

IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,
Appellant,

-vs-

STATE OF FLORIDA,
Appellee.

CASE NO. 63, 172

FILED

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REPLY BRIEF OF APPELLANT

On Appeal From the Circuit Court of the
Sixth Judicial Circuit In and For Pinellas
County, Florida. (Criminal Division)

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POINT I

THE TRIAL COURT ERRED IN EXCLUDING CERTAIN
PROSPECTIVE JURORS ON CHALLENGES FOR CAUSE
IN VIOLATION OF WITHERSPOON V. ILLINOIS.

Appellant primarily relies upon the arguments and authority cited in his Initial Brief. However, a brief reply to the Appellee's answer in this regard is appropriate.

Appellee is of the opinion that the trial court's initial question and announcement relative to the Witherspoon test is appropriate and reflects that the court had a full and complete understanding of that holding. In supporting its position, Appellee cited the following trial court announcement:

Does any juror have such a belief as to capital punishment, either for or against, that you could not or you would not be reluctant to or you would even hesitate to find the Defendant guilty of the offense in the first trial? (Emphasis added by Appellee).

Appellant maintains that the trial court's statement to the jurors clearly reflects an improper understanding and instruction relative to the Witherspoon holding. Using the same language, Appellant emphasized the following language which supports its position:

Does any juror have such a belief as to capital punishment, either for or against, that you could nor or you would be reluctant to or you would even hesitate to find the Defendant guilty of the offense in the first trial? (Emphasis added by Appellant).

In sum, Appellant maintains that the court's questions posed to the potential jurors simply does not track the Witherspoon holding and consequently created a false impression and misunderstanding in the minds of the jurors as a result in the misinstruction.

It is noteworthy that the records reflects the court at no time posed the appropriate language for 'test' contained in Witherspoon which is as follows:

'...make unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's

guilt...' (Witherspoon v. Illinois, supra, Emphasis in original).

In addition to failing to properly instruct the jury relative to the Witherspoon test, the court repeatedly interrupted trial counsel in her attempt to intelligently discuss the Witherspoon test with hopes of securing a position from the potential jurors. (R 103, R223, R 103). Further, the court invited excusals of two (2) jurors in the presence of the venire which further aggravated the court's error in improperly apprising the jury of the Witherspoon announcement. (R 100, R 103, R 223). Appellant maintains that the court's improper discussions of Witherspoon along with its interruption of trial counsel and blantant invitations for the State to excuse certain jurors constituted fundamental error warranting a reversal. See Bollenbach v. U.S., 66 S.Ct. 402 (1946), which provides that '...particularly in a criminal trial, the judge's last word is apt to be the decisive word...'. Also see Blich v. State, 427 So2d 785 (Fla. 2d DCA 1983), which stands for the proposition that a judge's ruling and/or instructions which is inherently confusing and misleading to the jurors may indeed warrant a new trial and constitute reversable error. Appellant maintains that the court's repeated misinstructions to the jury simply confused potential jurors as to answering the questions posed by all parties and consequently resulted in improper excusals for cause. (R 98, 99, 125, 16). Neither juror was asked the appropriate Witherspoon questions so as to determine if an excuse for cause was appropriate and in accordance with the appropriate law.

Appellee's argument that Defendant's trial counsel 'invited' responses by potential jurors, thereby invoking the 'invited error' doctrine discussed in McCrae v. State, 395 So2d 1145 (Fla. 1980) is simply inapplicable.

The voir dire process employed at trial violated Appellant's constitutional right to an impartial jury. See Grisby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983) and Keeten v. Garrison, 578 F. Supp. 1164 (W.D. N.C. 1984).

POINT II

THE DEATH SENTENCE SHOULD BE VACATED AND THE JUDGMENT REVERSED ON THE GROUNDS THAT THE RECORD IS INCOMPLETE IN THAT THE TRANSCRIBED COPY OF APPELLANT'S TAPED CONFESSION IS ABSENT FROM THE RECORD; FURTHER, THE USE OF SAID EVIDENCE RELIED ON BUT NOT INTRODUCED AS AN EXHIBIT AT TRIAL IS ERROR MANDATING REVERSAL.

