IN THE SUPREME COURT IN AND
FOR THE STATE OF FLORIDA

LLOYD DUEST, etc.,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.)

CASE NO. 63,678

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APPELLANT'S REPLY BRIEF

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ABBREVIATIONS USED

R	-	RECORD
AA	-	APPELLANT'S APPENDIX
AB	-	APPELLANT'S BRIEF
AAB	-	APPELLEE'S ANSWER BRIEF

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES RICHARD LONG AND EDWARD HEFFELMAN TO TESTIFY OVER OBJECTION BY APPELLANT'S COUNSEL 1

POINT II

WAS THE APPELLANT'S SIXTH AMENDMENT RIGHT TO HAVE "THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE" ABROGATED BY COMMENTS MADE BY THE PROSECUTOR REGARDING DEFENSE COUNSEL DURING THE TRIAL? 4

POINT III

THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATED MURDER TO CONVICT APPELLANT AS CHARGED IN THE INDICTMENT 6

POINT IV

THE TRIAL COURT ERRED IN ALLOWING INTRODUCTION OF STATE'S EXHIBIT #26 (A PHOTOGRAPH OF LYLE SALIN), OVER OBJECTION 9

POINT V

THE SENTENCE OF DEATH SHOULD BE REVERSED WHERE THE TRIAL COURT FOUND THAT FOUR AGGRAVATING CIRCUMSTANCES APPLIED AND THAT THERE WERE NO MITIGATING CIRCUMSTANCES, BUT APPEARED TO RELY ON NONSTATUTORY AGGRAVATING FACTORS 11

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF CITATIONS

Cases	Page
Adams v. State, 412 So. 2d 850 (Fla. 1982)	7
Alicea v. State, 392 So. 2d 960 (Fla. 4th DCA, 1980)	6
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963)	3
Brey v. State, 382 So. 2d 395 (Fla. 4th DCA, 1980)	3
Cumbie v. State, 345 So. 2d 1061 (Fla. 1977)	2
Elledge v. State, 346 So. 2d 998 (Fla. 1977)	12
Fleming v. State, 374 So. 2d 954 (Fla. 1979)	11
Frazier v. State, 107 So. 2d 16 (Fla. 1958)	6
Furguson v. State, 417 So. 2d 639 (Fla. 1982)	4
Groneau v. State, 201 So. 2d 599 (Fla. 4th DCA, 1967)	11
Johnsen v. State, 332 So. 2d 69 (Fla. 1976)	4
Nowlin v. State, 346 So. 2d 1020 (Fla. 1977)	9
Palmes v. State, 397 So. 2d 648 (Fla. 1981)	9
Pritchett v. State, 414 So. 2d 2 (Fla. 3rd DCA, 1982)	9
Richardson v. State, 246 So. 2d 771 (Fla. 1971)	1,2,3
Salvadore v. State, 336 So. 2d 745 (Fla. 1978), cert. denied 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed. 2d 113)	4
Snipes v. State, 154 Fla. 262, 270, 17 So. 2d 93, 97 (Fla. 1944)	7
State v. Murray, ______ So. 2d ________ (Fla. 1984) Case No. 63,364	4
Wilson v. State, 436 So. 2d 908 (Fla. 1983)	9,11

Other Authorities

Fla. R. Crim. P. 3.220	2,3

ARGUMENT

POINT I

THE COURT ERRED IN PERMITTING TESTIMONY OF TWO STATE'S WITNESSES (EDWARD HEFFELMAN AND RICHARD LONG) BECAUSE OF THE VIOLATION OF RULE (3.220) WHICH MAY NOT HAVE BEEN WILLFUL, BUT WAS SUBSTANTIAL, AND EFFECTED THE ABILITY OF THE DEFENDANT TO PROPERLY DEFEND AGAINST THE MURDER CHARGE.

In compliance with the requirements of Fla. R. Crim. P. 3.220, the Court heard argument of counsel in an effort to comply with the requirements of Richardson v. State, 246 So. 2d 771 (Fla. 1971), and the entire matter of the two rebuttal witnesses is included in the record (R-1143/R-1170). The prosecutor represented to the Court that he had not been aware of the existence of Edward Heffelman; defense counsel had no knowledge of the existence of Edward Heffelman until the trial was in progress (R-1145). Even though the police had the witness' name, same was not furnished to counsel (R-1155), who had no opportunity to determine the accuracy of the witness' testimony prior to trial.

It is conceded that both witnesses were deposed by defense counsel prior to their use by the State during the trial, but these depositions occurred some ten (10) days after the start of and while the trial was in progress.

As to witness Heffelman, defense counsel objected to his testifying on the ground that the witness' name was not included in the police reports (R-1146) nor furnished to counsel, notwithstanding the police knew the witness' name; the Defendant was thus prejudiced by the Court allowing the witness to testify for the State.

