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IN THE SUPREME COURT OF FLORIDA
August 7, 1991

STATE OF FLORIDA,

Petitioner,

v.

CASE NO: 78,084

PHILLIP EUGENE GUESS, JR.

Respondent.

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF RESPONDENT
PRELIMINARY STATEMENT

APPELLANT, PHILLIP EUGENE GUESS, JR., Defendant below, will be referred to as "Defendant", or "Respondent". The Appellant, STATE OF FLORIDA, will be referred to as the "Petitioner".

References to the record on appeal containing the legal documents filed in this cause will be made by reference to the appropriate page number preceded by the letter "R", all contained within parentheses. References to the record of appeal containing the transcript of the trial conducted October 5 and 6, 1989 will be made by references to the appropriate page number preceded by the letter "TR", all contained within parentheses.

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seize a knife from him. (T 335). Guess said that during the questioning by Roberson, that Roberson would not give up on him and kept asking questions, and Guess told him if he wasn't going to believe him, to get him a lawyer. (T 337). Guess said it was consensual sex. (T 347).

SUMMARY OF ARGUMENT

PETITIONER argues that the decision in Fulminante v. Arizona renders the failure to allow the Defendant to testify outside the presence of the jury as to the voluntariness of a confession, subject to harmless error analysis, The decision in Fulminante did not address the well settled and voluminous body of law that the Defendant must be allowed to testify to voluntariness outside the presence of the jury.

The Fulminante decision addressed the evidentiary impact of an improperly introduced involuntary confession. The error which occurred in this case affects the Fifth and Fourteenth Amendment rights of the Defendant and is a structural defect in the trial mechanism. The failure to allow the Defendant to testify at a proffer put the Defendant in a Hobson's choice between not testifying at trial, and arguing the voluntariness of the statement introduced against him.

The burden to the State where a proper proffer is held is minimal and does not hinder effective police procedure. The difficulty for an appellate court reviewing the facts where an involuntary confession was introduced is significantly increased where no adequate proffer occurs.

In this case, the Defendant testified at trial before the jury. The Defendant may not have related the entire circumstance of his confession for fear of prejudice and opening the door to other unrelated allegations of sexual battery.

The circumstances of this case indicate the introduction of

the Defendant's statement without a proper proffer was not harmless error because there was no other evidence of guilt besides the unreliable and impeached testimony of the victim.

ARGUMENT

ISSUE I - WHETHER IN LIGHT OF THE SUPREME COURT OPINION
IN ARIZONA V. FULMINANTE, THE TRIAL COURT'S
FAILURE TO ALLOW THE DEFENDANT TO TESTIFY
OUTSIDE THE PRESENCE OF THE JURY AS TO
VOLUNTARINESS MAY CONSTITUTE HARMLESS ERROR?

PETITIONER correctly states **that** under Florida Law a trial Court's failure to conduct a separate hearing on the voluntariness of a custodial statement, or confession outside of the presence of **the** jury is error of **such** proportions as to require a **new** trial. This procedural rule of protection still is and should be the law in Florida.

The Florida Procedural **Rule** is derived from the **United** States Supreme Court opinion in Jackson v. Denno 378 U.S. 368, **84 S.CT.** 1774, 12 L.Ed. 2d 908 (1964). In federal court, Jackson was codified in 18 USC 3501. Jackson has **been** followed throughout the nation with each state establishing its own **procedure** to adhere to the due process requirements. The voluminous cases on the particularities of **this** hearing have created an entire **body** of law independent from any other aspect of **coerced** confessions.

In Florida, **this** court outlined **the hearing procedure** to be followed and also held that the error was so prejudicial that a new trial was required, McDole v. State 283 So2d 553 (Fla. 1973), Land v. State 293 So2d 704 (Fla. 1974), McDonnell v State 336 So2d 553 (Fla. 1976), Green v. State 351 So2d 941 (Fla. 1971).

The opinion of the United **States** Supreme Court in Arizona v. Fulminante 111 S.CT. 1246, 5 FLW FED. S. 149 (U.S. March 26, 1991) did not address the significant and independent rule of law derived

from Jackson. **The issue in Jackson was separate and distinct from** the evidentiary impact of a coerced confession. Had the Supreme Court in Fulminante concluded otherwise it most likely would have spoken to the Jackson issue. The Petitioner's argument would have this court overrule a United States Supreme court decision that has provided constitutional protection to defendants **since** 1964, without any indication from that court that it should do so.

