

IN THE SUPREME COURT OF FLORIDA

**CASE NO.: SC09-1659
L.T. NO.: 90-5417CF10B**

LANCELOT URILEY ARMSTRONG,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JOHN COTRONE, ESQ.
Fla. Bar No. 827762
509 S.E. 9th Street
Ft. Lauderdale, FL 33316
(954) 779-7773

Attorney for Appellant

TABLE OF CITATIONS

CASES	PAGE
<u>Green v. State</u> , 907 So. 2d 489 (Fla. 2005).	1
<u>Hitchcock v. State</u> , 673 So. 2d 859 (Fla. 1996).	2-3
<u>Waterhouse v. State</u> , 596 So. 2d 1008 (Fla. 1992).	1, 2

REPLY BRIEF OF APPELLANT

The Appellate will rest on its Initial Brief as to the arguments presented as to Issues I, II and IV and confine his Reply herein to provide additional argument as to Issue III:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY PROVIDING AN INADEQUATE AND MISLEADING INSTRUCTION TO THE JURY THAT THE DEFENDANT WOULD RECEIVE CREDIT FOR TIME SERVED SHOULD HE RECEIVE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE (25) YEARS WITHOUT ADDITIONALLY INSTRUCTING THE JURY THAT PAROLE IS NOT GUARANTEED AT OR AFTER TWENTY-FIVE YEARS?

The State's Answer Brief offers the cases of Green v. State, 907 So. 2d 489 (Fla. 2005), and Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), as being dispositive to Issue III. The Appellant disagrees that Waterhouse, is dispositive. The facts of Waterhouse, are distinguishable from the case at hand. In Waterhouse, the trial court declined to answer the jury question "If he's sentenced to life, when would he be eligible for parole? Does the time served count towards the parole time?" 596 So. 2d 1008, 1015. In Waterhouse, The trial judge informed the jury that they would have to depend on the evidence and instructions. Id. at 1015.

In the case at hand, the jury presented the question, "Will the 17 yrs he served

be included in his 25 yrs sentence?” (R/Vol. 3: 446). The Appellant advocated for the Trial Court to decline to answer the jury question, consistent with Waterhouse. (T/Vol. 30: 1488-1491). However, the Trial Court did not decline to answer the jury question. Instead, the Trial Court provided the Jury with the instructional answer, “The defendant will receive credit for the time served on this charge.” (T/Vol. 30: 1506). Because the Trial Court in the case at hand answered the jury question, it must be determined whether that answer was confusing, contradictory or misleading. See, Green v. State, 907 So. 2d 489, 496 (Fla. 2005).

The Appellant agrees that Green, presents the most comparable precedent facts and approved of the trial court’s instruction, “The defendant if sentenced to life without parole would be entitled to credit for all time jail served against a life sentence. However, there is no guarantee that the defendant would be granted parole at or after 25 years.” Id. at 496. However, unlike Green, in the case at hand, the Trial Court did not provide the additional instruction that parole would not be guaranteed after twenty-five (25) years.

It was an abuse of discretion not to instruct the jury that parole would not be guaranteed after twenty-five (25) years, as requested by the defense, because it misled the Jury to believe that the Defendant would be released in eight (8) years, thus causing unfair prejudice to the Defendant. This type of unfair prejudice was

addressed in the case of Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). In Hitchcock, this Court held that the State's argument at a capital resentencing hearing that the defendant would be eligible for parole in twenty-five (25) years was improper and directed the State, upon remand, not to present argument that the defendant would be eligible for parole after twenty-five (25) years. In so holding, this Court found the argument to be unfairly prejudicial since the resentencing hearing occurred so close in time to the expiration of the twenty-five (25) years. Id. at 863.

The unfair prejudice resulting from the State's argument in Hitchcock, should be found to exist here, where the Trial Court exercised its discretion to answer a jury question informing that the Appellant would receive seventeen (17) years credit for time served without additionally instructing that parole is not guaranteed at twenty-five (25) years.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Defendant/Appellant respectfully requests that this Honorable Court reverse the Trial Court's sentencing Order entered on August 7, 2009, committing the Defendant to the custody of the Department of Corrections to be sentenced to death.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that oral argument be scheduled pursuant to Fla.

R. App. P. 9.142(a)(4).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant - was sent by U.S. mail to the Office of Attorney General, Department of Legal Affairs, criminal appellate division, 1515 N. Flagler Dr. 9th floor, West Palm Beach, FL 33401 and Lancelot Armstrong, DC 693504, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 33026 on this 18th day of January, 2011.

JOHN F. COTRONE, P.A
Attorney for the Appellant
509 S.E. 9th Street
Ft. Lauderdale, FL 33316
(954) 779-7773

By: _____
JOHN F. COTRONE, ESQ.
Fla. Bar No. 827762
john@jcotronelaw.com

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellate Brief complies with the font requirements of Fla. R. App. P. 9.210 and is written in Times New Roman 14-point font.

JOHN F. COTRONE, ESQ.
Fla. Bar No. 827762