IN THE SUPREME COURT OF FLORIDA

JESSIE JOSEPH TAFERO,

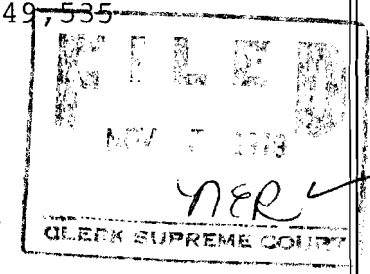
Appellant

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 49,535



REPLY BRIEF OF APPELLANT

On Appeal From the Circuit Court of the 17th Judicial Circuit of Florida, In and For Broward County.

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AUTHORITIES CITED

PRELIMINARY STATEMENT

This cause arose in the Criminal Division of the Circuit Court, Seventeenth Judicial Circuit of Florida, In and For Broward County; and is on direct appeal to this Court pursuant to Article V, Section (3)(b)(1), Florida Constitution. Appellant was the defendant below and will be referred to as he appears before this Court.

In the brief the symbol "AB" will refer to Appellee's Brief.

STATEMENT OF THE FACTS

Although Appellee has stated that it does not accept Appellant's Statement of the Facts, Appellee does not specify "areas of disagreement" as required by Rule 9.210(c), Florida Rules of Appellate Procedure. Therefore Appellant will rely upon the Statement of Facts contained in his Initial Brief herein.

POINT I

APPELLANT WAS DENIED A FAIR TRIAL BY THE INHERENTLY PREJUDICIAL ATMOSPHERE SURROUNDING THE PROCEEDINGS BELOW AND BY THE REFUSAL OF THE TRIAL JUDGE TO IMPLEMENT PREVENTATIVE OR REMEDIAL ACTIONS.

Appellant will rely upon the discussion presented in his Initial Brief except to clarify and respond to certain arguments put forth by the State.

Ignored by the State is the fact that the situation in the present case should be viewed as a whole -- the totality of the circumstances. We must look to the extreme actions occurring prior to trial which raised clear and present danger signals and the trial judge's reaction to these signs by refusing even the most reasonable requests by Appellant for preventative or curative measures. We must also see that the judge made no findings in denying Appellant's requests, thus leaving no basis in the record for determining whether the exercise of discretion was reasonable, or whether Appellant received a fair trial. We further must view the "coincidental" phenomena occurring during the trial that directly threatened Appellant's fair trial right and once again the judge's refusal to take any action whatsoever when faced with that explosive atmosphere.

Thus, the situation in the present case involves a broad-based series of events beginning from well before trial and continuing through the trial. Each of these events weighed on the side against the fairness of the trial, but cummulatively they constituted a pervasive and direct threat to the fairness of Appellant's trial. Viewed as a whole, it can be seen that the failure of the trial judge to take any measures to stem, counter,

or prevent the broad series of improper influences, was erroneous. In such an inherently prejudicial atmosphere the burden is to show that Appellant did receive a fair trial; and that burden cannot be met in the present case since the judge refused all of the reasonable requests for protective measures and while doing so stated no grounds which would demonstrate the reasonableness of the exercise of discretion.

Contrary to Appellee's interpretation of our position, we know that Defendant's pretrial treatment does not directly make Appellant's trial unfair. But such an extreme, explosive situation certainly should have been a pellucid warning signal to the judge that he was indeed facing an exceptional atmosphere within which to try this case. Such danger signs should have caused the judge to look carefully at the reasonable preventative actions requested by Appellant. The judge did not take such a careful look; he denied the motion to sequester the jury simply on the grounds that he had never sequestered a jury before(R III 8). There was no "careful and determined inquiry"[McArthur v. State, 351 So2d 972, n. 2(Fla 1977)]; there was no reason whatsoever given for denying the motion, despite the fact that all but one juror who was questioned had read about the case in the newspaper -- thereby indicating the widespread nature of the publicity.