The Fulminante decision concluded that admission of an involuntary confession at trial **was** subject to a **harmless** error analysis. The court in Fulminante distinguished "trial errors" which are subject to harmless error from errors which create structural defects in the constitution of **the** trial mechanism. **In this case** the failure to allow the Defendant to testify during a Jackson hearing was a structural defect in the trial mechanism.

Under the Fulminante decision, an involuntary confession presented to the jury may be weighed against other evidence in the case and is subject to scrutiny under the appropriate harmless error analysis. The Fulminante court found the confession had an evidentiary impact that is similar in both degree and kind to the erroneous admission of other types of **evidence**. **In contrast, the** failure to hold a Jackson hearing creates error which affects the entire framework within which the trial proceeds. The Defendant's fundamental right under the Fifth and Fourteenth Amendments are compromised for failure to hold a Jackson hearing. Without the opportunity to testify at a Jackson hearing, the Defendant must choose between his right to remain silent, or testify to the

involuntary nature of the confession in front of the jury. The trial procedure itself has unnecessarily restricted the defendant's rights, decisions and strategy. The prejudice to the Defendant in having to compromise his **Fifth** Amendment rights **occurs** regardless of the evidentiary impact of the introduction of the involuntary confession.

The Petitioner's argument that the most adverse consequence of the trial court error was that an involuntary statement **may** have gone to the jury is erroneous. The most serious consequence **was** that **the** Defendant **was** forced, **due** to the nature of the trial mechanism into a Hobson's choice of choosing one right over another. **The** State erroneously cites Jackson for support that the only impact of the error was introduction of an involuntary confession. Further reading of Jackson at P. 923 Fn 16, states:

"**Further** obstacles to reliable and fair determination of voluntariness under the New York procedure results from the ordinary rules relating to cross-examination and impeachment. Although not the case here, an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The **fear** of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence **as well as** voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony of the facts underlining the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence." U.S. v. Carrigan 342 U.S. 36, 496 Led. **48**, **72 S.CT. 97**.

The **error which** occurred affected the defendant throughout the course of the entire trial. The defendant may well have planned to not **take** the stand and argue the weakness of the State's case.

The defendant's counsel may not **have** prepared direct examination adequately with his client. This left the defendant subject to impeachment on such matters as the nature of prior convictions or other pending allegations. The prejudicial impact that such error has on the defendant during the course of his trial is enormous. In contrast, the burden on the State is minimal. The requirement of a Jackson hearing in which the defendant **be** given the opportunity to testify may take fifteen(15) minutes. The hearing poses no threat to the prosecutor's case. Prohibiting the introduction of an involuntary confession under the exclusionary **rule** may curtail effective police **procedure**, whereas an **adequate** Jackson hearing does nothing to ultimately hinder an effective **and** fair determination of the true facts.

There is also another adverse consequence in refusing to allow the defendant to testify at a Jackson hearing. A defendant who is not allowed to testify at the hearing may or may not subsequently testify in front of the jury. If the defendant does not testify in the front of the jury, there will be an absent or incomplete record as to the voluntary nature of the confession. If the defendant does testify in front of the jury, an appellate determination will have to be made as to whether **the** defendant freely explained the circumstances of his confession. **The** appellate court would have to have two separate standards of review, one for defendants who testified, and one for defendants who did not testify in front of the jury. The **State** may argue the defendant who did not testify to the jury waived his right to a

determination of voluntariness. This argument is surely violative of the Defendant's Fifth Amendment rights. The defendant who is prejudiced by the introduction of an involuntary confession at **his** trial, and was not allowed to testify at a Jackson hearing would have to weigh the court's appellate review as part of his decision of whether or not to testify. This consideration bears no relevance to the ultimate truth of the matter, nor maintains the integrity and confidence in **the** judicial system. The defendant should be given an opportunity to develop the **facts** of the voluntariness of his confession in the trial court, not on appellate review, Cantrell v. Maxwell, 298 F. Supp 1061, 1063 (1969).

