IN THE SUPREME COURT OF FLORIDA

ANDREW DARRYL BUSBY,

Appellant,

v. CASE NO. **SC02-1364**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT,
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either “defendant,” “appellant,” or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses. References to the State's brief shall be by "Appellee's Brief" followed by the appropriate page numbers.

ARGUMENT

ISSUE I

THE COURT ERRED IN REFUSING TO GRANT BUSBY'S CAUSE CHALLENGES TO PROSPECTIVE JUROR KIM LAPAN, A FORMER GUARD OF DEATH ROW PRISONERS AND ONE WHO HAD A BIAS AGAINST THEM, WHICH FORCED HIM TO USE A PEREMPTORY CHALLENGE TO KEEP HIM OFF HIS JURY, A VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The issue presented here is quite simple: Did the court correctly deny Busby's cause challenge for prospective juror Lapan. If not, and if he preserved the issue, as required by Trotter v. State, 576 So. 2d 691 (Fla. 1990), reversal is automatic because he did not have the impartial jury guaranteed by the Sixth Amendment. Id. at 693; Gootee v. Cleveninger, 778 So. 2d 1005 (Fla. 5th DCA 2000).

On page 32 of its brief the State quotes from this Court's opinion in Trotter that "Under federal law [then], the defendant must show that a biased juror was seated." That, of course, begs the question of how does Busby show a biased juror sat? If we continue reading Trotter, that case provides the answer.

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla.1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his

> peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.

Trotter, at p. 693. (Footnotes omitted.)

Thus, if, because the court wrongly forced Busby to exercise a peremptory challenge on Lapan, the defendant exhausted his peremptory challenges before he could challenge either Winston or Liebel peremptorily, and one or both of them sat as one of his jurors, then a biased juror sat, and Busby was denied the impartial jury the Sixth Amendment guarantees. Unlike Trotter, he never "stood by silently," voicing no objection to those two jurors who sat on his jury. Instead he complained by objecting to them and requesting additional peremptory challenges so he could have them removed. Unlike Trotter, who did nothing beyond exhausting his peremptory challenges, Busby objected to specific venirepersons who ultimately sat on his jury. If the trial judge had not improperly denied his cause challenge on Lapan, he would have removed at least one of them peremptorily. Because, however, the lower court wrongly forced the defendant to use one of his peremptory challenges, he has established reversible error, and this

Court should reverse the trial court's judgment and sentence and remand for a new trial.

The State, on page 33 of its brief says "Busby makes no attempt to demonstrate that the jury that did sit at his trial was not impartial or that the veniremen that he would have struck with additional peremptory challenges were unqualified."[1] He most certainly did. When he exhausted his peremptory challenges, requested more, and then said he would use them on prospective jurors Winston and Liebel, he was telling the court that he did not have an impartial jury, and that again neither of them were qualified to sit. That is all the law required for him to show a denial of state and federal right to a fair and impartial jury. Trotter; Ross v. Oklahoma, 487 U.S. 81 (1988)..

The State, on page 34 of its brief, however, says the law requires more. Regarding prospective juror Winston, it claims Busby had an impartial jury because "Busby did not move to strike venireman Winston for cause." This Court, as it held in Trotter, demands only that he have tried to challenge him peremptorily, which is what he did (75 R 744). Busby was denied his constitutionally guaranteed

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[1] The purpose of peremptory challenges, first and foremost, is to assure an impartial jury as guaranteed by the constitution. Gootee v. Clevinger, 778 So. 2d 1005 (Fla. 5th DCA 2000)(Harris, dissenting)

impartial jury because the trial court failed to peremptorily excuse Winston or Liebel, and not because they were excusable for cause.

> Neither *Trotter,* nor any other authority cited by the state, requires an explanation as to why the juror who sat was objectionable. Nor should an explanation be required since a peremptory challenge is, by definition, a challenge that "need not be supported by any reason, although a party may not use such a challenge in a way that discriminates against a protected minority." Black's Law Dictionary 223 (7th ed.1999).

Shannon v. State, 770 So. 2d 714, 716 (Fla. 4th DCA 2000).

So, because Busby preserved this issue for this Court's review, the question remains, as he identified in his initial brief, of whether the lower court correctly denied the defendant's cause challenge on Lapan. At trial, the State simply said Lapan was "imminently qualified" to sit as a juror. The State on appeal responds with only a bit more analysis by claiming that he was "qualified to serve because he indicated he could abide by the trial court's instructions." (Appellee's brief at p. 31, f.n. 4). But that response in light of his other strongly biased answers, fail to support the trial court's ruling. Bryant v. State , 656 So. 2d 426, 428 (Fla..1995) (Trial court erred in denying cause challenge. "Although Pekkola stated that he could follow the court's instructions, his other responses were sufficiently equivocal to cast doubt on this.) As argued in the Initial Brief on pages 20-22, 24-26, Busby presented abundant reasons to justify excusing him for cause.