Thus, Appellant did attempt reasonable preventative measures to avoid the pressures pulling strongly against the likelihood a fair trial. Appellee fails to recognize this point in its suggestion that the denial of sequestration was proper because Appellant did not move for a change of venue. To believe that a judge

who denies the reasonable request of sequestration, would for some reason grant the more extreme remedy of a venue change is not logical -- and counsel is not required to do a futile act. Moreover, sequestration is the preferred remedy. State ex rel Miami Herald Pub. Co. v. McIntosh, 340 So2d 904, 910(Fla 1976).

Following the sequestration scenario, the trial judge denied Appellant's again reasonable request for ten additional peremptory challenges(granting only three) and forcing Appellant to exhaust his challenges and to accept the jury only on the basis of the court's prior limiting ruling(R VII 319). Granting additional challenges was certainly a reasonable request considering first the very high percentage of jurors who had read the publicity about the case, and second that two capital and two life felonies were involved. Yet the trial judge again made no findings from which we could surmise a reasoned exercise of discretion -- and the record contraindicates such reasonbleness.

To these factors Appellee cites Murphy v. Florida, 421 U.S. 794(1975) for the proposition that jurors do not have to be ignorant of the case they are to try. Admitted. But Murphy did not involve the extraordinary pretrial danger signals present in this case. Murphy also does not stand for the proposition that reasonable preventative actions should not be considered or that the exercise of discretion in denying them can be without reason. Murphy involved pure publicity occurring well prior to trial and did not involve any indications that the general atmosphere outside the trial was inflammatory. 421 U.S. at 802. It is on this latter point that this case fully parts company with Murphy.

The State attempts to minimize what occurred during the trial of the present case, and virtually ignores the actions of the Attorney General of Florida. By claiming that the discussion of the phenomena that occurred during trial are an attempt by Appellant to "bootstrap" the fair trial argument, Appellee has revealed a basic misapplication of the issues involved. Appellee does not state actually what we are supposedly bootstrapping -- we surmise, because the coincidental phenomena occurring during trial reached directly to the fairness of the trial and do not bootstrap anything.[1]

During the trial of this case there was a large, highly publicized memorial service for fallen police officers, the courthouse flag was flown at half-mast in memory of the deceased officers in this case, and the Attorney General made several widely publicized speeches virtually on the courthouse steps. The Attorney General stated specifically that Appellant was guilty when he said that the "Turnpike murders" would not have occurred if Appellant had served one-third of his sentence.[2]

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[1] Appellee apparently obtained its "bootstrap" language from the opinion in Ford v. State, So2d (Fla 1979), Case No. 47,059, Opinion filed July 18,1979. However, the situations in Ford and the present case are not analogous. In Ford the appellant argued that because a juror had some general news magazines in the jury room that his motion to sequester should have been granted.However, in the instant case, although the denial of the sequestration motion is at issue, the issue involved is much broader and the denial of the motion is a part of but not the main focus of the overall issue. It also should be noted that in Ford this Court did look at the entire circumstances in evaluating the motion, finding that the record did not show any outside prejudicial media coverage or events attendant to the trial -- which is the opposite of the situation in the present case. Thus, the factual setting of Ford is not analogous, but the method of analysis is relevant to the present case.

[2] The newspaper reporting these events on the front page of the local section has been transferred to this Court and is contained in the cardboard box of exhibits.

These are all perhaps very laudible events -- but why did they occur in Broward County and why specifically did they occur coincidentally during the trial / Appellee does not offer an answer. The activities were certainly broad-based. Regardless, the fact remains that these extraordinary events came together in Broward during Appellant's trial and the trial judge took no remedial or preventative actions, despite Appellant's reasonable and repeated requests to do so.

Appellee further contends that Appellant received a fair trial because the record does not show that any of the jurors actually saw or were aware of any of the prejudicial outside events surrounding the trial. However, we do know that the jury inquired about the half-mast flag(R IV 347,355). Regardless, in most cases it is not possible to demonstrate an actual nexus to the outside influences -- especially where no individual voir dire of the jury was conducted.

With such a wide range of prejudicial events occurring both before and during the trial coupled with the trial judge's refusal, without findings, to take any preventative or curative measures, the presumptions can only be that Appellant did not receive a fair trial.

POINT II

THE EVIDENCE OFFERED BY THE PROSECUTION WAS IN MATERIAL CONFLICT AND WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE CONVICTIONS.