The Petitioner argues that Crane v. Kentucky 476 U.S. 683, 106 S. CT. 2142, 90 L.Ed.2d 636 (1986) is a case more factually similar to this **case** than Fulminante and one where the court found it subject to harmless error to not allow a defendant to testify to the jury as to the voluntariness of his statement. Crane had nothing to do with a Jackson hearing. **An** initial determination of voluntariness at a hearing **was** held. The defendant was not put **in** any compromising position. The decision of the trial judge to not allow testimony to the jury **as** to the confessions' voluntariness after a Jackson hearing was a trial error the same **as** prohibiting testimony on any matter because it was irrelevant, hearsay, immaterial, or otherwise objectionable. The Crane decision did not affect the trial mechanism the way the error in this case did.

It should be noted that the United **States** Supreme Court decided Crane in 1986. A full Jackson hearing has been required by the U.S. Supreme Court and by this Court for the five years since that decision, and no court has ruled that Crane makes a Jackson hearing error subject to harmless **error** analysis.

The Petitioner argues that in this **case** it is apparent no coercion was present. **There** is no way to know if coercion existed because the defendant was forced to testify before the jury and he may not have fully explained the circumstances surrounding the confession. Additionally, it has long been recognized that coercion **may** be mental as well **as** physical. Jackson at P.923. In the instant case, the defendant was confused and misled because of other allegations he was being **accused** of simultaneously. This very tactic was criticized in Justice Douglas's concurring opinion in Carrigan. It is also very possible that because law enforcement officers were making other allegations of sexual abuse besides the instant charge, the defendant did not wish to fully detail the circumstances of the confession in front of the jury because of the prejudicial impact of having to testify and/or open the door to these other allegations.

Petitioner's appeal incorrectly states that both the motion to suppress and the argument of counsel during the mid-trial voluntariness hearing referenced only respondent's asserted confusion during the interrogation. The written motion filed indicates in paragraph (2) that the defendant was not properly advised of his constitutional rights, and in paragraph (3) that the

defendant may have made certain statements which were not freely, voluntarily, and intelligently made after a proper appraisal of **his** constitutional rights. (R 26). Defendant's counsel, in arguing the defendant's right to testify, said he would **ask** that the defendant be allowed to testify concerning the voluntariness and other matters concerning the admissibility of purported statements (TR 244), and that the defendant was improperly denied access to counsel. (TR 246). The Petitioner's argument that there is no possibility the court would have found the confession voluntary is based on an inadequate **record**.

The statement in this case was a confession. **The** State introduced the statement to incriminate the defendant. Considering there was no evidence to support the allegation other than the victim's testimony, the statement, which was completely inconsistent with the defendant's explanation of consent, was probably the most damaging evidence against him. The Petitioner's argument that the statement is admissible because the confession was not one which the defendant systematically outlined culpable behavior is ludicrous. The Petitioner's logic would allow any statement, whether obtained through trickery, deceit, or even beatings to be admitted despite its impeachment potential, and regardless of its credibility as long as it didn't meet some layman's understanding of a confession.

The Petitioner argues the defendant in this case had to testify. This argument overlooks the fundamental principle that the State had the burden of proof in this case to prove the

allegations. The victim in this **case** admitted several times **she** was untruthful, once to law enforcement, and later to medical personnel. Her testimony **was obscure** and **she** was impeached by defense counsel. It is very possible that had the defendant's statement been thoroughly examined at a Jackson hearing and determined to be involuntary, the defendant would not have taken the stand and exposed himself to other prejudicial and irrelevant allegations of sexual battery.

In any event, the appellate court should not be in the position of guessing whether **a** defendant would or would not have **taken** the stand. **A** fifteen minute adequate Jackson hearing eliminates the need for speculation on a matter **as** important **as** rights under the Fifth and Fourteenth amendments.

CONCLUSION

For the reason set forth herein, the Respondent respectfully requests that the Court reverse the trial court and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to ROBERT BUTTERWORTH, Attorney General, to JAMES W. ROGERS, Assistant Attorney General, and to LAURA RUSH, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, Counsel for Petitioner on this 7⁺ day of August, 1991.



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