IN THE SUPREME COURT OF FLORIDA

JARVIS RAMON HAYNES,

Petitioner,

v. **CASE NO. SC07-123**

STATE OF FLORIDA,

Respondent.
_____/

On Notice To Invoke Discretionary
Jurisdiction To Review A Decision Of The
Fifth District Court of Appeal

MR. HAYNES' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, **JARVIS RAMON HAYNES,** will be referred to as "Mr. Haynes." The Respondent, **STATE OF FLORIDA**, will be referred to as the "state." The Appendix attached to this brief will be referred to as "App.," followed by the appropriate tab letter. The record on appeal will be referred to by the volume number, followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This petition seeks review of a decision by the Fifth District Court of Appeal in a final appeal from a final judgment and sentence entered in a direct contempt proceeding in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida ("trial court").

On May 10, 2005, the state filed an indictment against Mr. Haynes, Charlie Hamilton, and Taveress Webster, charging each with three counts (2/13-14). The first count alleged murder in the first degree, felony murder, of Roy Deering, in violation of §§ 775.087(1),(2) (2/13). Count Two alleged that the three men committed robbery with a firearm on Roy Deering or Jessica Alers, in violation of §§ 812.13(2)(a), 775.08(1),(2) (2/13). Count Two also alleged that during the commission of the offense, Mr. Hamilton actually possessed and carried a firearm, and Mr. Webster possessed, carried, and discharged a firearm, resulting in Mr. Deering's death. Count Three charged the three defendants with dealing in stolen property, in violation of §812.019(1) (2/14).

Following a jury trial involving only Mr. Haynes, the jury returned a verdict on Count One of guilty of a lesser included offense of third degree felony murder. On Counts Two and Three, Mr. Haynes was found guilty as charged (Progress Docket, p. E). He was sentenced to life in prison on Count Two, and concurrent terms of five years in prison on Count One and fifteen years in prison on Count Three (Progress Docket, p. E). Mr. Haynes' appeal of those convictions and sentences was affirmed in Haynes v. State, ___ So.2d ___ (Fla. 5th DCA 12/8/06)[31 Fla. L. Weekly D3093]. A timely motion for rehearing has been filed and is pending as of the filing of this brief.

The state tried Mr. Hamilton and Mr. Webster together in December, 2005. Mr. Haynes was allegedly subpoenaed by the state to testify in that trial. Because Mr. Haynes refused to testify the state requested that the trial court hold Mr. Haynes in direct contempt of court (1/9).

A direct contempt hearing was held on December 8, 2005 (1/1-12). The state filed a subpoena which required Mr. Haynes to testify in Mr. Hamilton's trial and a subpoena which required Mr. Haynes to testify in Mr. Webster's trial(1/4; 2/16-17). On their face, the documents state that they were personally served on Mr. Haynes on December 2, 2005 (2/16-17).

The trial court placed Mr. Haynes under oath (1/3). Mr. Haynes invoked his

Fifth Amendment privilege and stated that he would not testify at the ongoing Hamilton/Webster trial (1/8-9). The trial court never inquired to Mr. Haynes as to whether he had ever been served with a subpoena in either case. The trial court immediately found Mr. Haynes in direct contempt of court, and imposed a sentence of 179 days in the Orange County Jail, to be served consecutive to the DOC prison sentences previously imposed (1/9-10). A written order was filed on December 8, 2005, which found and adjudicated Mr. Haynes guilty of contempt of court and imposed the sentence (2/18-19).

Mr. Haynes filed a timely notice of appeal (2/23). He argued in his briefs, among other things, that the trial court's failure to provide him the opportunity to present evidence of excusing or mitigating circumstances required vacation of both the judgment and sentence.