Appellant maintains that the introduction of said transcribed confession was improper on the ground that same was effectively treated as independent evidence thereby displacing the primary evidence, the taped confession. See Golden v. State, 429 So2d 45 (Fla. 1st DCA 1983). The record reflects that the court read the alleged certified copy of transcribed confession during the course of the suppression hearing (RS 97) and that each juror had individual copies of said transcription (R 590, R 591) all over timely objections of defense counsel (R 543).

Furthermore, the taped confession contains a considerable amount of inaudible statements which were apparently attempted to be clarified in the transcription. Consequently, said transcription would serve to replace the primary evidence certainly at times when the taped confession was inaudible. The trial court did not make an independent determination as to the accuracy of the transcription prior to same being presented to the jury, nor did defense counsel stipulate to the accuracy of same thereby alleviating the trial court from making that determination. The trial court's failure to ensure the accuracy of said transcription given that fact that same was heavily relied upon during the course of trial constitute error in violation of United States v. Onori, 535 Fd. 2d 938 (5th Cir. 1976).

POINT III

THE TRIAL COURT ERRED IN ADMITTING GRUESOME AND INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT AND FURTHER SERVED TO INFLAME THE JURY AND PREJUDICE APPELLANT.

Appellee fails to address the fact that the most gruesome exhibits intro-

duced by the State were not relevant in that same were not photographed at the scene of the crime. (R 443, 448). See Thompson v. State, 398 So2d 197 (Fla. 1956), the Defendant was convicted of murder wherein the victim died of a gunshot wound to the head. In that case, photographs of the deceased lying on the mortuary table was introduced into evidence over Defendant's objection as in the instant matter. The State in the Dyken matter argued that it was relevant to indicate the fatal wound of the victim; however, the Dyken court held that it was not relevant because the location of the wound was conceded and further that the photograph did not depict the crime scene and was taken at a time too far removed to have any independant probative value. The court reversed and remanded the cause for new trial stating in perinent part that

'...we cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial...'. Dyken v. State, at 867.

Appellant maintains that the gruesome exhibits referred to herein were not relevant and furthermore that probative value of same were not outweighed by the prejudicial effect upon Appellant. Although the trial court did attempt to caution the jury relative to the gruesomeness of the exhibits, Appellant maintains that said cautionary instruction was insufficient in that said exhibits were not relevant and that the prejudicial effect clearly outweighed the probative value. The trial court's cautionary instruction was simply insufficient and could not have had the effect of negating sympathy created in the minds of the jurors who viewed the photographs during the course of trial and closing argument; all over timely objections by Defendant.

POINT IV

THE PROSECUTORS MISCONDUCT DURING THE COURSE OF CLOSING ARGUMENT IN BOTH THE GUILT/INNOCENCE PHASE AND PENALTY PHASE WAS SO EGREGIOUS SO AS TO WARRANT THE GRANTING OF A NEW TRIAL.

Appellant primarily relies upon the arguments and various authority cited in his Initial Brief. It is noteworthy that the State engaged in at least seven (7) acts or prosecutorial misconduct during the court of its closing argument during the guilt/innocence phase. The various acts of prosecutorial misconduct during the guilt/innocence phase included improper appeal for sympathy in an attempt to unduly bias the jury against Defendant (R 647, R 648, R 669, R 655); the improper comment on placing the Defendant's character in issue by effectively accusing Appellant of being a liar even though at no time did Appellant place his character at issue (R 659); and finally an improper comment relative to the murder weapon which was not introduced at evidence during the course of trial (R 662). Several instances of prosecutorial misconduct caused Defendant's trial counsel to object and move for a mistrial (R 655, R 669, R 662). However, after each objection, the court immediately denied defense counsel's motion, denied the granting of a mistrial and further condoned the prosecutorial misconduct by stating that said comments were proper comment on the evidence. In fact, the trial court stated that reference to the murder weapon did not warrant a mistrial in stating that it was a proper comment on the evidence though at no time was the pistol introduced at trial (R 662). Appellant reargues the various authority cited in its Initial Brief including reference to Edwards v. State, 428 So2d 357, 359 (Fla. 3d DCA 1983). Also see McMillan v. State, 409 So2d 197 (Fla. 3d DCA 1982); Smith v. State, 273 So2d 414 (Fla. 2d DCA 1973), which stands for the proposition that unless the Appellate court can determine from the record that prosecutorial misconduct and unfair comment during the course of closing argument has not prejudiced Defendant, a conviction must be reversed.

