that Almendarez-Torres was incorrectly decided. 120 S.Ct. at 2378-80. A majority of the current United States Supreme Court has either dissented in Almendarez-Torres or stated that it should be overruled. Thus, it is of questionable validity.

The death sentence must be reversed.

POINT IX

THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON COUNTS V-VIII.

Appellant relies on the argument as put forth in Point IX of his Initial Brief.

CONCLUSION

WHEREFORE Mr. Ault's conviction and/or death sentence must be reversed.

Respectfully submitted,

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____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MELANIE DALE, Assistant Attorney General, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, courier this _____ day of September, 2002.

____
Attorney for Howard S. Ault

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of September, 2002.

____
Attorney for Howard S. Ault