IN THE SUPREME COURT OF FLORIDA

Case No. 63,107
63,258

**WILLIE F. VAUSE,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

FILED

SEP 16 1983

SID J. WHITE
CLERK, SUPREME COURT
Chief Deputy Clerk

**STATE OF FLORIDA,**

Petitioner,

vs.

**WILLIE F. VAUSE,**

Respondent.

**REPLY BRIEF OF DEFENDANT VAUSE AS PETITIONER**

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## ARGUMENT

### POINT I

THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT THE RADIOLOGIST WAS PROPERLY QUALIFIED AS AN EXPERT WITNESS TO TESTIFY AS TO THE MANNER IN WHICH THE FATAL BULLET BECAME FRAGMENTED

The State "frankly believes" that the Court did not accept review to resolve this issue and contends in the alternative that even if so, review was improvidently granted. Neither of these positions can be sustained.

The assumption that the Court was only interested in the "sentencing issues" is unwarranted as the Court could have easily limited review to those issues by expressing such an intention in the Order. In any event it should be clear that the parties do not have the right to make assumptions about the Court's motivation in accepting a case for argument on the merits.

Nothing contained in the State's Answer Brief could be said to support the conclusion that the Court acted improvidently in accepting review. It is true that Salinetro v. Nystrom, 341 So.2d 1059 (Fla. 3rd DCA 1977) is a civil case and this one is a criminal case but that is of no import. The issue is not civil or criminal; it is one involving only the law of evidence.

Of course the cases are not exactly the same. No two cases would be. The point is that the Third District held in Salinetro

that a physician was not competent to give an expert opinion outside the field of his particular medical specialty. The First District Court of Appeal held that a physician may not only testify outside his field of specialization, but that he may even render an opinion on a matter which is outside the field of medicine generally, if the Trial Judge in his "discretion" wants to allow that. The conflict in the underlying principle of these cases cannot be refuted by pointing to immaterial factual distinctions.

The Defendant concedes that "one may be qualified by study without practice or by practice without study to give an opinion on a medical question," Copeland v. State, 50 So.621 (Fla. 1909) but Dr. Beeckler's testimony was not on a "medical question" to begin with. On the contrary, he gave what purported to be an expert opinion as to why the bullet was not in one piece. Questions relating to the cause of a change in the physical composition of a projectile discharged from a firearm are solely within the province of a ballistics expert. A radiologist is trained to read and interpret x-rays for the purpose of treating illnesses.

For these reasons and those more fully expressed in the Initial Brief, the Defendent Willie Vause respectfully submits that the District Court erred in approving the use of the opinion testimony in question.

## POINT II

THE DISTRICT COURT ERRED IN APPROVING THE IMPOSITION OF AN ENHANCED PENALTY FOR THE USE OF A FIREARM AS THE FIREARM WAS AN ESSENTIAL ELEMENT OF THE OFFENSE ITSELF

The Defendent does not contend that Section 775.087(2), Florida Statutes (1981) defines a substantive offense in and of itself. The argument was that the three year mandatory minimum could not be imposed under the allegation and proof in this case without violating the rule in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).

The predicate felony of shooting into an occupied vehicle is the type of offense which will invaribly require proof that the offender used a gun. Since the firearm aspect was necessary to prove the underlying felony which was in turn an indispensible element of the major offense of third degree murder, it should not be used again to aggravate the penalty.

This argument was treated in considerable detail in the Initial Brief and has not been refuted in any respect by the State's Answer. The State's "alternative argument" on this point (Answer Brief of the State as Respondent 12-15) is the same as the general argument made in the State's Initial Brief as Petitioner. Therefore, the Defendent relies on his answer to that brief. (Brief of Defendent Vause as Respondent)

## CONCLUSION

The Defendant respectfully submits that the Court should enter an Order vacating the Judgment of the District Court of Appeal and remanding the case for a new trial, or in the alternative, this Court should enter an Order vacating the three year mandatory minumum sentence.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, ATTN: John W. Tiedemann, Esquire, Assistant Attorney General, 1502 The Capitol, Tallahassee, Florida 32301, by U.S. Mail this 16th day of September, 1983.

Attorney