Appellee maintains that trial counsel waived her right to appeal the prosecutors comment on the murder weapon by citing Ferguson v. State, 417 So2d 639 (Fla. 1982); Mancebo v. State, 350 So2d 1098 (Fla. 1978). Appellee fails to recognize that those decisions resulted in this court determining that the prosecutors

comments represented fair comment on the evidence, consequently said holdings are inapposite to the instant matter. Appellant reemphasizes the case of Peterson v. State, 376 So2d 1230 (Fla. 4th DCA 1979) wherein although most of the prosecutors closing argument went entirely unobjected to a trial, the court determined that the contents of the final argument taken as a whole was so prejudicial that the conviction was reversed and a new trial granted. Also see State v. Miranda, 593 F.2d 590 (5th Cir. 1979) which stands for the proposition that when an Appellate court cannot say with certainty that the prompt curative instructions would have eliminated prejudice from the prosecutor's improper argument, then the court must resolve any doubts in favor of the accused and not find absence of an objection to be fatal for appellate purposes.

Appellee cites McCrae v. State, 395 So2d 1145 (Fla. 1980) for the proposition that Defendant is barred from challenging a ruling which Defense counsel instigated. However, that case is inapplicable in that it relates to appellate points pertaining to cross examination whereupon the State was allowed to go beyond the breadth of Defendant's questions as a result of the Defendant attempting to mislead the jury.

The prosecutors engaged in greater acts of prosecutorial misconduct during closing arguments at the penalty phase, as more particularly outlined in Appellant's Initial Brief. Briefly, the prosecutors improperly sought the sympathy of the jury by suggesting that the victim's life should not be minimized by imposing a life sentence on Defendant (R 766), by telling the jury that the victim's family would 'for the rest of their lives, there is going to be an empty chair at their table' (R 774). He further advised that jury that they were the victim's voice during deliberation (R 775). In addition, the prosecutor improperly placed Defendant's character in issue even though he did not take the stand during the guilt or sentencing phase nor did he call any witnesses relative to his character (R 772).

Finally, the prosecutor employed the 'golden rule', error by advising the jury that Defendant's crime was not only against the victim and her family but '... against all of the people of the State of Florida...' (R 775). See Peterson v. State, supra, Adams v. State, 192 So2d 762 (Fla. 1966). Also see Fernandez v. State, 427 So2d 265 (Fla. 2d DCA 1983) and Brown v. State, 427 So2d 304 (Fla. 3rd DCA 1983), which stands for the proposition that a new trial should be granted when the prosecutor improperly comments on the Defendant's failure to testify. See Ruiz v. State, 395 So2d 566 (Fla. 3rd DCA 1981).

The amount, degree and severity of prosecutorial misconduct during the State's closing arguments in both the guilt/innocence phase and sentencing phase shows that Defendant has been denied a fair trial and due process of law.

POINT V

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF LINEUP OF THE ALLEGED ACCOMPLICE, BUSH.

Appellant primarily relies upon the argument contained in his Initial Brief. Appellant maintains that the introduction of the lineup photograph of Bush was improper in that in that it was not relevant and further that the State failed to lay a proper predicate for the introduction of said photograph. Further, the court's erroneous ruling was further magnified by the fact that it assisted the State in attempting to establish corpus delicti prior to the introduction of Defendant's confession (R 342). Also see Point IX.

POINT VI

THE TRIAL COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROFFER HER CLOSING ARGUMENT AT THE GUILT PHASE.

Appellant primarily relies upon his argument contained in the Initial Brief. It is important to recognize the practical and inevitable prejudice to the defendant resulting from the court rebuking defense counsel during her closing argument and then excusing the jury immediately thereafter. The jurors had to have questioned

in their own mind the appropriateness of defense counsel's closing argument after the court excused them after rebuking defense counsel in their presence. It is not unreasonable to believe that the jurors at least subconsciously questioned the weight and reliability of defense counsel's argument. Furthermore, for the trial court to require defense counsel to proffer her closing argument is unprecedented and outrageous. Any trial attorney recognizes the adverse affect upon being interrupted during the course of closing argument so consequently an interruption of the magnitude involved in this matter including ordering the jury out of the courtroom would necessarily and practically adversely affect trial counsel's concentration and rhythm during the course of her closing argument. Appellant maintains that such conduct by the trial court resulted in violating Appellant's fundamental right to a fair trial and due process. There is authority which stands for proposition that if trial counsel is rebuked in the presence of the jury to the extent of discrediting trial counsel, then the defendant's right to a fundamental right to a fair trial is violated. In essence, Appellant maintains that the trial court abused its discretion in rebuking defense counsel in the fashion and at the time it did in the instant matter. See Jones v. State, 385 So2d 132 (Fla. 4th DCA 1980).

