IN THE SUPREME COURT OF FLORIDA

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RICHARD HENYARD, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,314

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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STATEMENT OF THE FACTS

Appellant corrects the Appellee's Statement of the Facts by pointing out that during her testimony, Dorothy Lewis specifically testified that while she was being assaulted on the trunk of the car, she could not see inside the car and had no way of telling whether her children could see her. (T1843)

ARGUMENT

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S CONVICTIONS AND SENTENCES MUST BE REVERSED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION DUE TO SERIOUS ERRORS WHICH UNDERMINE THE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THE JURY.

Appellee asserts that, with regard to the granting of the State's challenge for cause on Juror Schrock, the trial court was correct since, "That juror clearly stated, on no less than five occasions, that he could not under *any circumstances* recommend the sentence of death in this case." (Brief of Appellee, Page 22) This is simply inaccurate. What Juror Schrock said was, that <u>because</u> of the circumstances in this case he would not be inclined to vote for the death penalty. The particular circumstances that Juror Schrock was referring to was the statutory mitigating circumstance of the age of the defendant. The Legislature, and indeed this Court as well as the Supreme Court of the United States, have determined that the age of the defendant is a circumstance which a jury can consider in determining whether the death penalty is warranted in a particular case. Thus, despite the presence of any number of aggravating circumstances in a given case, a juror or jurors can determine that the statutory mitigating factor of the age of the defendant is entitled to such weight that the death penalty is

simply not warranted. Far from refusing to follow the law, Juror Schrock was indeed stating that he accepted the law and would apply it. While obviously his application of the law was not to the liking of the prosecutor, this is not a grounds for a challenge for cause. Indeed, this Court itself has declared that for those persons fifteen years of age and younger the sole factor of age prevents the imposition of the death penalty. See Allen v. State, 636 So. 2d 494 (Fla. 1994). Additionally, in the instant case it was solely because of age that the State could not seek the death penalty for Alfonzo Smalls.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO SUPPRESS HIS STATEMENT WHERE THE EVIDENCE CLEARLY SHOWED THAT APPELLANT DESIRED TO STOP THE INTERROGATION, WHICH REQUEST WAS NEVER HONORED.

Appellee argues that since the State only admitted one of Appellant's three statements into evidence this Court need not consider the propriety of the denial of the motions to suppress in regard to the two statements that were not admitted. This is not so. In the likely event that Appellant receives a new trial or even a new penalty phase, the State could still seek to admit any and all of the statements. Therefore, it is incumbent upon this Court to determine the propriety and admissibility of those statements at this juncture. Consequently, that portion of Appellant's brief dealing with these issues is not as Appellee would have this Court believe "mere surplusage." (Brief of Appellee at Page 25)

Appellee states that with regard to the statement of Appellant that was admitted into evidence, Appellant never indicated any desire to terminate the questioning. Appellant disagrees with this conclusion. On several occasions during the statement Appellant questioned whether he could go home. At the very least this is equivalent to a request to terminate the interrogation. Even if it is not an outright unequivocal

statement, it is at least an equivocal statement concerning Appellant's willingness to continue the interrogation. At that point the officers simply should have terminated the interrogation. The fact that Appellant continued to answer questions is certainly not indicative of his willingness to do so. It is just as reasonable to assume that it didn't matter what Appellant's wishes were, that the officers were going to do exactly what they wanted to do and therefore Appellant really had no say in the matter. Once again, Appellant draws this Court's attention to its own pronouncement in Traylor v. State, 596 So. 2d 957, 967 (Fla. 1992), wherein this Court stated:

> Under Section 9, [of the Florida Constitution] if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.

The authorities in the instant case did not scrupulously honor Appellant's right to terminate the interrogation. Thus, the statement must be suppressed. With regard to the remaining two statements, Appellee simply has not addressed the propriety of the ruling of the trial court in its brief other than to say there was no error. Appellant relies upon the argument presented in his Initial Brief with regard to these statements and considers Appellee's failure to address the same as a concession that error occurred.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE OF DNA TESTING.