Appellee states that Appellant's discussion of this issue is written in the light most favorable to Appellant. However, Appellant only accurately presents the testimony of the two dis-

interested eyewitnesses -- who both stated they had clear unobstructed views -- as it appears in the record. Although these two citizen eyewitnesses were testifying as State witnesses, the State now virtually ignores or wholly discounts their testimony as somehow unworthy of belief(but the State does tell us to believe them when it comes to Rhodes' activities).

The State then cites general law regarding review of evidence on appeal. The State does not address however the fact that in a capital case this Court reviews the evidence to determine whether the "interests of justice" require a new trial. E.g. Tibbs v. State, 337 So2d 788(Fla 1976). And the State does not recognize that this Court has not hesitated to reverse where the evidence was insubstantial, uncertain or unworthy of belief[See e.g. Council v. State, 111 Fla. 1973, 149 So.13,14(1933); Cordell v. State, 157 Fla 295, 25 So2d 885,887(1946)] -- especially where the ultimate penalty has been imposed. See Platt v. State, 65 Fla. 253, 61 So. 502-3(1913); McNeil v. State, 104 Fla. 360, 139 So. 791(1932); Tibbs v. State, supra. The State further wholly fails to discuss the principal represented by the decision in Majors v. State, 247 So2d 446(Fla 1st DCA 1971) as well as others, that the state is bound by its evidence where its evidence is in material conflict a reasonable doubt exists as a matter of law.

In contending that Rhodes' testimony should be believed to the exclusion of the citizen eyewitnesses, Appellee fails to even mention or try to rebut the many different grounds that call into question his credibility. His testimony carries indicia of unreliability. Appellee instead attempts to vaguely ignore

the disinterested eyewitnesses and fails to recognize their direct and unambiguous testimony that Appellant fired no shots and was bent over the trooper car, and turned around only after all the shots had been fired. Appellee fails at all to discuss the other material conflicts between Rhode's and the independent eyewitnesses (See footnote 8 of Appellant's Initial Brief).

Thus, Appellee has not addressed the most important issues in this case. Instead Appellee devotes a major portion of its argument to a showing that Rhodes did not fire any shots -- which is incidently the only time that Appellee recognizes the validity of the citizen eyewitnesses' testimony and the only time it notes that they were disinterested (AB 27). Appellee then notes that the physical evidence excludes Rhodes as firing any shots. The State says that no spent cartridge was found anywhere near Rhodes (AB 28). Appellant disagrees with the conclusiveness of Appellee's statement because one casing was found outside and in front of the Camero.

Regardless of Appellee's argument that Rhodes fired no shots, the issue here is whether Appellant did. And Appellee has in no way demonstrated any reliable evidence that points to Appellant. Appellee does however come up with a new theory to explain why the shots entered at a downward angle -- the State now says that Appellant was standing next to the Camero (AB 29) which of course is contrary to the state's evidence at trial (R IV 286-287).

Thus, in summary, the physical evidence offered at trial does not demonstrate that Appellant fired any shots and indeed

indicates that the he did not; and the testimony of the two disinterested citizen eyewitnesses on its face unambiguously established that Appellant fired no shots. Therefore contrary to Appellee's assertion, the State has not established that Appellant was the "actual perpetrator"(AB 29) in order to support a theory of premediation.[3] Because of the conflicting nature of his testimony and the clear questions of credibility of Rhodes, the evidence was insubstantial and insufficient to support the convictions of Appellant, and reasonable doubt exists as a matter of law.

For its felony-murder argument, the State has apparently recognized the validity of Appellant's position because it has developed a new theory, different from the one it contended below. At the trial level, the State told the jury that this situation was like two men going into a 7-11 store to rob it shooting the clerk and taking the money or like a lookout to a bank robbery where a teller was killed(R VIII 391-292). Because there is no evidence of anything like that situation in the present case and it thus could not support a conviction in the present case, the state's new theory is that Appellant killed the officers to take the trooper car in order to get away because the Camero