In a concession supported by the law and the facts, the state agreed with Mr. Haynes' claim (AB 14):

> C. THE TRIAL COURT DID NOT AFFORD AN OPPORTUNITY FOR APPELLANT TO PRESENT EVIDENCE OF EXCUSING OR MITIGATING CIRCUMSTANCES:
>
> Appellant's final assertion, that the trial court did not afford him an opportunity to present evidence of excusing or mitigating circumstances, is well taken. See Fla.R.Crim.P. 3.830; see Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005) (reversing as defendant was given no real opportunity "to present evidence of excusing or

mitigating circumstances.") McCrimager v. State, 919 So.2d 673 (Fla. 1st DCA 2006); Garrett v. State, 876 So.2d 24, 25-26 (Fla. 1st DCA 2004). This Court's reversal should be "without prejudice to the institution of proper contempt proceedings." Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005); Marshall v. State, 764 So.2d 908 (Fla. 1st DCA 2000).

However, initially the Fifth District issued a "per curiam affirmed" opinion. On motion for rehearing, the Fifth District issued an opinion which upheld the conviction and only vacated Mr. Haynes' sentence. Haynes v. State, ___ So.2d ___ (Fla. 5th DCA 10/27/06)[31 Fla. L. Weekly D2694]. In addressing this specific claim, the court wrote:

> However, the trial court did err by failing to permit Appellant to present evidence in mitigation, as authorized by rule 3.840(g). This is fundamental error. See, e.g., Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006); Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006). The proper remedy is reversal of the sentence and remand for a new sentencing proceeding.

Id. at D2695. Mr. Haynes filed another timely motion for rehearing. The Fifth District issued a corrected opinion (App. A) which changed the second to the last paragraph to read:

> However, the trial court did err by failing to permit Appellant to present evidence in mitigation, as authorized by rule 3.830. This is fundamental error. See e.g., Hibbertv. State, 929 So.2d 622 (Fla. 3d DCA 2006). We believe that the proper remedy under the facts of this case is reversal of the sentence and remand for a new sentencing proceeding. Cf. Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006).

The court then denied the motion for rehearing (App. B). The mandate issued on January 8, 2007. Mr. Haynes filed a timely notice to invoke this Court's jurisdiction on January 18, 2007.

SUMMARY OF THE ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AS TO THE EFFECT OF THE FAILURE OF THE TRIAL COURT TO GIVE A DEFENDANT IN A DIRECT CONTEMPT PROCEEDING THE OPPORTUNITY TO PRESENT EVIDENCE OF EXCUSING OR MITIGATING CIRCUMSTANCES

This Court has jurisdiction pursuant to Art. V, § 3(b)(3) to review cases which directly and expressly conflict with opinions of this Court or other district courts of appeal on the same question of law. This Court must exercise its jurisdiction and accept Mr. Haynes's case for review because the Fifth District's opinion expressly and directly conflicts with numerous decisions on the effect of the trial court's failure to give the defendant in a direct contempt proceeding the opportunity to present excusing or mitigating circumstances. Contrary to the ruling below, this error requires reversal of both the judgment and sentence, and not just the sentence.

ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AS TO THE EFFECT OF THE FAILURE OF THE TRIAL COURT TO GIVE A DEFENDANT IN A DIRECT CRIMINAL CONTEMPT PROCEEDING THE OPPORTUNITY TO PRESENT EVIDENCE OF EXCUSING OR MITIGATING

CIRCUMSTANCES

The Fifth District correctly found that the trial court failed to provide Mr.

Haynes an opportunity to present excusing or mitigating evidence in the case.

However, contrary to Mr. Haynes' argument, and the state's concession, it refused to

vacate the judgment of conviction, and instead vacated only the sentence.

A. Construction of Fla.R.Crim.P. 3.830

This Court should exercise jurisdiction over this case because the decision of the Fifth District expressly addresses and wrongly resolves and important issue in direct contempt proceedings. In doing so, it has issued an opinion which conflicts with numerous precedents.

Fla.R.Crim.P. 3.830 states, in its entirety:

> A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts on which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against the defendant and inquire as to whether the defendant has any cause to show why he or she should not be adjudged guilty of contempt by the court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

Of importance, in reading this rule, is that the sentence about excusing or mitigating circumstances is included in the group of sentences dealing with adjudication and the judgment. It is not grouped with the single sentence dealing with sentencing. The proper remedy - that provided in nearly all cases discussing

the issue - is vacation of the judgment and sentence.