Appellee has obviously missed the boat with regard to this issue. As was argued below, Appellant sought suppression of the DNA test results because the FDLE lab that performed the test did not meet the standard as set forth by the NRC Report so as to meet the minimum requirements accepted by the scientific community. In Hayes v. State, 660 So. 2d 257 (Fla. 1995), this Court addressed the issue of the admissibility of DNA evidence for the first time. While this Court accepted the fact that DNA evidence can be a valuable tool in criminal prosecutions, it nevertheless set forth the minimum standards that must be met before such evidence may be admitted in a particular trial. In this regard, this Court pointed to the NRC Report with approval. In particular, this Court set forth with emphasis added the following:

> The validity of assumption 4 -- that the analytical work done for a particular trial comports with proper procedure -- can be resolved only case by case and is always open to question, even if the general reliability of DNA typing is fully accepted in the scientific community. The DNA evidence should not be admissible if the proper procedures were not followed. Moreover, even if a court finds DNA evidence admissible because proper procedures

> were followed, the probative force of the evidence will depend on the quality of the laboratory work. More control can be exercised by the court in deciding whether the general practices in the laboratory or the theories that a laboratory uses accord with acceptable scientific standards. Even if the general scientific principles and techniques are accepted by experts in the field, the same experts could testify that the work done in a particular case was so flawed that the court should decide that, under Frye, the jury should not hear the evidence.

Id. at 263. This Court then approved of the NRC Report and apparently endorsed it as a means of determining the admissibility of DNA evidence at trial. In the instant case, the trial court was presented with the NRC Report and at the hearing on the motion to suppress the DNA testimony, it was pointed out to the trial court that the NRC Report advocates a number of measures that need to be taken to protect the accuracy of testing including line proficiency testing, certification and mandatory licensing of the technicians performing the testing, external audits, and other methodology to assure the accountability of the labs and lab personnel. These controls were lacking in FDLE. Nancy Rathman, the lab technician for FDLE, testified that FDLE was not accredited and not certified to perform DNA testing. She also testified that they do not have quality control procedures which the NRC lists as important. (T2775-78) Further, the NRC Report notes that match criteria must be objective and firmly established. Rathman stated that her match criteria is only accurate to a plus or minus 1.75 percent. (T2779) Additionally,

the NRC Report provides that the ceiling principle must be utilized when determining statistical probabilities of DNA matches. However, Ms. Rathman stated that FDLE does not employ the ceiling principles. Simply put, the State failed to establish the predicate for admissibility of the DNA testing results in the instant case. While the trial court did not have the benefit of this Court's Hayes decision, it did have the benefit of the NRC Report which this Court adopted and approved in Hayes.

Notwithstanding this glaring deficiency, Appellee urges this Court to find such admission, even if erroneous, to be harmless given the other evidence of Appellant's guilt. This statement is somewhat baffling since one questions why the State presented such evidence if it were not that important. It was the DNA testing results which the State employed to counter Appellant's assertion that he was not the triggerman in the instant case. Despite Appellee's belated attempt to downplay the importance of this evidence, there is simply no way that this Court can judge the weight given to this evidence by the jury. Indeed, DNA testing is still relatively new and highly technical that a jury may be inclined to accept such evidence and accord it greater weight than other lay testimony which it may feel can be affected by outside biases. A new trial is required at which time this Court should rule that the DNA testing results are inadmissible for any purpose.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER PROSECUTORIAL COMMENTS MADE TO THE JURY.

Appellee has completely misstated the comment of the prosecutor below during voir dire which is a subject of this appeal. Appellee states, "The first statement which Henyard claims is improper is the state attorney's statement, during voir dire, that if the aggravators outweigh the mitigators, the sentencing recommendation should be death." (Brief of Appellee at Page 44) This is not correct. The offending comment that the prosecutor made is, "If the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death." (T275,296,531) It is the prosecutor's use of the word "must" that makes this statement an incorrect statement of the law. It is clear that there is no automatic death penalty in this state. Indeed, such a death penalty would be deemed unconstitutional. As long ago as 1975 this Court recognized this principle when it stated in Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975):

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of

> death by capital punishment in the other case.