3The State also claims without discussion and without any support that Appellant was guilty as an aider and abettor under a premeditation theory(AB 30). Since Appellee does not support this claim, Appellant will not respond in detail except to note as he did in his Initial Brief that not only is there no evidence of a previous intent, the evidence affirmatively shows that there was in fact no intent and that the shooting was apparently a spur-of-the moment action by either Linder or Rhodes. Certainly, the circumstantial evidence does not exclude the fact that Appellant did not possess the requisite intent.

license number was known(AB 30). Aside from the lack of logic in this theory[4], Appellee fails to recognize first the direct testimony of Rhodes that there was no discussion or planning of any scheme whatsoever and second that circumstantial evidence must exclude all reasonable hypotheses of innocene. Appellee also does not mention that the robbery count was dropped against Rhodes and Linder was acquitted of robbery.

Also, Appellee has cited as supplemental authority, the case of Campbell v. State, 227 So2d 873(Fla 1969). Campbell involved a robbery and a chase during which the defendant shot a police officer. The situation in that case was opposite, or certainly inapposite, to the present case. The issue-at-bar is that the subsequent theft of the weapon or vehicle was not shown to be connected in any way to the death.

POINT III

APPELLANT WAS DENIED THE DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO EXCLUDE THE TESTIMONY OF ELLIS MARLOWE HASKEW OR TO GRANT A CONTINUANCE TO ALLOW TIME FOR INVESTIGATION AFTER A CLEAR VIOLATION OF THE RULES OF DISCOVERY BY THE STATE.

There are several material misstatements by Appellee that must be corrected.

Appellee contends that defense counsel or another lawyer in his firm could have deposed the witness during trial. The error in this claim is that the witness was totally unavailable until the morning he testified -- having been secreted and his true identity concealed under the federal witness program(R VI 635, 636, 640).

Appellee also contends that Appellant never requested that

[4]Is a trooper car with three civilian adults and two children in it less conspicuous than a Camero?

Haskew be excluded, however, Appellant did "object" to Haskew testifying(R VI 639).

Appellee misconstrues the prejudice to Appellant in this case from the lack of any notice of Haskew or the substance of his testimony. Appellee's statement that "[o]f course, all testimony offered against an accused is prejudicial" grossly misses the point of this issue. The prejudice is that Appellant contended at trial and reaffirms now that he was not at the party at which Haskew claimed he was, and he had no opportunity to prove it. Moreover, Appellant had no chance to investigate any of the miriade of factors demonstrating Haskew's lack of credibility. To say that Appellant had a chance to cross-examine Haskew(AB 36), is to ignore the facts. Because of surprise Appellant's cross-examination was ineffectual -- this Court only needs to compare the cross-examination that Appellant was able to muster with that conducted with Haskew in United States v. Diecidue, 448 F.Supp. 1011, 1019(M.D. Fla 1978).

POINT IV

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO PRODUCE EVIDENCE WHICH IS MATERIALLY FAVORABLE TO THE ACCUSED.

A salient point from Appellee's brief is that the State in no way denies that it was paying the attorney fees for Ellis Marlowe Haskew when it called him to testify against Appellant or that it did not make the fact known to Appellant. Thus, there is no factual issue remaining. What remains then are procedural arguments.

This issue also cannot be viewed without consideration of

the fact that Haskew was a total surprise to Appellant. (See Point IV). Any failure to specifically request the state to reveal whether it was paying Haskew's attorney fees can be explained by this fact and the fact that he was given no time at all to investigate Haskew. Nevertheless, Appellant did file a Motion for Production of Favorable Evidence prior to trial which certainly encompassed such a fundamental fact as the State paying Haskew for his attorney fees.

The State now minimizes the testimony of Haskew, but at trial it characterized it as "important" to its case in order to show motive and intent(R IX 403-404). Intent is critically at issue in the present case(See Point II). It was further prejudicial to Appellant because it went to establish a collateral offense and constituted a clear attack on Appellant's character (See Point V of Appellant's Initial Brief; also see Appellee's brief at 40). Also, a principle emphasized in United States v. Agurs, 427 U.S. 97(1976) is certainly pertinent to the instant case:

> "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." Id. at 113.

