IN THE SUPREME COURT OF FLORIDA

PAUL EVERETTE,

Appellant,

v. CASE NO. **SC03-73**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTEENTH** JUDICIAL CIRCUIT,
IN AND FOR **BAY** COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

All references shall be as set fort initially except the State's Answer Brief shall be referred to as (Appellee's Brief).

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING EVERETT'S MOTIONS TO SUPPRESS BLOOD, HAIR, AND OTHER BODY SAMPLES TAKEN FROM HIM AS WELL AS A CONFESSION HE GAVE TO POLICE OFFICERS, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

Between the State's well-argued Answer Brief and Everett's Initial Brief, the issue this Court must resolve has clearly come into focus: Does the defendant's assertion of his Fifth Amendment right to counsel mean the police can have virtually no contact with the defendant without counsel being present? The State says no, and it cites authorities from other States and the federal courts favoring its claim (Appellee's Brief at pages 30-31).[1] The defendant, on the other hand, also provides

[1] United States v. McClellan, 165 F. 3d 535 (7th Cir 1999)(Within minutes of invoking his right to counsel, McClellan gave the police permission to search his car and the motel room he had rented.); Cody v. Solem, 755 F. 2d 1323 (8th Cir 1985)(Cody gave his consent to search shortly after invoking his right to counsel, and within hours of being arrested.): United State v. Rodriquez-Garcia, 983 F. 2d 1563 (10th Cir 1993)(Consent given within an hour of arrest, being given rights, and invoking right to counsel); United States v. Hidalgo, 7 F.3d 1568 (11th Cir 1993); People v. Wegman, 428 N.E. 2d 637 (Ill App. 5th 1981)(entire interview lasts 20 minutes); Scott v. State, 317 S.E. 2d (GA. App. 1984)(request for search, consent, and request for lawyer occur together at airport); State v. Houser, 490 N.W. 2d 168 (Neb. 1992)(Shortly after asking for counsel, Houser consents to search of his apartment.); State v. Childress, 448 N.E. 2d 155 (Oh 1983)(unclear how much time elapsed but probably a short time.); State v. Baumeister, 723 P. 2d 1049 (OR. App. 1986)(about one or two hours after the defendant invoked his right to counsel he gave consent to search); State v. Morato, 619 N.W. 2d 655 (SD

out of state and federal cases as support for his argument.[2] No Florida court has apparently confronted this issue.

To correctly resolve this issue, this Court must keep in mind the facts this case presents. Everett twice told the police that he wanted the assistance of counsel before he would deal with or talk with them (1 SR 8, 21). They never honored that request, as the law required. Specifically, over the course of almost two weeks, from the time he first invoked his Fifth Amendment right to counsel until the police questioned him

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2000)(consent given immediately after right to counsel invoked); Jones v. State, 7 S.W. 3d 172 (Tex Ct. App. 1999)(six hours after invoking right to counsel Jones consents to search); State v. Crannell, 750 A. 2d 1002(VT 2000)(Crannell consents to search within 90 minutes of invoking right to counsel).

[2] See Initial Brief at pp. 15-16. State v. Britain, 752 P.2d 37, 39 (Ariz.App.,1988)(" We view a request for a consent to search, after the right to counsel has been invoked, as interrogation and the serving of a search warrant as conduct "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297, 308 (1980). Accordingly, defendant's statements should have been suppressed. *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982)."); People v. Esposito, 503 N.E. 2d 98 (NY App. 1986)"[O]nce the defendant invokes the right to counsel guaranteed by N.Y. Constitution, article I, § 6, any waiver obtained in the absence of counsel is ineffective."); Kreijanovsky v. State, 706 P. 2d 541 (OK Crim. App. 1985)("The defendant's rights are no less at stake and the advice of counsel no less important if the police seek a relinquishment of defendant's constitutional right to be secure against unreasonable searches and seizures than if they seek a waiver of his privilege against self incrimination.")

for a third time, they did absolutely nothing to provide him a lawyer.[3] Instead, as they freely admitted, they tried to find ways to get around his invocation of his right to counsel by asking him to give blood (2 SR 67, 69). Thus, after being isolated for such a long time without ever seeing a lawyer, Everett's will to resist the police badgering had eroded so much that this Court must conclude he believed he was on his own, and he had to do his best without counsel's help. Moreover, making his capitulation appear less obvious, the Panama City police had Investigator John Murphy of the Baldwin County, Alabama Sheriff's Office deal with the defendant, ostensibly believing that Everett's invocation of his right to counsel did not apply to that law enforcement officer.