This Court should, as requested in the Initial Brief, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF MARTHA JOBSON, A SOCIAL WORKER, WHO WOULD HAVE TESTIFIED THAT BUSBY SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, WHERE SUCH EVIDENCE WOULD HAVE SUPPORTED AND JUSTIFIED A DEFENSE OF SELF-DEFENSE, A VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

How do you explain a coldly premeditated murder? Busby, who looks like any other human being (except being very skinny and appearing very, very young (80 R 1302)), has a significant, fatal difference. He suffers from Post-traumatic Stress Disorder. The law recognizes that looks are deceiving and that people, because of past trauma in their lives, may harbor demons that can be unleashed by acts that, on the surface, are mild or even non threatening to a normal person. e.g. State v. Hickson, 630 So. 2d 172, 175 (Fla. 1993).

Traumatized persons look like any other man or woman on the street, but appearances are deceiving because they typically demonstrate a perpetual hyper vigilance, a heightened sensitivity of the world they live in. For them the placid lake hides an alligator ready to drag them under or a cotton mouth snake ready to strike.

The point of Busby's brief on this issue was that Nan Jobson's testimony would have explained why Busby, with his extraordinarily traumatized youth, saw the prison environment, with its real threats of rape and beatings for any inmate, as presenting an imminent threat to him. As discussed in the Initial Brief, prison life, even for the "normal" inmate is fraught with real dangers, some immediate, others lurking. For Busby prison life blended into a battlefield of constant, perpetual threats and terror, and it was one of constant, life threatening danger. And the combat analogy rings particularly true: a lurking danger with hours of boredom punctuated by moments of sudden, utter terror. Hence, while the law requires an imminent threat, it not be an immediate one. Instead it recognizes that there are times and places and situations whose dangers are forever present for which sudden, utter violence can erupt. They are imminent simply because the defendant is in a place where people are willing to use violence suddenly and without provocation or warning.

The law also recognizes that there are people who, because of beatings, abuse, and other terrors, are particularly atuned to the nuances of their life that the average juror would miss. Recognizing these subtle clues allowed them to survive in their hostile world, but it also prompted them to strike out and back at their tormentors. Courts of this state have allowed jurors to hear explanations for

apparently criminal acts because they may not understand why a person with PTSD, who appears normal, could do something so violent.. Hickson, cited above, State v. Mizell, 773 So. 2d 618, 621 (Fla. 1st DCA 2000). In this case, Jopson's testimony would have assisted the jury to understand why Busby, who appeared so normal, could kill so coldly.

On page 38 of its brief, the State notes that "Busby's claim [of imminent threat] is refuted by the testimony of his expert that the victim's act in refusing to have oral sex with Appellant, immediately preceding the murder, would not have triggered the response that he was in imminent danger. (R. 78: 1109)." This is what the prosecutor asked Ms. Jopson:

> Q. Now how about this for a trigger: Someone said to Mr. Busby, "No, I won't give you a blow job." Would that trigger what you are talking about here?
>
> A. I don't think–I don't think that. My understanding from–again, I haven't seen him since 1976 (sic)–but my understanding from him, in watching him grow up was that he was not a homosexual. And so I realize the prison system is different, but no I don't think it would trigger him.

(78 R 1109) That, of course, was the wrong question. The prosecutor should have asked if someone had demanded of Busby that he(Busby) "give him a blow job," would that have triggered the defendant. Instead, Jopson was asked if the defendant would be triggered if someone refused his request and not the more

relevant inquiry of someone demanding a homosexual act from him. Jopson's response reflects the strangeness of the question to her. It was not so much that the person's refusal would trigger a murderous rage, but that Busby, because he was not homosexual, would not have made it in the first place. Her response, therefore, hardly refutes her much stronger testimony and conclusion that the pervasive prison culture of sexual attacks could have triggered him.

> In my opinion he was never safe in most of his life. He just did not have a safe place to live. He wasn't safe from his early childhood throughout his different foster care placements; and really for the first time in his life he found safety in the home of Reverend Busby.
>
> Q. Okay. And for someone that has safety as an issue and as well has suffered sexual abuse as a child–I'm going to pose a hypothetical question to you–that if someone in that position had been placed in a prison setting and had been the subject of constant sexual harassment and possibly hearing the threat of being raped or being forced to submit to someone sexually, could that possibly be a trigger?
>
> A. Yes, sir.
>
> Q. And if somebody was triggered in that manner, would they interpret that possibly as an imminent threat?
>
> A. Yes, sir.
>
> Q. Even though a person that didn't suffer from post traumatic stress disorder might not interpret that the same way, correct?
>
> A. That is correct.

