IN THE SUPREME COURT OF FLORIDA

DAVID ALLEN GORE

APPELLANT

V.

STATE OF FLORIDA

APPELLEE

_____/

CASE NO: 65,201

REPLY BRIEF OF APPELLANT

Richard Saliba
Saliba & McDonough P.A.
2121 14th Avenue
Box 1690
Vero Beach, Florida 32961-1690
305 567 6111

Counsel for Appellant

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PREFACE

The State, in it's answer brief, chose to address various issues simultaneously and not in chronological order. This has required Appellant in his reply brief to endeavor to address the issues in as succint, concise and logical fashion as possible. To achieve this endeavor Appellant has designated the particular issue upon which he is focusing to correspond to that Point in his initial brief. Appellant has further set forth in detail a brief and concise statement of each issue analyzed. To minimize any confusion Appellant has responded to the issues raised by the State in the order those issues were addressed by the State.

POINT ONE

IT WAS ERROR FOR THE TRIAL COURT TO PRECLUDE THE INQUIRY OF APPELLANT'S COUNSEL DURING VOIR DIRE RELATIVE TO THE FEELINGS, ATTITUDES OR PREJUDICES OF PROSPECTIVE JURORS REGARDING THE ISSUE OF RECOMMENDATION OF MERCY.

The State has superficially focused upon a crucial issue in this appeal relative to the propriety of the Court's precluding the Defendant's attorney's inquiry into the recommendation of mercy during voir-dire. It is of interest to note that the State does not attempt to distinguish Poole v State, 194 So.2d 903 (Fla.1967), the very case upon which the Appellant predicates the argument of this issue. Rather, the State focuses upon a collateral issue as to whether the Defendant established that a juror would not follow the law!

Irrespective as to whether or not there was a juror who would or would not follow the law the relevent issue related to whether it was or was not improper to preclude the Defendant from inquriing as to the issue of mercy. The failure to allow the Defendant, according to this Supreme Court, precludes the Defendant from ascertaining the attitude of a prospective juror on the subject of mercy. As this Court succintly stated:

> "..But neither should it be held improper to question a prospective juror as to whether he would never under any circumstance be able to recommend mercy in such a case...We think it is extremely important to an accused to know whether a juror would dogmatically refuse to consider the possibility of mercy....We are of the opinion that inquiry should be permitted to enable the accused to ascertain the attitude of a prospective juror on the subject of mercy, and certainly a juror completely adverse to a mercy recommendation might be a fitting subject of a peremptory challenge. (Poole v

State, supra at page 905-emphasis supplied).

Thus, the crucial issue is whether or not the Defendant could properly, in the context of due process, select a fair and impartial jury. The State emphasizes that the respective jurors did not indicate a bias towards the death penalty. However, that is not the consideration regarding this particular issue. The relevant consideration is whether or not the Defendant was precluded from ascertaining the attitudes of the prospective jurors upon the subject of mercy. He obviously was when the trial court stated that mercy is not involved and disallowed the inquiry. (R1596 L12,13,15,16).

The State's reliance upon Thomas v State, 403 So.2d 372 (Fla.1981) and Fitzpatrick v State, 437 So.2d 1072 (Fla.1983) is misplaced. While the proposition of law the State advances to this Court is valid upon a different issue the specific purpose for presenting it relative to this issue circumvents the focus regarding this point on appeal. The crucial issue here is whether the Appellant was precluded from the opportunity to select a fair and impartial jury during the voir dire process by reason of the Court's refusal to allow the inquiry relative to mercy. The voir dire question posed by the Appellant is exactly the same question in the Poole case. The Court's preclusion of the Appellant from even ascertaining the possibility of prejudice on behalf of any juror or jurors violated Appellant's right to a fair and an impartial jury and to a fair and impartial trial in contravention of the Sixth Amendment to the Constitution of the United States and in violation of the guarantees afforded Appellant by the Florida Constitution. As in Poole a reversal is clearly warranted and it is respectfully requested this Court remand for a new trial

POINT TWO

IT WAS ERROR FOR THE LOWER COURT TO ADMIT THE CONFESSION INTO EVIDENCE AS THE ADMISSION OF THE CONFESSION VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION.

The State in its answer brief contends that anything which was said after the request was appropriately suppressible. But the statements made before that time are fully, according to the State, admissible. (State's Answer Brief page 16).

In Cannady v State, 427 So2d 723 (Fla-1983), this Court held that when a person expresses both a desire for an attorney and a desire to continue the interview without an attorney the further inquiry is limited to clarifying the suspect's wishes.