Additionally, "excusing" circumstances are those that are typically offered as a defense to a charge, i.e., those that are an effort to negate some essential element of the offense. That evidence - those "excusing" circumstances - is thus relevant to adjudication, and would necessarily have to be offered before the issue of adjudication has been decided.

B. Express and Direct Conflict

Uniformly, each of the other district courts of appeal reverse both the judgment and sentence upon finding error in a direct contempt proceeding for the failure to provide an opportunity to present evidence of excusing or mitigating circumstances. See, e.g., McCrimager v. State, 919 So.2d 673, 674 (Fla. 1st DCA 2006); Garrett v. State, 876 So.2d 24, 25 (Fla. 1st DCA 2004); Rhoads v. State, 817 So.2d 1089, 1092 (Fla. 2d DCA 2002); Sanjuro v. State, 677 So.2d 965, 966 (Fla. 3d DCA 1996); Bouie v. State, 784 So.2d 521, 523 (Fla. 4th DCA 2001)("Prior to the adjudication of guilt, the judge did not inquire as to whether appellant had any cause to show why he should not be adjudged guilty of contempt and was not given an opportunity to present evidence of excusing or mitigating circumstances, contrary to rule 3.830") . See also Bauder v. State, 923 So.2d 1223, 1224 (Fla. 3d DCA 2006)(prior to a finding of contempt the accused must be given

opportunity to offer any mitigation of his conduct). In the one case cited by the Fifth District on this issue - Hibbert v. State, 929 So.2d 622 (Fla. 3d DCA 2006) - the remedy was the vacation of the judgment as well as the sentence.

The Fifth District's citation to Gooden v. State, 931 So.2d 146 (Fla. 1st DCA 2006), is misplaced. Gooden is an indirect criminal contempt case, governed by Fla.R.Crim.P. 3.840, and not Rule 3.830.

In the past, the Fifth District had also uniformly held that the appropriate remedy for a violation of this part of Rule 3.830 is reversal of both the judgment and sentence. See Johnson v. State, 906 So.2d 361 (Fla. 5th DCA 2005); Jackson v. State, 562 So.2d 855, 855-56 (Fla. 5th DCA 1990)(judgment reversed due to trial court's failure to provide opportunity to present evidence of excusing or mitigating circumstances prior to finding of direct criminal contempt); State v. Eastmoore, 393 So.2d 567, 573 (Fla. 5th DCA 1981)("The opportunity to present evidence of excusing circumstances must precede the adjudication of guilt; . . . .").

Additionally, in Hutcheson v. State, 903 So.2d 1060 (Fla. 5th DCA 2005), the court stated "Where a claim of false or perjured testimony is involved, the accused must, **prior to the adjudication of guilt**, be given an opportunity to present evidence of excusing or mitigating circumstances." Id. at 1062 (emphasis added). In S. B. v. State, 940 So.2d 576 (Fla. 5th DCA 2006), an opinion issued the

same day as Mr. Haynes', the court construed Fla.R.Juv.P. 8.150(a), the virtually identical juvenile counterpart to Rule 3.830. M. L. v. State, 819 So.2d 240, 242 (Fla. 2d DCA 2002). In S. B. the court vacated both the judgment and sentence, in part because the defendant was not provided the opportunity to present evidence of excusing or mitigating circumstances.

The conflict between these cases and Mr. Haynes' must not be allowed to exist. He is entitled to the same relief as the other defendants in the same situations. There is no legal basis to treat his case differently.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must grant Mr. Haynes' petition for review, and order briefing on the merits.

RESPECTFULLY SUBMITTED this 29th day of January, 2007, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2007, a true copy of this brief and Appendix have been furnished by United States mail, first class postage prepaid, to Rebecca Rock McGuigan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief is typed in Times New Roman 14 point font.

_____

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