(78 R 1105-1106).

Thus, refusing to let Busby present Nan Jopson's testimony was error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN ALLOWING STATE ATTORNEY INVESTIGATOR LISA LONG TO TESTIFY THAT SHE SAW BUSBY MAKE SOME HAND GESTURES DURING THE TESTIMONY OF CHARLES GLOBE, AND IT ALSO ERRED IN ALLOWING THE STATE TO READ, AS SUBSTANTIVE EVIDENCE OF GUILT, THE TESTIMONY OF ANDREW BUSBY WHEN HE TOOK THE STAND AFTER LONG ONLY TO EXPLAIN THE GESTURES, A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

The State, on page 42 of its brief, says that the trial court did not tell Busby the State would not use his in court testimony until after he had testified. "Thus any contention that Busby relied upon the trial court's assertion would be unfounded as occurring after his admitted testimony (compare R. 79:1223-1225 with R. 81: 13493-1394)." First, Busby's damning testimony came out during the State's cross-examination, and the defendant vigorously objected to it (79 R 1224). At that point, the trial court merely confirmed what defense counsel would later assert, that what he said in the motion hearing would not and could not be used against him (80 R 1316-17). "The jury is not going to hear it, but it goes in the record and you have the right to ask." (79 R 1224). At what point the court said that is irrelevant because it merely confirmed the common, justified belief that what a defendant testifies about in a motion hearing cannot be used against him

except to impeach him. It was, therefore, unfair for the trial court to later reverse course and let the State use the defendant's statements against him.

On the same page, the State argues that Busby's Fifth Amendment rights evaporate "regarding actions that he voluntarily took in open court, but for which he had no constitutional right." Well, it is not so much what actions he voluntarily took that the defendant objects to, but his testimony that explained them. As to the latter, he has a Fifth Amendment right for it not to be used against him, as Simmons v. United States, 390 U.S. 377 (1968), Hayes v. State, 581 So. 2d 121 (Fla 1991), and the other cases cited in the Initial Brief on this point support.

Long's testimony of Busby's hand motions, on the other hand, was objectionable simply because it had no relevance. That is, she could testify about what she saw, but the jury had to speculate about its meaning, and more significantly if Globe saw it (which he denied (81 R 1411). Her testimony, therefore, was irrelevant, because it tended to prove or disprove nothing.

As to the State's short harmless error argument, Busby relies on his argument on this point in his Initial Brief.

ISSUE IV

THE COURT ERRED IN REFUSING TO GIVE BUSBY HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE IN THE WAY HE CHOSE WHEN IT REFUSED TO LET HIS CO-DEFENDANT, CHARLES GLOBE, TESTIFY BEFORE THE JURY LIVE AND IN PERSON, BUT INSISTED HE DO SO ONLY BY VIDEOTAPE, A VIOLATION OF BUSBY'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

The State's argument here claims that because Busby personally wanted the video shown instead of having Globe testify in person, he has waived the issue he now complains about. "As the above colloquy establishes, it was Busby's decision to present Globe's testimony via videotape. His change of mind now on appeal does not provide a basis for relief." (Appellee's brief at pp. 49-50). Busby's counsel on appeal and at trial have not change their minds. At trial defense counsel clearly said he wanted Globe to testify in person, not by a videotape, and he never changed his mind on that point.

> MR. DOSS: Judge I object to that. I want Mr. Globe here. I want the jury to see what kind of person that we are dealing with. . . .I consider Mr. Globe an extremely intimidating man, that the jury will not get a full flavor of what is going on in that cell unless they are able to see him, hear him, look at him, have him look at them, and that they can understand what went on there. .. . .And a videotape is not going to be able to convey that.

(79 R 1129-31)

Rather than listen to what Busby's lawyer wanted, the trial court went straight to Mr. Busby and negotiated with him. That was error. When a defendant has a lawyer, he speaks through counsel. See, Logan v. State, 846 So. 2d 472 (Fla. 2003). The court should never have shunted Mr. Doss aside and spoken directly to the defendant. That was error because in this matter it was counsel's decision of how to defend Mr. Busby that was crucial, not what the defendant personally wanted.