The State advances the position that it is not the duty of the arresting officer to convince the defendant that he wants an attorney. (State's brief-page 16) However, under Florida law it is the duty of the officer, once the defendant, while in custody, has expressed both a desire for counsel and a desire to continue the interview without counsel, to clarify the suspect's wishes. This duty the State refuses to address in the answer brief. However, this is the issue relative to this custodial interrogation.

It is clear that the Defendant did specifically state that he wanted to get something off his chest and then he wanted to see a lawyer, talk to a lawyer (R1222 115-20) Deputy CC Walker testfied that he watned to walk with a lawyer (R12228 1-20 R125011-14). It is further clear that the arresting officer and the interrogating officer never clarified the request for a lawyer. Of further intrigue is the fact that during the alleged confession the officers took statmenets off the record!

In light of Canady, supra and in light of Edwards v Arizona, 451 US 477 (1981), the Appellant's statement should have been suppressed. The State's failure to establish that the interrogating

officer had clarified the Appellant's wishes renders the statements inadmissible. The State, in it's answer brief, has failed to address the crucial issue of clarification. The facts clearly indicate that no clarification was undertaken. There was a clear violation of Canady and by reason thereof the Appellant is entitled to a new trial.

POINT XIII

IT WAS ERROR FOR THE LOWER COURT TO DENY THE APPELLANT'S REQUEST FOR A DEMONSTRATION OF THE DISTANCE TO THE JURY FROM WHERE THE ONLY WITNESS APPARENTLY STOOD WHEN HE SAW THE MURDER.

The State's position relative to the attempted demonstration is that distance is something normally within the ordinary knowledge of the juror. However this is not the test to allow a demonstration to be admitted into evidence. This Court in Johnson v State, 8 FLW 460 (Fla 1983) allowed a demonstration to determine the distance from which a firearm was fired. In the instant matter the primary purpose was to allow the jury to view the distance from where the boys stood as identity was a crucial issue. The facts, which were stipulated to by the State, did establish that the young boy who identified the Appellant was three hundred and fifty six feet away from the occurance. (R-1218 L-21-23).

The State argues that this constituted a test. The purpose as consistently empahsized during the trial was not to perform a test but to provide a demonstration so as to allow the jury to acquire an insight into the distance and to make an appraisal of the ability or inability, in light of the distance, of the child to identify the Appellant. The relevance of the demonstration was clear. The Court's preclusion of the demonstration constituted reversible error denying to Appellant fundamental due process because he was precluded from presenting relevant evidence and consequently he as denied the right to a fair and impartial

trial.

POINT XXIII

IT WAS ERROR FOR THE LOWER COURT TO FAIL TO GRANT A MISTRIAL UPON THE MISCONDUCT OF ONE OF THE JURORS WHICH WAS BROUGHT TO THE COURT'S ATTENTION IN TIMEY AND PROPER FASHION

The State argues that the juror's attack upon the defense attorney in the presence of the other jurors constituted harmless error. It is extremely curious to note that the state quotes the Court's alleged curative instruction as follows:

> "....THE COURT:...Ladies and gentlemen, any outbursts Mr. Brown may have made or may not have made-I did not hear-but I want to state to you, as I have stated to you from the beginning, this case must be tried solely on the evidence and on the law and nothing else. (R 2865)

The State's incomprehensible position is that the Court can cure error without being previously cognizant of the error. The Court specifically admits in it's instruction to the Jury that it was not privy to the statements:

> "...any outbursts Mr Brown may have made or may not have made I did not hear---(R2865)...".

If the Court was not aware of what the Juror said, but was aware he said something, then the Court could not correct the error by a standard cure-all instruction without first ascertaining the exact nature of the error. This was not done!

As a result the slurs, which are accurately reflected by the Court Reporter in the record, were never addressed. The mere statement of the Court that the case must be tried solely on the evidence and on the law and nothing else (R2865) does not cure the personal attacks by this juror in the presence of the jurors upon defense counsel or upon Appellant.

The State's arguments fail to address the issue that this juror, by his specific course of conduct, expressed to the other jurors, in open court, his prejudice and hostility toward the Defendant. Such conduct and the failure to address and correct the error in proper and expeditious fashion constitutes and warrants a reversal.

In Rolle v State, 9 F.L.W. 90 (4DCA-1984) the Court did conduct an evidentiary hearing on the issue of the probable influence of the juror's remarks when one juruor engaged in misconduct. As a minimum of fundamental due process it was incumbent upon the Court to at least engage in conducting an evidentiary hearing to ascertain the effect of the prejudicial remarks. Such statments by this juror certainly influenced the jury and certainly served to prejudice the accused.