POINT VII

THE TRIAL COURT ERRED IN DENYING A MISTRIAL ON THE
GROUNDS THAT AN INVESTIGATOR TESTIFIED AS TO THE
SUBSTANCE OF AN ACCOMPLICE'S STATEMENT THAT APPEL-
LANT OWNED THE KNIFE WHICH WAS USED TO STAB THE VICTIM.

Appellant primarily relies on arguments and authority cited in his Initial Brief. Appellee cites Ferguson and Mancebo to stand for the proposition that a new trial was not required in this matter. However, said reliance upon that authority is misplaced in that those cases dealt with prosecutorial misconduct during closing argument which the court in each case determined that said prosecutors exercised 'fair reply' to Defendants' closing statements.

The State clearly committed Bruton rule violation in that a leading question posed by the prosecutor sought to implicate Appellant by showing that an accomplice stated during the course of his confession that the knife presumably used to stab the victim was owned by Appellant (R 554). Trial counsel timely moved for mistrial which was improperly denied by the trial court (R 555, R 556). As previously stated, the leading question by the prosecutor relative to the ownership of the knife and the response thereto along with the testimony of Detective Jones that Bush's statement implicated Cave was highly prejudicial and clearly denied Appellant of fair trial in violation of due process thereby requiring a reversal and granting a new trial. Appellant maintains that there was a Bruton violation along with the court violating the decisions in Hall v. State, 381 So2d 683 (Fla. 1979); Engle v. State, 438 So2d 803 (Fla. 1983); Palmes v. State, 397 So2d 648 (Fla. 1981). In Palmes v. State, the court stated that when an error affects the constitutional right of the Defendant, the reviewing court may not find it harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or the error may not be found harmless beyond a reasonable doubt. Also see Petersen v. State, 376 So2d 1230 (Fla. 4th DCA 1979), which stands for the proposition that even though Defendant failed to timely object at trial, the final argument in that case was so outrageous so as to destroy the Defendant's right to the essential fairness of the criminal trial in violation of due process. In the instant matter, Appellant timely objected and properly requested the trial court to grant a mistrial which was improperly denied thereby warranting a reversal and the granting of a new trial. Finally, it is noteworthy that at no time was any evidence adduced whatsoever so as to suggest circumstantially or otherwise other than the improper conduct committed by the prosecutor and State's witness indicating that Appellant owned the knife. Consequently, it is indisputable that the error committed by the trial court in denying a mistrial was of fundamental error proportions requiring granting of a new trial. Also see Russell v. State, 349 So2d

1224 (Fla. 2nd DCA 1977). Further, in Ruiz v. State, 395 S02d 566 (Fla. 3rd DCA 1981), the court held that certain errors at trial may be so prejudicial that a curative instructions will not vitiate the likelihood of jury prejudice.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S CONFESSION WHICH WAS INVOLUNTARILY GIVEN AS A RESULT OF IMPROPER INFLUENCE.

Appellant primarily relies on the arguments and authority cited in his Initial Brief however it appears that Appellee expects this court to naively believe that the officers of the Fort Pierce Police Department appeared at Appellant's boarding house at 2:00 o'clock in the morning to 'solicit Appellant's cooperation'. The facts surrounding Appellant being introduced to the various representatives of the Police Department and Sheriff Department indicate that he did not 'voluntarily' accompany the officers to the State Attorney's office. Furthermore, all the facts and circumstances surrounding Appellant's confession indicate that same was not a result of his volunteering same free of undue influence and/or fear. Appellant specifically testified that he was advised by Detecitve Charles Smith that in the event Appellant did not confess, then in that event he would be found somewhere dead in a ditch because the victim's family had so much money they would pay to have him killed (RS 123). Appellant testified that he sought counsel but was denied to confer with an attorney and futher that he denied any involvement or knowledge of the alleged crimes but the interrogators persisted in their questioning (RS 68, 116, 57). Finally, only after Appellant heard the accomplice, Bush's taped confession did he discuss his involvement with Detective Jones (RS 68, 69). Psychological coercion may vitiate a confession. See Fillinger v. State, 349 So2d 714 (Fla. 1977); State v. Caballero, 396 So2d 1210 (Fla. 1981) and La Vocca vs. State, 401 So2d 866 (Fla. 1981).

