IN THE SUPREME COURT OF THE STATE OF FLORIDA

NEWTON CARLTON SLAWSON

Appellant

vs. : Case No. 75,960

STATE OF FLORIDA

Appellee

REPLY BRIEF OF APPELLANT

SIMSON UNTERBERGER, ESQUIRE
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant
Florida Bar Number 158800

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ARGUMENT UPON ISSUE I

Appellee's expert opined that legally recognized impairment defenses (i.e., intoxication) are a charade. The basis of this opinion was a study of persons found not guilty by reason of insanity, the results of which were that:

a. It is extremely difficult **and** virtually impossible to reconstruct the mental state of defendant post facto.

b. The persons studied were not mentally ill.

c. Persons in legal jeopardy will say what they believe will serve their interests.

In Appellant's view, the presentation of this opinion in rebuttal to Appellant's experts, whose opinions supported his claim that he was intoxicated when he killed the victims named in the Indictment, was error because it did not assist in understanding any fact or determining any factual issue, as expert opinion is supposed to do, and constituted commentary as to the validity of the law, a matter not the proper subject of expert opinion.

Appellant's view is assailed on the theory that it fails to consider the context within which the "charade" opinion was made. According to Appellee, that context consists of certain acknowledgments made by Appellant's experts on cross examination, to wit: that reconstruction of mental states can be difficult, that in some respects Appellant malingered, that Appellant's stories were inconsistent, that it is possible that Appellant told a story to convince an evaluator of his intoxication, that sometimes people charged with crime exaggerate their psychological symptoms and tell different stories to benefit themselves **and** convince their

evaluators of their impairment and that there is a "minimally common" view in the field of psychology that it is futile to reconstruct mental states. Though it never tells us how, Appellee nevertheless contends that this context consisting of these acknowledgments somehow renders the opinion that legally recognized impairment defenses are a charade, a **proper** matter of expert opinion, and something other than a commentary on the validity of such defenses.

While Appellant recognizes the latitude accorded to trial courts in deciding the matters about which an expert can opine, the fact remains that the validity of intoxication as a **defense** is not one of them. No amount of obfuscation by Appellee can overcome the obvious, that is, that the opinion that impairment defenses are a charade (which is the only opinion, view, statement, or testimony of Appellee's expert here under attack) is improper in that it makes clear no obscure fact through the opinion of an expert skilled in relation to the subject of the inquiry, provides no assistance in comprehending and resolving a factual issue, Miller v. Tropical Gables, Corp., **99** So. 2d 589 (Fla. 3d DCA **1958)** and Wright **v.** State, **348** So. 2d 26 (Fla. 1st DCA 1977), and constitutes nothing more than the expert's opinion that a defense recognized in law is a charade.

On the question of whether the admission of the opinion was fundamental error, Appellee criticizes Appellant's reliance upon Carter v. State, **469** So. 2d **194** (Fla. 2d **DCA 1985).** The crux of the criticism is that the factual distinctions between Caster v. State, supra, and the case at hand render Carter v, State, supra,

inapplicable. While factually distinctive, Appellee fails to recognize the conceptual similarity between the two situations. In both the case at hand and Carter **v.** State, supra, the defendant failed to object to a matter (an expert opinion in the case at hand and a jury instruction in Carter v. State, supra,) which negated an accused's only defense. The high prejudice to the accused of such an occurrence is without question and if the unobjected to instruction in Carter v. State, supra, is analogous to the unobjected to opinion in the case at hand, then fundamental error has occurred as per Carter **v.** State, supra.

ARGUMENT UPON ISSUE 111

In this case Appellant was sentenced to death on each of the four counts of first degree murder of which he was convicted. Of the four victims, two were children. In deciding to impose a death sentence on each such count, one of the aggravating circumstances utilized to support same is that contained in Chapter 921.141(5)(b) Florida Statutes and with regard thereto in its Judgment, Order, and Sentence, the trial court stated that:

> The Court finds that though the Aggravating Circumstances fall into only two statutory categories, the fact that one of those categories includes the Defendant's conviction of four First Degree Murders, including the murder of two helpless and defenseless young children, would be sufficient in itself to justify and warrant the imposition of the death penalty as to each capitol felony.

Appellant recognizes that as to any of said first degree murders of which he was convicted, the others constitute the aggravating circumstance of another capital or violent felony as

per Chapter 921.141(5)(b) Florida Statutes. And, Appellant also recognizes that with regard to such other capital or violent felonies, evidence concerning them is admissible and may be considered by a sentencing court. Stewart v. State, 558 So. 2d 416 (Fla. 1990); Brown v. State, 473 So. 2d 1266 (Fla. 1985); Mann v. State, 453 So. 2d 784 (Fla. 1984); and Elledse v. State, 346 So. 2d 998 (Fla. 1977). Despite these recognitions, Appellant also notes the proscription against using non statutory aggravating circumstances in a proceeding pursuant to Chapter 921.141 Florida Statutes. Walton v. State, 547 So. 2d 622 (Fla. 1989) and Elledge v. State, supra.