The State's focus, relative to this point, relates primarily to the propriety of graning a mistrial. The State, aware the Court was not privy to the error, specifically states that no mistrial was warranted. The state makes this blanket assertion without addressing the key issue as to whether or not the prejudice was cured by the Court's instruction. But the failure of the Court to address the error by first ascertaining the nature and extent of the error and the actual effect of the prejudice constituted fundamental error ans warrants reversal and the granting of a new trial. Doyle v State, 9 F.L.W. 453 (Fla.1984); Rolle v State, 9 FLW 90 (4DCA-1984); and In Re Davis, 83 A.2d 590 (1951).

POINT XXVI

IT WAS ERROR FOR THE TRIAL COURT TO DENY A MISTRIAL UPON THE APPELLANT'S MOTION RELATIVE TO DETECTIVE KHEUN'S TESTIMONY IN CONTRAVENTION OF THE COURT'S PRETRIAL ORDER.

During the trial the State presented evidence in contravention of the Court's prior ruling. The Court specifically precluded this statement after a stipulation was entered by the Office of the State Attorney that such testimony would be inadmissible (R2268 L11-25). Then at trial the following very succint question was asked by Mr. Midelis, the Assistant State Attorney conducting the examination:

> :"...What did he say?
> A. He said that he wanted to get something off his chest, to make a statement and then he wanted to see a lawyer.."(R2268 L11-25).."

It was incumbent upon the State to insure that it's witnesses abided by the pretrial order especially after it was stipulated by the State that such testimony would be inadmissible. By virtue of the stipulation the State agreed that this particular evidence was prejudicial, damaging and inadmissible. It, of course, would constitute a different set of circumstances if the statement was elicited by the Defendant upon cross-examination. However, it was not the Appellant who elicited this statement but the State after the State had conceded such statement was inadmissible and after the State had stipulated not to introduce such statement.

The State's argument that the statements were admissible is completely oblivious to the fact that the prosecutor agreed by stiuplation that such statements were inadmissible. Further, the State's

arguments that the totality of the circumstances must be analyzed has no validity in light of the stipulation. The Appellant was entitled to rely upon that stipulation and the expected and anticipated compliance with the Court's pretrial order. Since the State had previously stipulated that no mention should be made about the statement which was elicited by the State there is no issue relaive to the improperity of the comment. The circumstances surrounding this statement and the severe prejudicial effect of the statement constituted justification for the granting of a mistrial. No curative instruction could possibly have cured the prejudicial effect of such statement and the Court's failure to grant a mistrial constituted reversible error.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED TO AVOID OR TO PREVENT A LAWFUL ARREST OR TO EFFECT ESCAPE.

The State argues in the instant appeal that the evidence is 'clearly strong' enough to meet the Riley standard. In support of this argument the State cites various cases which are clearly distinguishable from the instant matter. In Hitchcock v State, 513 So.2d 741 (Fla.1982), a case cited by the State, there was a post arrest statement introduced into evidence wherein the defendant admitted that he beat the victim to make her be quiet and to keep her from telling her mother about the rape. The court specifically stated:

> "...In view of proof this strong..."murder to eliminate a witness is properly considered in aggravation..."(Hitchcock v State. supra at page 747 emphasis supplied).

There was no evidence presented of a confession or otherwise which

established that the Appellant's intent was to eliminate a witness.

The case of Vaught v State, 410 So2d 147,(Fla.1982) also cited by the State, involves facts where the victim announced that he knew who the assailant was. The court specifically focused on this facts to justify the imposition of this aggravatting circumstance:

> "...The finding that the capital felony was commited for the purpose of avoiding or preventing arrest and prosecution is supported by the evidence that the shooting was precipitated by the victim's announcement that he knew who his masked assailant was. The evidence showed that after the victim was shot once and fell to the gound appellant shot him four more times to make sure he was dead and therefore unavailable to identify appellant...."

The instant case did not involve such facts and circumstances. This Court has required in the past and still requires strong proof of requisite intent:

> "...It must be clearly shown that the dominant or only motive for the murder was the elimination of witnesses..." (Menendez v State, 368 So.2d 1278 (Fla.1979), at page 1282).