Appellee cites United States v. Diecidue, supra for the claim that the evidence would not have affected the verdict. However, in that case the district judge denied a new trial because the defendant had had a full opportunity to investigate Haskew and thus was able to cross-examine him for 350 pages of transcript with a wide variety of impeachment. 448 F.Supp. at

1019. Thus, the holding in Diecidue supports, rather than contradicts, the finding of error in this case.

POINT V

APPELLANT WAS DENIED THE DUE PROCESS OF LAW BY THE INTRODUCTION OF COLLATERAL FACT EVIDENCE THAT WAS NOT LOGICALLY OR LEGALLY RELEVANT AND THAT WAS PREJUDICIAL TO APPELLANT.

Appellee, in its discussion of alleged motive, does not address the fact that Rhodes and Linder had identical "motives" and thus the quality and necessityof such testimony is questionable. Appellee also fails to discuss the weighing of probative value against prejudicial effect mandated by Williams v. State, 117 So2d 473(Fla 1960) and its progeny.

POINT VI

APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FACTS OF THIS CASE WHERE THE STATE WAS ALLOWED TO PROCEED SIMULTANEOUSLY ON THE DUAL THEORIES OF PREMEDITATION AND FELONY-MURDER.

Appellant will rely on his Initial Brief herein, but will further cite to this Court the case of State v. Cherry, 257 S.E. 2d 551(N.C. 1979) regarding the prejudice to Appellant in the penalty phase. The court held therein that where a prosecution is based upon felony-murder, the underlying felony may not be used in aggravation. See also Smith v. Estelle, 602 F.2d 694(5th Cir. 1979).

POINT VII

APPELLANT'S PERSONAL RIGHT TO PARTICIPATE FULLY IN OWN DEFENSE WAS UNCONSTITUTIONALLY RESTRICTED BY THE TRIAL COURT.

Appellee has failed to address the many instances wherein the trial court refused to allow Appellant to participate in a meaningful way in his defense. We will not restate the instances

here, but will rely upon Appellant's Initial brief. Contrary to Appellee's assertion, Appellant's requests were reasonable -- for example Appellant's request for use of the law library asked for only 60-90 minutes a week in the library located in the same building and this is not a request for "free and unfettered access" as Appellee claims(AB 37).

POINT VIII

THE TRIAL COURT ERRED BY REFUSING TO RECUSE HIMSELF WHERE APPELLANT BELIEVED HE COULD RECEIVE A FAIR TRIAL.

Appellant will rely upon his Initial Brief herein except to reemphasize that techinical deficiencies in the motion should not be determinative since Appellant was denied any access to a law library.

POINT XII

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO NOTIFY THE DEFENDANT PRIOR TO TRIAL, OF THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO PROVE IN THIS CASE.

Appellant additionally relies upon the case of Smith v. Estelle, 602 F.2d 694(5th Cir.1979) regarding the prejudice to a defendant from the failure to be given notice of the proof or allegations the state would rely on in a capital sentencing proceeding.

POINT XIII

A

THE EXTREME PENALTY WAS ASSESSED AGAINST APPELLANT ON THE BASIS OF AGGRAVATING CIRCUMSTANCES THAT WERE IMPROPER AND/OR WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

First it must again be noted that the trial court did weigh mitigating factors. This fact is important in the analysis of this issue. See Elledge v. State, 346 So2d 998,1003(Fla 1977).

Next, Appellee relies heavily on Appellant's supposed statement that they were "only cops" to support a finding of heinous, atrocious and cruel. First, even if it is believed that Appellant made such a vague statement, it must be considered that at the time it was made, Appellant was being repeatedly beaten by the officers; and secondly, even believing it as the state trys to portray it, lack of remorse is not permissible aggravating circumstance. See Menendez v. State, 368 So2d 1278, 1281, n.12 (Fla 1979).

CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's initial brief, Appellant respectfully requests this Honorable Court to Vacate the Judgment and Sentence of the Trial Court.

Respectfully submitted,

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BY _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Benedict P.Kuehne, Assistant Attorney General, Room 204 Elisha NewtonDimick Building, 111 Georgia Avenue, West Palm Beach, Florida, by mail/courier, this 2nd day of November, 1979.

Of Counsel.