POINT IX

THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S CONFESSION ON THE GROUND THAT THE STATE FAILED TO ESTABLISH SUFFICIENT CORPUS DELICTI PRIOR TO THAT ADMISSION OF SAID CONFESSION.

Appellant primarily relies upon argument and authority cited in his Initial Brief. However, Appellee fails to recognize that there was insufficient evidence adduced at trial relative to proof of corpus delicti with regards to Appellant committing murder. Further, contrary to the State Attorney's argument that the Defendant participated in a division of the proceeds after the murder, there is no evidence whatsoever introduced at trial to support that argument prior to the introduction of the subject taped confession (R 589). In sum, Appellant maintains that there was insufficient independent proof of corpus delicti so as to admit Appellant's confession.

POINT X

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CERTAIN AGGRAVATING CIRCUMSTANCES AND BY LIMITING THE MITIGATING CIRCUMSTANCES PRESENTED TO THE JURY BY FURTHER REFUSING TO CONSIDER ALL EVIDENCE RELATIVE TO THE ISSUE OF MITIGATING CIRCUMSTANCES.

Appellant primarily relies upon his argument and authority cited in the Initial Brief. As indicated in a legion of case law, the mere fact of a murder committed for the purpose of avoiding unlawful arrest is not enough to constitute an aggravating factor when the victim is not a law enforcement official. See Oats v. State, 446 So2d 90 (Fla. 1984). Furthermore, to support this aggravating circumstance, it must be proved beyond reasonable doubt that it was an intent to avoid arrest and detection. Further, it must be criminally shown that the dominate and/or only motive for the murder was elimination of the witness. See Menendez v. State, supra; Riley v. State, supra.

POINT XI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY DURING THE PENALTY PHASE THAT A MAJORITY VOTE WAS REQUIRED TO REACH AN ADVISORY SENTENCE THAT THE JURY WAS TO TABULATE THE AGGRAVATING CIRCUMSTANCES IN COMPARISON TO THE MITIGATING CIRCUMSTANCES IN ORDER TO ARRIVE AT AN ADVISORY SENTENCE.

Appellant primarily relies upon the argument and authority cited in its Initial Brief. In addition, Appellant maintains that the court improperly instructed the jury as reflected in the resulting confusion pertaining to the advisory sentence. Appellant maintains that the trial court committed reversible error by instructing the jury in an inherently confusing, misleading and contradictory fashion. See Blicht v. State, 427 So2d 785 (Fla. 2d DCA 1983); which stands for the proposition that an erroneous instruction constitutes a reversible error thereby warranting a new trial. Furthermore, it is essential to a fair trial that the jury render a verdict or in the instant matter advisory sentence based on a proper instruction on the law. See State v. Jones, 377 So2d 1163 (Fla. 1979). As a result of the court improperly instructing the jury on the vital issue of the advisory sentence, Appellant maintains that conviction should be reversed and a new trial granted. Further, Appellant maintains that he has been prejudiced as a result of the court's action contrary to the decision in Harich v. State, 437 So2d 1082 (Fla. 1983).

POINT XII

THE TRIAL COURT ERRED IN CHARGING THE JURY DURING THE PENALTY PHASE IN RESPONSE TO THE JURY'S INQUIRY THAT THE ADVISORY SENTENCE FORM DID NOT ALLOW FOR A 'SPLIT' DECISION.

Appellant primarily relies upon the argument and authority contained in its Initial Brief. In addition, Appellant maintains that the court had an obligation to ensure that proper instructions were furnished the jury and in light of the court's failure to do so, a new trial should be granted. See State v. Jones, supra; Blicht v. State, supra; Harich v. State, supra; and Peterson v. State, supra; Palms v. State, supra.

The trial court's error was critical in that a six/six advisory sentence would have resulted in a jury recommendation of life imprisonment which would have been accorded great weight pursuant to the legion of case law. See McCrae v. State, supra. Also see Engle v. State, supra, which provides that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a

sentence of death should be so clear and convincing that virtually no reasonable person could differ.

