IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1963

JERONE HUNTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY BRIEF

On direct review from a decision of the Circuit Court of the Seventh Judicial Circuit imposing a sentence of death

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
FLORIDA BAR NO: 0144886
P.O. BOX 568005
ORLANDO, FL 32856-8005
(407) 841-7676

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This reply brief is being filed to respond to some of the State's arguments. By filing this brief, Mr. Hunter does not waive any of the components of his initial brief. Additionally, by filing this reply brief, Mr. Hunter does not concede any of the factual assertions or arguments made by the State in its answer brief.

REPLY ARGUMENT

ARGUMENT 1: THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION PROVIDES MORE PROTECTION TO CRIMINAL DEFENDANTS THAN THE FEDERAL DUE PROCESS CLAUSE

Florida's due process clause provides higher standards of protection than its federal counterpart. See State v. Griffin, 347 So.2d 692, 696 (Fla. 1st DCA 1977) ("Florida due process standards in many instances exceed federal standards as defined by the United States Supreme Court."). Significantly, the State did not challenge this argument in its answer brief.

This Court has never made a ruling on the protections of Florida's due process clause as compared to the federal due process clause. It is still an open question.

If this Court were to disagree with the appellant on this issue, then Florida's due process clause would be redundant and therefore meaningless. The citizens of Florida did not intend for this to be the case.

The State has merely argued in conclusory fashion on page 49 of its brief, that this issue is irrelevant because all of this Court's death penalty precedent still

applies. This misses the point. This Court has never held that the Florida due process clause provides more protection, so therefore this Court has never analyzed an appellate issue with this fundamental concept in mind.

If this Court holds that the Florida due process clause provides more protection, then all of this Court's prior precedent would not automatically apply to these issues. Such a holding would require a re-examination of all precedent with the new mandate that Florida's due process clause provides more protection.

ARGUMENT 5+: RAISING CLAIMS OF INEFFECTIVE ASSISTANCE ON DIRECT APPEAL

The State argues throughout its brief that the defendant waives his right to pursue a collateral attack on the ineffective assistance of his trial counsel if such an issue is raised on direct appeal. There is no such case law and such a rule would not make any sense.

If ineffective assistance claims are raised on direct appeal and the claims are not addressed by the appellate court, the appellant is not barred from pursuing the claims in a collateral attack. See Acosta v. State, 884 So.2d 278 (Fla. 2d DCA 2004). See also Cueto v. State, 937 So.2d 144, 146 (Fla. 3d DCA 2006) (there is

no re judicata in such an instance). This is due to the different standard of review on direct appeal versus collateral attack.

For the most part, the State attempts to defeat the defendant's claims of ineffective assistance with general axioms that these claims cannot be brought on direct appeal. Significantly, the State fails to say why an evidentiary hearing on the different claims of ineffective assistance would be necessary or why the record is insufficient for this Court to review these issues.

These issues were raised on direct appeal because they are apparent on the face of the record. They are not issues of trial strategy in front of the jury, but rather are strictly legal arguments that should have been made in front of the judge.

No evidentiary hearing is necessary on issues of law. If the defendant would have prevailed (in the trial court or on appeal) had the proper legal argument been made, then it is automatically deficient performance for failing to make the argument and/or preserve the issue for appeal.

This Court should look at Strickland's prejudice prong first. This dictates the outcome. There is simply no excuse for failing to make a dispositive motion. See Barber v. State, 901 So.2d 364 (Fla. 5th DCA 2005); Lambert v. State, 811 So.2d 805, 807 (Fla. 2d DCA 2002).

ARGUMENT 8: THE ERRONEOUS USE OF THE AND/OR JURY INSTRUCTION WAS NOT HARMLESS ERROR IN THIS CASE

The erroneous use of the and/or jury instruction in the case of co-defendant Michael Salas was recently held to be harmless error. See Salas v. State, 2007 WL 4352749 (Fla. 5th DCA, December 14, 2007).

Contrary to the Fifth District's conclusion, the jury verdicts were not individualized. All three defendants were found guilty of all six murders, on both a premeditated and felony murder basis. All three defendants were found guilty of conspiracy and armed burglary. The only differences in the jury's verdict were on the significantly lesser charges of abusing a corpse and cruelty to animals. These convictions are mere afterthoughts.