So, the police deliberately ignored Everett's request for counsel, being more interested in and determined to get around that constitutional barrier. In doing so, however, they neglected their obligation to provide him with a lawyer, something that Miranda clearly said they could not ignore. See, Miranda, at pp. 471-76 . Thus,

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[3] As seen in footnote one, none of the cases cited by the State on pages 30-31 of its brief show the police waiting days and weeks after the defendants had invoked their right to counsel before asking them to search. Such a lengthy time without them doing anything to get him a lawyer shows, with greater clarity than the minutes and hours in the cited cases, an indifference to and even a contempt for Miranda's guarantee that they will provide him a lawyer if he believes he needs one.

whether this Court labels what the police did after Everett repeatedly stopped their questioning interrogation or not, misses the point. The police had a Fifth Amendment duty to provide this defendant with a lawyer. They never did, so this Court should not reward them for their indefensible indifference to the defendant's assertion of his constitutional rights by letting the State use the physical evidence and confession gained by approaching him after he had claimed them.

If, however, the State is correct and Everett had no right to counsel, this Court must consider, from a broader policy perspective, what he could have done to prevent them from approaching him and wearing him down. The State would say he could do nothing. Law enforcement could repeatedly, and without any fear, harass the defendant by "asking" to take his blood or search his person, property and effects, and there would be nothing he could do to stop it. Miranda, however, has a broader application than the "interrogation" limits the State argues. That case recognizes that police custody inherently compels defendants to do what the police want, and the court crafted the rights created in Miranda and Edwards to prevent that governmental erosion. Miranda, at p. 458. "'Edwards is 'designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights.'" Michigan v. Harvey, 494 U.S. 344, 350 (1990).

Thus, various opinions from this Court and the United States Supreme Court

have supported a broader view of the Fifth Amendment than one which views that constitutional protection as limited strictly to police questioning.

In Traylor v. State, 596 So.2d 957, 966 footnote 14 (Fla.,1992), this Court said that under the Florida's constitution, Article I, Section 9, "Once the right to counsel has been invoked, any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid, whether or not the accused has consulted with counsel earlier." (Emphasis supplied.) In Edwards v. Arizona, 451 U.S. 477, 484, 85, the nation's high court said, "We further hold that an accused. . ., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him. . . ."(Emphasis supplied.). In Oregon v. Elstad, 470 U.S. 298, 306-307 (1985), it also found that "The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.... Thus, in the individual cases, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.(Emphasis supplied.) "The initiation by the police of contact with an unrepresented defendant, after the invocation of the right to counsel during interrogation .... creates an irrebuttable presumption that a defendant's waiver of his privilege against compelled self-

incrimination is not voluntary." Michigan v. Harvey, at 356. (Emphasis supplied.) The interests of the defendant in the assistance of counsel in his confrontation with the prosecutorial forces of organized society extend to all efforts to elicit information from the defendant whether for use as impeachment or rebuttal at trial or simply to formulate trial strategy. Michigan v. Harvey, cited above at 360. (Stevens, dissenting. Emphasis supplied.) Unlike the courts that have limited the Fifth Amendment to a narrow, pinched interpretation, this Court has read it and a similar provision in our state constitution broad enough to capture the mischief apparent in this case.

Of course, had Everett invoked his Fifth Amendment right to remain silent, the police could have reapproached him under certain limited circumstances. Michigan v. Mosely, 423 U.S. 96 (1975). He did not do this, however. Instead, the defendant clearly told the police not once, but twice, that he wanted a lawyer, and he did so under Miranda's Fifth Amendment guarantee that the police must provide him a lawyer if he asks for one. Edwards v. Arizona, 451 U.S. 477 (1981) Because he invoked that specific constitutional guarantee, the bright line rule is that until he had a lawyer they had to stay away from him. They could not approach him to ask for blood or even serve an arrest warrant.

Thus, the State has missed the point of Everett's argument when it says on pages 30-31 of its brief that "a defendant's consent to search is not an incriminating

response and therefore a request for consent, following an invocation of the Fifth Amendment right to counsel, is not 'interrogation' subject to limitation by Edwards [v. Arizona, 451 U.S. 477 (1981)]." When the police asked for blood, they had to "deal" with him, and before they could do so they had to provide him with a lawyer, as he had requested, and as Miranda and its progeny guaranteed. Here, they never did that. Indeed, the evidence clearly shows they never intended to do so, but were aware of their obligation and repeatedly tried to find ways around Everett's clear and unambiguous request for counsel.

The State, on pages 36 and 37 of its brief and the trial court in its order denying Everett's motion to suppress (1 R 48, 50) asserted that Everett, not the police, initiated the contact that led to his confession. Not so. At no time did he ask the Panama City Beach, or even the Alabama authorities, to see him. Instead the police approached the defendant on November 19 and 8 days later on November 27. They initiated the contact by first asking for his blood and then to serve the arrest warrant. Only after they were in his presence, and without counsel also being there, did he indicate he would talk with them.