On the merits, the State, on page 50 of its brief, says Busby's confrontation clause argument is without merit because Globe was his witness. But, if he was his witness, he should have been able to present him or have him testify as he wanted. That is, Globe should have testified in person, as defense counsel wanted, rather than by video tape as the prosecution suggested. In that sense, Globe was the prosecution's witness and not defense counsel's when he testified by video tape rather than in person. Without any valid reason for following the State's lead, the trial court simply erred in refusing to let defense counsel present his case as he had planned.

ISSUE V

THE COURT ERRED IN DENYING BUSBY'S MOTION TO SUPPRESS STATEMENTS HE MADE TO LAW ENFORCEMENT OFFICERS AFTER HE TOLD THEM HE DID NOT WANT TO TALK WITH THEM, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND HIS RIGHTS UNDER ARTICLE I, SECTION IX OF THE FLORIDA CONSTITUTION.

In his Initial Brief at pages 62-65, Busby applied the factors identified by the United States Supreme Court in Michigan v. Mosely, 423 U.S. 96 (1975) as relevant in determining if the police "scrupulously honored" his Fifth Amendment right to cutoff questioning. In its Answer Brief, the State mentions only one of them, the time lapse between the two sessions (Appellee's Brief at p. 55). It says nothing about any of the other critical considerations a reviewing court should consider.

On page 57 of its brief it also contends that "The fact that Busby had previously declined to talk to the authorities about the murder does not give rise to a heightened waiver requirement, and Busby fails to cite any authority for his belief that a distinct standard is required." That is precisely what Michigan v. Mosely with its list of factors and its "scrupulously honor" requirement establishes.

Finally, as to the harmlessness of the confession, the State's case for premeditation, and Busby's direct involvement in the murder, became significantly stronger after the jury heard what the defendant had said. Indeed, if we look at the State's case without those statements we have evidence that either Globe or Busby or both killed Ard, but we do not know which one actually committed the murder, or if the defendant simply happened to be at the wrong place at the wrong time. The statements also provide a crucial motive for the apparently senseless killing. To say that no reasonable doubt exists to conclude what the jury heard Busby admit had no affect on their deliberations simply denies the obvious. Busby's confession was so important that the State vigorously defended its right to present it at trial, did so, and then used what the defendant had said in his closing argument (81 R 1490). The court's error in finding no Fifth Amendment problem was error and reversible error at that. This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN ADMITTING, AS WILLIAMS RULE EVIDENCE THAT BUSBY WANTED TO KILL A ROBERTO ROSA AND ALPHONSO PALMER, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL

The State's argument on this point does little to weaken Busby's contention that "the State simply had no need for this evidence, which had only a minimal relevance at best." (Initial Brief at p. 69) As such, and because the points he made in his brief adequately present the argument, Busby relies on what he said there to carry the day on this issue.

ISSUE VII

THE COURT ERRED IN ADMITTING A TRANSCRIPT OF BUSBY'S JULY 7, 2000 CONFESSION RATHER THAN THE ORIGINAL AUDIOTAPE OF THAT STATEMENT, A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

The State, on page 69 of its brief, says that Inspector Schenck testified that "the transcript completely and accurately reflected the incriminating statements made by Appellant," contrary to what Busby said in his Initial Brief. First, although asked to make a detailed analysis of the transcript with the tapes (82 R 1552), he never did because by that time "I discovered that the tape had been separated from the file." (82 R 1553). And, moreover, the request to do the comparison had come about a year after the homicide (82 R 1553). Thus, we have no comparison because there simply was no way he could have said that the transcript accurately reflected what was on the now lost tape.

ISSUE VIII

THE COURT ERRED IN FINDING BUSBY MURDERED ELTON ARD IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS.

Appellant relies upon his original arguments for this issue.

ISSUE IX

THE COURT ERRED IN REFUSING TO ADMIT SEVERAL EXHIBITS BUSBY OFFERED DURING THE PENALTY PHASE PORTION OF HIS TRIAL, WHICH WOULD HAVE HELPED THE JURY UNDERSTAND WHY HE HAD BEEN DIAGNOSED AS SUFFERING FROM POST TRAUMATIC STRESS DISORDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court's opinion in Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994), controls this issue, as argued in the Initial Brief. Contrary to the State's claim on page 78 of its brief, it is "the issue" that it had the opportunity to cross-examine Nan Jobson, and rebut her testimony if it could. Moreover, there is no evidence that at the time Busby wrote the letters or made the videos he intended them to be self-serving for a penalty phase defense in a capital murder trial. Instead they were self serving to the extent they helped mitigate a death sentence, which is the purpose of mitigating evidence. To blandly say a defendant cannot offer self serving evidence is similar to saying the State cannot present prejudicial facts. Both assertions are wrong. State v. McClain, 525 So. 2d 420 (Fla. 1988). Parties are supposed to defend or prosecute with evidence favorable to their side or damaging to the other. The State needs to present more justification for excluding this evidence than to say it was self-serving, particularly when the evidence Busby

offered was written or produced years earlier and in a context completely foreign to a penalty phase hearing.