POINT XIII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO DISCUSS WITH THE INDIVIDUAL JURORS THEIR THOUGHTS AND/OR MISUNDERSTANDINGS BELIEVED TO HAVE RESULTED IN THE ADVISORY SENTENCE FOR THE DEATH PENALTY.

Appellant primarily relies upon the argument contained in his Initial Brief. In addition, Appellant believes that the trial court should have allowed the trial counsel to discuss the verdict with individual jurors to determine whether or not any misconceptions and/or misunderstandings resulted in the advisory sentence given the fact that the six/six decision became a seven/five advisory sentence of death immediately after the court's reinstruction. Appellant maintains that in light of the peculiar facts at hand resulting in the ultimate sanction in the form of the imposition of the death penalty, the court should have exercised all reasonable attempts in assuring that the jurors rendered the advisory sentence intelligently and without any misconceptions.

Contrary to Appellee's assertions, Appellant reasonably believes that one of the jurors did misunderstand the court's reinstruction read after the jury submitted its advisory sentence of a six/six vote. The trial counsel represented to the court as an officer of the court that she understood that there was indeed a misunderstanding by one of the jurors; consequently, Appellee is incorrect in stating that said motion was based on nothing more than speculative conjecture (R 809, 810, 811).

Appellant respectfully suggests that the seriousness of the imposition of the death sentence should have entitled Appellant to inquire into the 'sanctity' of the jury system in light of the unique and disturbing facts in this matter. Appellant should have been provided the opportunity to explore the allegation of the juror's misconception. In U.S. v. Forrest, 620 F.2d 446 (C.A. Fla. 1980), the

court held that a party claiming jury misconduct should be entitled to prove the allegation in light of the serious ramifications. In the alternative the court should have investigated the allegation as was done in Odom v. State, 403 So2d 936 (Fla. 1981) wherein the allegation of jury misconduct prompted the court to entertain affidavits from the accused juror. In Diaz v. State, 435 So2d 911 (Fla. 4th DCA 1983) the appellate court remanded for further proceedings directing the lower court to interview jurors to ascertaining whether any juror had read a newspaper article pertaining to the trial. In that decision, the jury was deadlocked on the evening before it rendered a verdict of guilty. Defense counsel had suspicions that a juror may have been improperly influenced by an article which resulted in the jury verdict less than one (1) hour after an Allen charge was given. Appellant maintains that the trial court in this matter clearly should have granted the motion to interview the jurors based on the unique facts at hand. Consequently, Appellant maintains that the trial court erred in denying Appellant the right to engage in individual questioning, in violation of due process.

POINTS XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI & XXII

Appellant primarily relies upon his argument and authorities cited in the Initial Brief.

POINT XXIII

THE CONVICTIONS AND SENTENCING RELATIVE TO KIDNAPPING AND ROBBERY WITH A FIRE ARM SHOULD BE VACATED AND REVERSED ON THE GROUND THAT SAME REPRESENTS A VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHT IN REGARDS TO DOUBLE JEOPARDY.

Appellant primarily relies upon his argument and authorities cited in the Initial Brief. Appellant may not be convicted of a felony murder and the underlying or predicate felony as will. See Bell v. State, 437 So2d 1057 (Fla. 1983); Smith v. State, 9 F.L.W. 1685, (1984).

POINT XXIV

THE TRIAL COURT ERRED BY VIOLATING APPELLANT'S DUE PROCESS RIGHTS AND SIXTH AMENDMENT RIGHT TO THE JURY BY PRECLUDING DEFENSE COUNSEL FROM PRESENTING VARIOUS FACTS AND CIRCUMSTANCES UNDER WHICH THE CONFESSION WAS MADE.

Appellant primarily relies upon the arguments and authority cited in his Initial Brief. The court advised counsel that she could proffer testimony going solely to the issues of threats or any type of promises but it clearly had ruled that she could not go into various circumstances surrounding the giving of said confession. Further, the court stated clearly that it was concerned about whether any proffer testimony and/or further questioning would be a repeat of the suppression hearing (R 574). After additional dialogue between the court and defense counsel, it was clear that the court would not allow defense counsel the latitude to proceed into the various circumstances surrounding the confession. See (R 575). Appellant maintains that the court committed error in precluding the Defendant from presenting to the jury evidence pertaining to circumstances under which the confession was made in violation of Palmes v. State, supra.