Richard Laun's name had been furnished to the BSO who, in turn, furnished it (without an address and incorrectly spelled) to the Defendant (R-1757)(AA-45). This misinformation was compounded by the fact that officer Cubas had the witness' correct name and address and provided same to the BSO, but listed the identifying information about Long as a confidential informant. The State failed to comply with Rule 3.220(a)(1)(vii), in that, it had within its possession and control access to "information" from a person who had improperly been described as a confidential informant by Officer Cubas, to the prejudice of the Defendant. Defense counsel conceded that he was only prejudiced because he did not have the name of the witness, and while it was represented that the State did not have the name either (R-1169), the defense was prejudiced in being unable to properly do a follow-up investigation on the witness prior to trial.

The protection of Richardson, supra, requires more than the mere disclosure of the identity of witnesses, it requires the State to fully comply with the rules of discovery. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977). While admission of undis-

closed evidence without conducting a Richardson inquiry renders a conviction reversible as a matter of law, Brey v. State, 382 So. 2d 395 (Fla. 4th DCA, 1980), the purported Richardson hearing in this case was insufficient to overcome the prejudice to the Defendant which resulted from the State's failure to provide (under Rule 3.220(a)(1)(vii)) material or information provided by a confidential informant. In the Long situation where, in fact, the witness was not a confidential informant, but clothed with that status by a police officer, while the officer apparently knew the correct spelling, etc. of Long's name, there was no possible way the Defendant could have found and deposed the witness prior to the start of the trial from the information provided defense counsel in pretrial discovery (R-1757)(AA-45). The Court's inquiry into the surrounding circumstances may have been adequate, however, the State's noncompliance prejudiced Defendant's ability to prepare to defend against the testimony. This is a clear violation of Defendant's due process rights as enunciated by the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963).

POINT II

WAS THE APPELLANT'S SIXTH AMENDMENT RIGHT TO HAVE "THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE" ABROGATED BY COMMENTS MADE BY THE PROSECUTOR REGARDING DEFENSE COUNSEL DURING THE TRIAL?

While Furguson v. State, 417 So. 2d 639 (Fla. 1982) is cited by Appellee (AAB-8) for the proposition that when the Prosecutor makes an improper remark as he did in the closing argument in Furguson, counsel objected and moved for a mistrial (R-765); to also require the Defendant to request a curative instruction, places form over substance. In this case, the Court saw fit to rebuke the Prosecutor (out of the hearing of the jury) (R-764)(AA-67)(AAB-8/9), so that the Court did not appraise the jury by a curative comment. Accordingly, the damage was done and this abuse of discretion violated Defendant's rights. Appellant realizes that "a mistrial is a device used to halt the proceedings when an error is so prejudicial and fundamental that the expenditure of further time and expense would be futile." Johnsen v. State, 332 So. 2d 69 (Fla. 1976); "It should be granted only in cases of absolute necessity." Salvadore v. State, 366 So. 2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed. 2d 113). The latest pronouncement of this Court's rulings on prosecutorial comment is in State v. Murray, _______ So. 2d ________ (Fla. 1984) (Case No. 63,364 decided January 12, 1984) wherein the Court

said:

> Prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." (Page 2 of slip decision).

The Prosecutor in this case went too far; the Court did not make a curative comment to the jury - the failure to grant the Defendant's motion for a mistrial after timely objection was an abuse of discretion and error.

POINT III

THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATED MURDER TO CONVICT APPELLANT AS CHARGED IN THE INDICTMENT.

Appellee has argued and compared this case to Alicea v. State, 392 So. 2d 960 (Fla. 4th DCA, 1980) as to the sufficiency of evidence to support premeditation. In that case the Court said:

> Examined as a whole, the evidence established that (1) the victim was known to carry large sums of money, (2) the defendant was short of money and had been trying the night before to sell the gun used to inflict the fatal wounds to pay off gambling debts.

In Alicea, this Court referred to Frazier v. State, 107 So. 2d 16 (Fla. 1958) wherein this Court found "that evidence supported conviction that killing was by premeditated design" although there was little proof of premeditation except that near a gate where the victim's car was found was a trampled down area (described as an area where someone stood or sat for some time), and tracks which led to another spot where there were signs of a struggle. The sum total of proof was buttressed by a reenactment of the crime by Furguson and a confession that he stole $7 from Lacie (the victim).