Appellee claims that the reference in the aforecited portion of said Judgment, Order, and Sentence to the two helpless and defenseless young children represents merely consideration by the trial court of evidence concerning such other capital or violent felonies. Appellant asserts that it constitutes employment of a non-statutory aggravating circumstance. That Appellant is correct is clear from the following.

From said quoted portion, the trial court clearly noted that one category of aggravating circumstance is that set forth in Chapter 921.141(5)(b) Florida Statutes and that as to each murder the other three fall within the category. Had the trial court stopped at that point, and from it have gone on to claim sufficiency as to each murder of the other three as justification for a death sentence, there would be no problem. But instead, the trial court utilized and included the fact that within the four murders were two of helpless, defenseless young children to arrive

at its conclusion that the remaining murders were sufficient to justify and warrant a death penalty for each murder. If excluded, apparently the helplessness and defenselessness of the two child victims would not have been sufficient in the eyes of the trial court for the remaining murders, to wit: the other capital or violent felonies under Chapter 921.141(5)(b) Florida Statutes, to justify and warrant a death penalty for each murder.

However, only when included as they were did such sentences become justified and warranted and it is this effect that renders the trial court's utilization of the helplessness and defenselessness of two child victims as a nonstatutory aggravating circumstance.

ARGUMENT UPON ISSUE V

A party on the receiving end of expert opinion testimony may, of course, cross examine the expert as to the underlying facts and data upon which the opinion is based, Chapter 90.705(1) Florida Statutes, for the obvious purpose of attempting to reduce the weight of the opinion in the eyes of the trier of fact. If this party questions whether or not the underlying facts and data provide a sufficient basis for the opinion, he may voir dire the expert upon the question prior to the expert relating the opinion to the trier of fact in an effort to have the opinion declared inadmissible. Chapter 90.705(2) Florida Statutes. If the voir dire results in the prima facia establishment that the underlying facts and data do not provide a sufficient basis for the opinion,

then the one offering the opinion may establish the underlying facts and data in an effort to prove the sufficient basis. Chapter 90.705(2) Florida Statutes.

In the case at hand, experts as to various aspects of Appellant's mental condition based their opinions regarding same upon underlying facts and data acquired from various sources including Appellant. Of the many facts and data acquired from Appellant, one was that he was a previous drug user. At no time during the testimony of these experts did Appellee ever avail itself of the opportunity to voir dire as per Chapter 90.705(2) Florida Statutes. Thus, Appellant's prior drug use never had to be and was not established for the purposes of supporting the admission of said opinions pertaining to his mental condition. Despite this, the court utilized the underlying fact **or** data of **Appellant's** prior drug use to negate (in appellant's view) or vitiate (in appellee's view) the statutory mitigating circumstance of no significant history of prior criminal activity. Chapter 921.141(6)(a) Florida Statutes. It is this use which Appellant asserts was error.

The reason this use was error is that the underlying fact or data of Appellant's prior drug use was never evidence in the case. **As** demonstrated above, it never had to be established in an effort to prove that the underlying facts and data provided a sufficient basis for the experts' testimony. Accordingly, while Appellant concedes that:

> In the proceeding, evidence may be presented as to any matter that the Court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or

> mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the Court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. Chapter 921.141(1) Florida Statutes.

he disputes any contention that the underlying fact or data of Appellant's prior drug use rose to the level of or constituted "evidence" in this case.

CONCLUSION

In this Reply Brief, Appellant has replied to various arguments upon Issues contained in Appellee's brief. With regard to those arguments not replied to in this Reply Brief, the lack of a reply should not be construed as any concession by Appellant that Appellee's argument and position on the Issue is correct; rather, same should be deemed as representing Appellant's view that a reply is not necessary because his argument upon the Issue contained in Initial Brief of Appellant is more than sufficient.

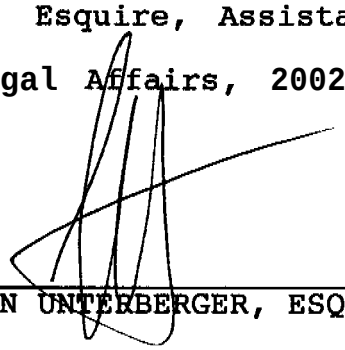
For all the reasons set forth in Initial Brief of Appellant and this Reply Brief, Appellant's conviction and sentence should be reversed and set aside.

Respectfully submitted,

SIMSON UNTERBERGER, ESQUIRE
Suite 707, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant
Florida Bar Number 158800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished, by mail, this 20th day of February, 1992, to Robert Krauss, Esquire, Assistant Attorney General, Florida Department of Legal Affairs, 2002 North Lois Avenue, Tampa, Florida 33607.



SIMSON UNTERBERGER, ESQUIRE