POINT XXV

THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF TESTIMONY AT THE GUILT PHASE OF THE TRIAL RELATIVE TO STATEMENTS MADE BY APPELLANT'S ACCOMPLICES.

Appellant primarily relies upon his arguments contained in his Initial Brief and further adopts arguments contained in his Reply Brief under Point VII herein. In brief response, Appellant maintains that indeed the introduction of the officer's testimony relative to the co-accomplice's statement implicating Appellant constituted a Bruton violation; in addition, the rationale underlying the Bruton rule is applicable at the case at hand and consequently the introduction of said testimony served to violate Appellant's fundamental right to confront witnesses against him and a fair trial. In addition, Appellant naturally disagrees with Appellee's opinion that if any violation exists, same was harmless. As stated in various author-

ity cited herein, when the error affects a constitutional right, an appellate court may not find it harmless if there is a reasonable possibility that an error may have contributed to the accused's conviction or if any error may not be found harmless beyond a reasonable doubt. Appellant maintains that there is certainly a reasonable possibility that the error in allowing the officer's testimony may have contributed to Appellant's conviction and further said error cannot be found harmless beyond a reasonable doubt. See Palmes v. State, supra; Peterson v. State, supra; Engle v. State, supra; which stands for the proposition that statements or confessions made by co-defendants are inadmissible as evidence against Defendant at the guilt phase of the trial. In the instant matter, the officer testified about the major part of the co-accomplice Bush's statement, namely that portion of said confession that implicated Appellant in the instant matter. Consequently, Appellant maintains that the court committed reversible error thereby entitling Appellant to a new trial in this matter.

POINT XXVI & POINT XXVII

Appellant primarily relies upon the arguments and authority contained in his Initial Brief.

POINT XXVIII

THE TRIAL COURT ERRED BY NOT GRANTING A JUDGMENT OF ACQUITTAL IN THAT THE EVIDENCE PRESENTED BY THE STATE WAS PURLEY CIRCUMSTANTIAL AS TO PREMEDITATED MURDER AND SUCH EVIDENCE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

Appellant relies primarily on his argument and authority submitted in the Initial Brief relative to this point. In Jaramillo v. State, 7 FLW 1982, SSC 301 No. 60,570, this court determined that a strict standard relative to weighing the sufficiency of evidence is required when a conviction is based wholly on circumstantial evidence. That decision succinctly states that the test to be applied is as follows:

'...where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence...'
(Jaramillo v. State, supra at page 301).

Appellant respectfully submits that the court erred in failing to grant a Judgment of Acquittal in that the evidence adduced to trial was not inconsistent with any reasonable hypothesis of innocence.

POINTS XXIX, XXX & XXXI

Appellant primarily relies upon the arguments and authority cited in his Initial Brief.

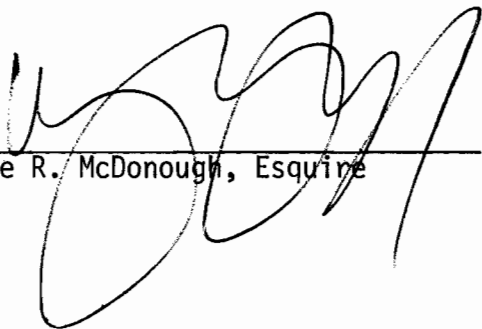
CONCLUSION

It is respectfully submitted that the convictions be reversed and the death sentence imposed upon Appellant, ALPHONSO CAVE, be vacated for every and/or any of the arguments raised herein.

Respectfully submitted,

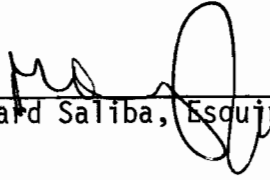
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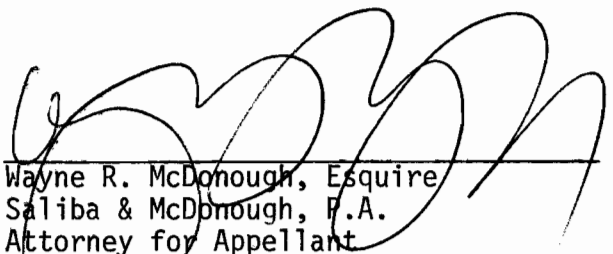
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Richard Saliba, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of the Appellant has been forwarded by United States Mail this ^{13th} day of November, 1984, to Richard G. Bartmon, Esquire, Office of the Attorney General, Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.



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