Finally, the State makes its predictable harmless argument. As with the argument on the merits, the facts of this case must compel this Court to conclude that the Court reversibly erred in admitting the evidence of the blood as well as his

confession. That is, the only evidence the State had to identify Everett as the one who killed Kelli Bailey came from the blood and confession. Without them, the State had no case. Indeed, it is doubtful they would have had probable cause to arrest him without it. The trial court's error, therefore, in admitting the blood evidence and confession would have unarguably had an effect on the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). It was prejudicial error, and this Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN FINDING EVERETT COMMITTED THE MURDER WHILE UNDER SENTENCE OF IMPRISONMENT BECAUSE THERE WAS NO NEXUS OR CONNECTION LINKING THAT AGGRAVATOR WITH ANY ASPECT OF THE HOMICIDE, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The State is absolutely correct when it notes that Everett never objected to the jury instruction on and the judicial finding of the aggravator that at the time of the murder he was under a sentence of imprisonment. It is absolutely wrong that, because of that failure, his claim is "not subject to appellate review." (Appellee's brief at p. 54).

In this case, the State presented insufficient evidence to justify both the instruction and the judicial finding of that aggravator. Such a failing amounts to fundamental error, which can, of course, be reviewed without any trial level objection. Aggravating factors are essential elements of a capital murder. State v. Dixon, 283 So. 2d 1 (Fla. 1972). Hence failing to adequately define them or finding them applicable when insufficient evidence supports them amounts to fundamental error, which this Court can review without any objection by the defendant. Sochor v. State, 619 So. 2d 285, 290 (Fla.1993).

Moreover, this issue arose out of a capital sentencing proceeding, and this

Court has traditionally overlooked many preservation problems and reached the merits of the strictly unpreserved issue. It does so under this Court's unique obligation to review the judgment and sentence of death, and that has meant that it has relaxed the normal rules that govern the preservation of error, particularly sentencing errors. Section 921.141(4), Florida Statutes (2001). Anderson v. State, 28 Fla. L. Weekly S 731 (Fla. Sept. 25, 2003); Taylor v. State, 855 So. 2d 1, 14 (Fla. 2003)(In a capital case, "This Court has the obligation to independently review the record for sufficiency of the evidence.") This is true even when a defendant never raised a claim of insufficient evidence.

This Court has also expressly considered sentencing issues never raised at the trial or appellate level. Indeed, in this case, the State has raised two issues, sufficiency of the evidence and proportionality, Everett never raised below or on appeal. It would seem, therefore, that the State should have a hard time with consistency when it wants this Court to consider admittedly unpreserved issues it has raised while at the same time rejecting those unpreserved questions he wants this Court to review.

Everett's claim in this issue, while not strictly preserved or even raised at the trial court level, nevertheless, is ripe for this Court's review.

As to the merits of Everett's claim, the State finds fault with his use of the avoid lawful arrest aggravator because it does not "theoretically or factually apply to every

murderer." (Appellee's brief at p. 58) However true that may be misses the point of the defendant's argument. This aggravator is not an "all or nothing" factor. Sentencers and this Court must analyze the facts of a case to discover the degree to which this aggravator applies. In that sense, Everett claims that a similar examination must be made of the under sentence of imprisonment aggravator.

That is, until now this Court has taken a mechanistic approach to it. Either he was under some form of incarceration or not. End of examination. Everett says that in his case this Court should reject that routine solution. If the aggravators must "genuinely narrow" the class of people eligible for a death sentence, Zant v. Stephens, 462 U.S. 862, 877 (1983), simply being under some sentence of imprisonment does little to do so. Instead, for this aggravator to clearly identify those who should be put to death, there must be some causal link, some nexus between the defendant's status of being in prison and the murder. In this case no evidence somehow connected those two facts. Just as everyone has an age, a defendant's youth has mitigating value only when he or she can show some connection between that fact and the defendant's moral culpability. Likewise, just as virtually every killer flees a crime scene, more must be shown to justify putting him to death. The State must prove that the sole or dominant reason for the killing was to avoid arrest.

In this case, the State never connected Everett's status of being under sentence

of imprisonment with the murder. Without any such nexus neither the trial court nor the jury could consider that aggravator in justifying a death sentence.

This Court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

CONCLUSION

Based on the arguments presented here and in the Initial Brief of Appellant, appellant 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 with 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, **PAUL GLEN EVERETT**, #Q13157, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, January 14, 2004

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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.

Respectfully submitted,

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