Therefore, the prosecutor's absolute statement to the jury that if the aggravators outweigh the mitigators they "must" return a death penalty was clearly an improper statement of the law. While it certainly may have been appropriate during a closing argument in the penalty phase for a prosecutor to exhort the jury that based on the evidence presented concerning the aggravators and the mitigators they should return a verdict of death, it is highly improper to tell the jury during voir dire that if a certain quantity of evidence is presented they must return a verdict of death. The objection to the comments below were timely and proper, and the trial court erred in overruling them.

With regard to the second offending statement of the prosecutor, concerning the allusion that Appellant never confessed to raping Ms. Lewis, once again Appellee has missed the mark. Appellee urges this Court to review the entire transcript and concludes that it is clear that the prosecutor was only referring to the statement that was admitted. While it is true, that at the bench conference wherein the objection was argued, the prosecutor emphasized to the trial judge that he was only referring to the statement in evidence, this was never conveyed to the jury. In fact, the jury did not know that Appellant made three statements, only one of which was admitted into evidence. Therefore, when the prosecutor made the statement concerning Appellant's failure to ever admit to raping Dorothy Lewis, the jury had no way of properly assessing the context in which the

prosecutor was arguing. Rather, the prosecutor improperly implied to the jury a fact that he knew was not true. Appellee argues that Appellant could have sought admission of the other two statements himself if he so desired. Quite simply, this argument is ludicrous. There would be no reason for Appellant to seek admission into evidence of these statements. Certainly defense counsel could not have anticipated that the prosecutor would make such a blatant misstatement to the jury. Of course, at the time this statement was made, during closing argument, Appellant could not have admitted the other statements into evidence since both sides had rested their cases. As stated in the Initial Brief, the State's decision not to admit Appellant's other statements into evidence is indeed suspicious. One questions why they would have so vigorously opposed Appellant's motions to suppress the statements and then simply choose not to present them to the jury. Notwithstanding this question, the prosecutor clearly implied that at no time did Appellant ever admit to raping Dorothy Lewis in an attempt to undermine the defense in this case. This Court should not approve of such prosecutorial shenanigans.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY HEARD AND THE TRIAL COURT EXPRESSLY CONSIDERED HIGHLY PREJUDICIAL TESTIMONY WHICH DID NOT RELATE TO ANY STATUTORY AGGRAVATING CIRCUMSTANCE.

A. The robbery of Julia Delisle in November 1989, which resulted in a juvenile adjudication rather than a criminal conviction, was improperly introduced and considered in aggravation.

As Appellee correctly notes, this Court in Merck v. State, 20 Fla. L. Weekly S537 (Fla. October 12, 1995), has ruled that juvenile adjudications of delinquency are not admissible to prove the aggravating circumstance of a prior conviction for a violent felony. In this regard, it was clearly error for the State to be permitted to present to the jury evidence concerning Appellant's prior juvenile delinquency adjudication for the offense of armed robbery. However, Appellee concludes that such error was harmless since there were other convictions which were used to satisfy this aggravating circumstance. However, the other convictions which were used to satisfy this particular aggravating circumstance were contemporaneous convictions. Quite recently in Terry v. State, 21 Fla. L. Weekly S9 (Fla. January 4, 1996), this Court noted that while contemporaneous convictions for violent felonies qualify under this aggravator, the weight accorded to such aggravator is less than it would be if the

qualifying offenses were truly committed on prior occasions. Additionally, to the extent that the contemporaneous convictions are considered, under this aggravator, Appellant asserts that the trial court improperly doubled this aspect with the aggravating circumstance that the murder was committed in the course of a kidnapping. Such doubling is impermissible. Provence v. State, 337 So. 2d 783 (Fla. 1976).

CONCLUSION

Based upon the foregoing reasons and authorities cited herein as well as in the Initial Brief, Appellant respectfully requests this Court to grant the requested relief as set forth in the Initial Brief Conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Richard Henyard, Jr., #225727 (42-2082-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 24th day of January, 1996.

Michael S Becker
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ASSISTANT PUBLIC DEFENDER