It also appears that there was more evidence of Salas's guilt as compared to that of the defendant. This would make the defendant's case distinguishable. In sum, the State cannot prove beyond a reasonable doubt that the error in instructing the jury was harmless to this defendant.

ARGUMENT 10: THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL

This question is one of first impression for this Court. This is due to the fact that death penalty case law has evolved significantly over the last 8 years (since Ring) and now Florida stands alone on the fringe of what death penalty protections should be applied in a statutory scheme.

In sum, Florida has not followed the death penalty revolution, despite this Court's urging,[1] and therefore this Court must employ a more comprehensive comparative proportionality review to make up for it.

Florida's death penalty scheme does not provide the necessary constitutional safeguards to allow this Court's proportionality review to be so narrow.

Florida is the only state that allows juries to find the existence of aggravating factors and allows the decision to impose death on a mere majority vote. There is also no assurance that the jurors are even agreeing on the same

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[1] State v. Steele, 921 So.2d 538, 548-50 (Fla. 2005) ("need for legislative action" because Florida is the "outlier state."

aggravating factors. This Court is constitutionally required to undertake a more comprehensive review as a result.

The United States Supreme Court case law on this issue is pre-Ring and therefore is ripe for abrogation. Regardless, the high court specifically makes the holding that comparative proportionality review is not required when the State system at issue provides sufficient safeguards against arbitrariness. See Pulley v. Harris, U.S. 37 (1984).

Florida's system does not satisfy this criteria, given the recent changes in death penalty jurisprudence and new statutory capital schemes throughout the states.

A review of cases like Ferry v. State, 507 So.2d 1373 (Fla. 1987), would require a reversal in this case. (In addition to the examples in the initial brief, p.46-47). Ferry was an erroneous judicial override of a life sentence. The facts of the case are on point with the case at bar.

The defendant in Ferry killed five people by dousing them with gasoline and lighting them on fire, but was given a life sentence because he was a paranoid schizophrenic and suffered from extreme mental illness. This is the exact situation in the case at bar, save for the additional fact that the defendant herein has the mental and emotional maturity of a child.

ARGUMENT 11: THE DEFENDANT'S SENTENCE OF DEATH WAS DISPROPORTIONATE

Michael Salas and the defendant bore equal responsibility and committed equally abhorrent crimes on the day in question. As a result, they should have received the same sentence.

Salas and the defendant were each convicted of premeditated and felony murder for all six victims. Both were equally active in planning the events, committing the attacks, and Salas had even more culpability after the fact when he disposed of the weapons. The defendant also had more mitigation than Salas.

The State argued in the trial court that Salas was equally culpable and that his conduct could not be distinguished from the other co-defendants. The State has now conveniently changed its position and is arguing that Salas is less culpable, so that the defendant can be fingered for death. This change of position is a due process violation in and of itself. Prosecutors are supposed to be ministers of justice, they are not supposed to "kill at all costs."

The facts from the Fifth District Court of Appeals decision on this case are pertinent. The facts reveal that Michael Salas:

+ Was "unconcerned" and "deadpan" on the night of the murders.

+ Disposed of the pants he wore on the night of the murders and brought a change of clothes with him.

+ Helped dispose of the bats and wiped the blood off of them.

+ When Victorino said he wanted to get a "group of niggers" to beat the people to death with lead pipes, Salas said, "yeah, I'm down for it."

+ When Victorino, the defendant, and Salas got out of the truck, and Cannon asked Graham if he was still "down for it," Salas "was like come on B, you can't bitch out on us."

+ When Salas was being booked he said he did not know how he got caught because he tied up his hair and had taken precautions not to get any blood on himself.

+ When Salas was asked whether he understod that he took a human life, he said "yes," and was smirking and appeared joyful.

+ "Salas hit one of the victims in the head, the person who was in the front room when they first entered the house."

+ Victorino then instructed Salas to get the "dude" sitting on the floor in the back bedroom.

The Fifth District made all of these factual findings. See Salas v. State, 2007 WL 4352749 at *2-5 (Fla. 5th DCA, December 14, 2007). The court concluded

that: "By his own admission, Salas was an active participant who forcibly entered the house, armed with a baseball bat and struck at least one victim, Gonzalez, repeatedly with the bat." Id. at *10. In fact, Salas actually hit two different people with his bat, as indicated in the Fifth District's own facts.