The State concludes by claiming that excluding the evidence was harmless error. First, that argument would have more strength if the jury had unanimously recommended death. As it was, one of the jurors would have voted for life, even knowing the defendant was under two life sentences for committing two murders. So, with at least one member of the jury unpersuaded that death was the appropriate sentence in light of the very heavy weight of the aggravation, this Court cannot say with the easy confidence required that excluding this mitigation would have had no effect on the jury's recommendation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

This Court should reverse the trial court's sentence of death and remand for a new penalty phase hearing.

ISSUE X

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THE COURT ERRED IN ADMITTING A LETTER BUSBY OSTENSIBLY WROTE TO CHARLES GLOBE BECAUSE ITS PREJUDICIAL VALUE SUBSTANTIALLY OUTWEIGHED ITS LIMITED RELEVANCE, A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The State, on page 83 of its brief, argues that "at no time did Appellant request that the trial court redact any portion of the letter that he believed to be unduly prejudicial (see R 82: 1581-1583), and he therefore defaulted upon the claim." This is what Busby said, "I am going to object as to the relevance of this, particularly in regard to the one that's been identified as being written by Andrew Busby. I don't think it has any relevance whatsoever. My recollection, this is a letter that is very explicit and sexual and lurid in nature; that it does nothing other than inflame the jury." Busby raises the same issue on appeal that he argued at trial: this evidence, whatever its logical relevance, is so inflammatory that its prejudicial value substantially outweighs its probative worth.

The State, on pages 82 and 83 of its brief, argues that section 90.403 Florida Statutes (2000) has no application to the penalty phase of a capital sentencing trial. The State never presented that argument at the trial level, and just as a defendant can only raise issues and arguments on appeal that he had presented to the trial court, the State is similarly limited. See, Cannady v. State, 620 So. 2d 165 (Fla.

1993); State v. Dupree, 656 So. 2d 430 (Fla. 1995); Section 924.051, Florida Statutes (2000).

Moreover, that is certainly a novel argument, and this Court has applied Section 921.141(1) only to relax the confrontation problems occasionally presented by certain types of evidence. It has never relaxed the rules of relevancy to include gossip, innuendo, or victims' desire for the punishment a defendant should receive. Windom v. State, 656 So. 2d 420 (Fla. 1995). Indeed, the section itself limits its reach when it provides "Any such evidence which the courts deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statement." If we accept the State's claim, that section 921.141(1) negates any relevancy requirement, sentencing hearings will become little more than a black robed version of the National Enquirer, and True Detective. Sentencing hearings would be better held in the supermarket check-out line than in a courtroom. Fortunately, this Court has rejected that contention. Perry v. State, 801 So. 2d 78, 90 (Fla. 2001) ("This Court has held that, to be admissible in the penalty phase, the State's direct evidence must related to any of the aggravating circumstances.")

This Court should, therefore, affirm the obvious, reject the State's argument on this point, and remand for a new sentencing hearing.

ISSUE XI

THE COURT ERRED IN SENTENCING BUSBY TO DEATH BECAUSE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO SENTENCE HIM TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY.

The United States Supreme Court's opinion in Ring v. Arizona, 536 U.S. 584 (2002), will not go away, however much some may wish it to do so. Similarly, neither will the various opinions of members of this Court about the impact that case has on Florida's death penalty scheme. See Duest v. State, Case No. SC00-2366 (Fla. June 26, 2003). Busby raises this issue to preserve it for review once the United States Supreme Court resolves how that case impacts the way we put people to death.

ISSUE XII

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE BEYOND THE FACT THAT BUSBY HAD TWO PRIOR FIRST-DEGREE MURDER CONVICTIONS IN SUPPORT OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR, A VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Appellant relies upon his initial arguments for this issue.

ISSUE XIII

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF BUSBY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Appellant relies upon his initial arguments for this issue.

CONCLUSION

Based on the arguments presented here, the Appellant, Andrew Busby, respectfully asks this honorable Court to 1. Reverse the trial court's judgment and sentence and remand for a new trial. Or, 2. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **CASSANDRA K. DOLGIN,** Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **ANDREW DARRYL BUSBY**, #V03727, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, August 25, 2003.

Respectfully submitted,

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_____

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

_____

DAVID A. DAVIS