As reprehensible as may have been Appellant's Duest's lifestyle (of stealing from gays) and but for the fact that the State proved that Appellant had most likely stolen Demezio's

knife and had it in his possession the day after the theft (R-735), there is little, if any, evidence to indicate the Appellant planned to kill anyone. Appellee has argued that there is "overwhelming proof of Appellant's guilt of premeditated murder as charged in the indictment." What was proved was that the Appellant may have killed John Pope, Jr., and while the motive for the stabbing was clearly robbery, lacking was proof that the Appellant intended to kill Pope, and certainly lacking was a sufficient amount of proof to show premeditation in the homicide. See Snipes v. State, 154 Fla. 262, 270, 17 So. 2d 93, 97 (Fla. 1944).

In our society today thousands of people walk around armed with knives, handguns and other assorted weapons. Can one reasonably infer, that in each instance, the possessor of the weapon is guilty of premeditated murder - without more proof - simply because they were in possession of a weapon, just prior to a crime? Appellant thinks not. Appellee cites as authority for the proposition that premeditation may be established by circumstantial evidence. Adams v. State, 412 So. 2d 850 (Fla. 1982). In that case, there were not only written and oral statements made by the Defendant to police, but a photograph depicting the victim with her hands bound which this Court commented was relevant to show premeditation. Does the mere possession of a weapon raise a presumption of a mental condition which presumes the person guilty by virtue of that

fact alone? Considering all of the record in this case, the evidence is lacking of sufficient evidence of premeditation and the Court should have granted a motion for judgment of acquittal on the first degree murder charge.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING INTRODUCTION OF STATE'S EXHIBIT #26 (A PHOTOGRAPH OF LYLE SALIN), OVER OBJECTION.

In response to Appellee's argument on this point, could one speculate that the admission of the Lyle Salin photograph and the characterization of the man as a transvestite be harmless error? Referring to Wilson v. State, 436 So. 2d 908 (Fla. 1983), "Photographs are admissible if relevant to any issue required to be proven in the case." Appellee cites Pritchett v. State, 414 So. 2d 2 (Fla. 3rd DCA, 1982), however, the decision is not quite clear as to the nature of the evidence admitted. Here the trial court's ruling on the evidence tended to prejudice the Defendant before the jury. There was evidence of the guilt of the Appellant - certainly the evidence of guilt was not overwhelming in light of the presentation of alibi testimony and if "there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found to be harmless beyond a reasonable doubt." Nowlin v. State, 346 So. 2d 1020 (Fla. 1977).

Palmes v. State, 397 So. 2d 648 (Fla. 1981) concerned the admissibility of an extra judicial confession - not photographs - however, as stated therein, it is the Court's function to scrutinize any error. The State could have had no purpose in this case of introducing the Salin photograph into evidence,

except to prejudice the jury. The Court's admitting the photo was prejudicial error.

POINT V

THE SENTENCE OF DEATH SHOULD BE REVERSED WHERE THE TRIAL COURT FOUND THAT FOUR AGGRAVATING CIRCUMSTANCES APPLIED AND THAT THERE WERE NO MITIGATING CIRCUMSTANCES, BUT APPEARED TO RELY ON NONSTATUTORY AGGRAVATING FACTORS.

This Court cited Groneau v. State, 201 So. 2d 599 (Fla. 4th DCA, 1967), at page 955 of Fleming v. State, 374 So. 2d 954 (Fla. 1979) - "The accused must have intended to accomplish the particular crime which is the basis of the charge against him." Appellee has taken out of context this Court's holding in Fleming where the trial judge improperly considered sections (d) and (f) of Section 921.141(5) of the Florida Statutes as two separate aggravating circumstances to mean that the death penalty would still be appropriate when, in fact, this Court reversed and remanded for resentencing because the Court was unable to determine what significance the "especially heinous, atrocious or cruel" aggravating factor was given in the weighing process. A similar situation existed in the case at bar with four overlapping aggravating factors and no apparent mitigating factors (R-1833)(AA-59)(AB-3). Appellant is not unaware of this Court's ruling in Wilson v. State, 436 So. 2d 908 (Fla. 1983), wherein this Court said where there was at least one aggravating factor and no mitigating factors at all, the sentence of death is proper. However, notwithstanding the foregoing, in

this case, it is apparent nonstatutory aggravating factors - Defendant's prior criminal record - was considered by the Court. On authority of Elledge v. State, 346 So. 2d 998 (Fla. 1977), the cause should be remanded for resentencing.

CONCLUSION

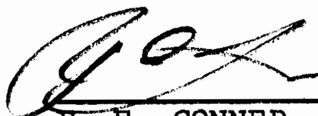
Based upon the record and the briefs submitted, it appears that the death sentence should be set aside and remanded to life imprisonment or in the alternative, the case remanded for a new trial for the reasons stated herein.

Respectfully submitted,

R. E. CONNER

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true copy of the foregoing was furnished to: MARLYN J. ALTMAN, Assistant Attorney General, Attorney for Appellee, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, by mail, this 9th day of April, 1984.



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