The court went on to hold: Additionally, overpowering evidence was presented that Salas intended to commit the offense of premeditated murder in the house. Salas was present when the plan was hatched, to break in and to kill the occupants of the house. Salas arrived at the house with a change of clothes and armed himself with a baseball bat. Salas was seen hitting one of the victims in the head. After the crimes were committed Salas disposed of the bloodied bats. Id. at *10, 12.

There is not one legally relevant distinguishing act that the defendant undertook that makes him more worthy of a death sentence than Salas.

ARGUMENT 12: LETHAL INJECTION ITSELF AND FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL

After the initial brief was filed this Court decided Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), where this Court upheld the constitutionality of Florida's lethal injection procedures as currently administered.

In the initial brief on page 57, the defendant incorporated by reference the record-on-appeal in Lightbourne. The defendant asks this court to judicially notice said record as it did in Schwab v. State, 969 So.2d 318 (Fla. 2007).[2]

To be clear, the defendant is challenging the inherent per se unconstitutionality of lethal injection itself as cruel and inhumane, in violation of *inter alia*, Article I, Section 9 of the Florida Constitution (See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007) – as well as challenging the fact that Florida's implementation of lethal injection presents an unnecessary risk of pain and suffering.

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[2] A stay of execution for Mr. Schwab was granted on November 15, 2007 by the United States Supreme Court. Case No. 07A383.

The new May 2007 and August 2007 lethal injection protocols promulgated by the Department of Corrections do not sufficiently minimize the risk of pain and suffering in lethal injection executions.

The dispostive standard on this issue should be whether the method of execution creates an unnecessary risk of pain and suffering (as opposed to a substantial risk of the wanton infliction of pain). Regardless, Florida's procedures do not comply with either standard.

Florida's procedures are also unconstitutional because there are readily available alternatives that pose less risk of pain and suffering. Other chemicals and procedures can be implemented, as an alternative to Florida's current cocktail and procedures, which pose less risk of suffering. Using the least restrictive alternative is constitutionally required.

The continued use of the three drugs – sodium thiopental, pancuroniam bromide, and potassium chloride – individually or together, also violate the proscription against cruel and unusual punishment.

All of these issues are currently pending with the United States Supreme Court in Baze v. Rees, 217 S.W.3d 207 (KY. 2007), *cert. granted*, 2007 WL 2075334 (U.S. Sup. Ct., September 25, 2007) (07-5439). It is requested that this

Court not rule until Baze is decided. Lightbourne does not resolve all of the arguments presented in the case at bar.

DOC's current procedures are also insufficient because the consciousness assessment needs to meet a clinical standard using medical expertise and equipment and a one-drug protocol utilizing only a lethal dose of sodium pentothal (sodium thiopental) is a less restrictive, and more humane, alternative.[3]

Currently, Florida courts are providing too much deference to DOC on these issues. Precedent on this point will most likely change after the United States Supreme Court decides Baze. This Court will then have a new freedom to do what's right – something DOC is apparently unwilling or unable to do.

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[3] See Schwab v. State, 2007 WL 3286732 at fn 3 (Fla., November 7, 2007) (J. Pariente concurring), noting that the one-drug protocol was recommended by Tennessee's protocol committee but was not adopted. See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn 2007).

ARGUMENT 15: THE CUMULATIVE EFFECT OF THE DEFICIENT PERFORMANCE OF TRIAL COUNSEL AND THE NON-REVERSIBLE ERRORS IN THIS CASE DEPRIVED THE DEFENDANT OF A FAIR TRIAL

The State inaccurately contends on page 100 of its brief that this issue is not properly presented because the State cannot identify the claims. However, the defendant incorporated by reference every single argument that was made in the initial brief. All of these issues were fully briefed and argued in the body of the brief. It would simply be a waste of space to re-list all of them.

CONCLUSION

For all the foregoing arguments and authorities, the Appellant/Defendant, Jerone Hunter, respectfully requests this Honorable Court to hold that the Florida due process clause provides more protection to criminal defendants than its federal counterpart, to expand its comparative proportionality review, and reverse his convictions and remand for a new trial/penalty phase, or reduce his sentence to life imprisonment without the possibility of parole.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 on this 16th day of January 2008.

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
Florida Bar No. 0144886
Appellate Attorney for Defendant
P.O. Box 568005
Orlando, FL 32856-8005
(407) 841-7676

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 16th day of January 2008.

RYAN THOMAS TRUSKOSKI, ESQ.
Appellate Attorney for Defendant