The State engages in conjecture and presents no clear evidence that the dominant or only motive for the murder was the elimination of the witness. The State argues:

> "..Clearly, if Appellant had let Lynn Elliot run free, she would have gone straing to law enforcement authorities....."(State's brief page 42)

In the case of Welty v State, 402 So2d 1159 (Fla.1981) there appears to be insufficent facts upon which to determine upon what basis the Court determined the endeavor to avoid arrest was a proper aggravating circumstnace. This is suggested as it further appears this ground was not challenged by the Appellant in that case. Consequently the State's reliance upon the Welty case is misplaced by reason of the fact that no comparative facts can be adduced from the opinion to establish the clear and strong intent of the Appellant.

In the last case cited by the State, Elledge v State, 408 So 2d 1021 (Fla 1982), the facts delineated by the State in the answer brief clearly establish that there was evidence in Elledge that appellant was afraid the victim would provide testimony against him concerning the rape. In the instant case there is not such evidence. Absent clear and strong evidence that the dominant and/or only motive for the murder was the elimination of the witness such finding of this aggravating circumstance can not apply. Riley v State, 366 So2d 19 (Fla.1979); Menendez v State, supra. The conjecture which the State relies upon in it's answer brief is insufficent and not indicative of the standard of proof required by this Court. Thus, this aggravating circumstance was improperly found by the trial court and a reversal is warranted in light of this improper application thereof.

POINT XIV

IT WAS ERROR FOR THE LOWER COURT TO ENTER FINDINGS IN SUPPORT OF THE DEATH SENTENCE THAT THE CRIME FOR WHICH THE DEFENDANT IS SENTENCED WAS ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL.

The State primarily relies on the case of Lucas v State, 376 So.2d 1149 (Fla.1979) to support it's position that the murder was

especially cruel, heinous and atrocious. However, the facts involved in Lucas differ substantially from the attendant facts in this case despite the State's contention to the contrary. In Lucas there was evidence that the defendant first shot the victim, pursued her into the home, struggled with her, hit her, dragged her from the house, and finally shot her to death while she begged for her life. These facts are substantially different from the instant case.

In order for this aggravating cirumstance to be properly applied there must first be a finding setting this crime apart from the norm of capital felonies. The cases cited by the State do set the crime apart from the norm whereas the facts of this case, do not. Dixon v STate, 283 So2d 1 (Fla-1973), Lucas v State, 376 So.2d 1149(Fla.1979); Alvord v State, 32 So.2d 553 (Fla.1975).

The facts clearly do not support the imposition of this aggravating circumstance as the evidence does not show, beyond a reasonable doubt, that the crime is apart from the norm of capital felonies.

The State has injected an argument in it's answer brief relative to this issue. The substance of the State's argument is that since the Court failed to find no mitigating circumstances then if any circumstance exists the penalty is valid. However, the State has failed to take into consideration the argument of Appellant that the Court erred in failing to find as a mitigating circumstance that the Appellant had no significant history of prior activity and in failing to find that he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (Appellant's Points XVII and XVIII in his initial brief). A reversal upon this two issues would obviate the State's contention herein.

POINT XVI

IT WAS ERROR FOR THE TRIAL COURT TO FIND THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND/OR PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL LEGAL JUSTIFICATION.

It must be emphasized initially that in order for this aggravating circumstance to be properly imposed there must be evidence that the murder was committed in a cold or calculated manner. Washington v State, 432 So.2d 44 (Fla-1983).

The State in it's answer brief relative to this point cites the case of Herring v State, 446 So.2d 1049 (Fla.1984) and reiterates the Court's findings in that case:

> "...We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness elimination murders..." (Herring v State, supra at page 1057).

The State concludes, in support of the application of this factual finding that the witness was eliminated "execution style". (State's answer brief page 44). There is absolutely no evidence which is submitted by the State, either at trial or in it's arguments incorpoated in it's answer brief, which support this contention. The evidence established that the slaying of the victim occured in the driveway with a witness apparently present. The case cited by the State in it's answer brief contravenes the logic of it's argument upon this point and illustrates that the attendant facts simply will not justify the imposition of this aggravating circumstance.

POINT XVII

IT WAS ERROR FOR THE COURT TO FAIL TO FIND AS A MITIGATING CIRCUMSTANCE THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR ACTIVITY.

The State does not address, in it's reply to this point, what constitutes the significant history and the severity of the prior offense. This is the criteria delineated by State v Dixon, 283 So.2d 1(Fla 1973). The State cites a portion of the Dixon opinion in it's answer brief wherein this Court previously stated:

> "...Also the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance..."(State v Dixon, supra at page 9)

The Appellant's prior record included this one conviction which did not involve circumstances indicative of violence. Again, the State in it's answer brief endeavors to combine factual issues with speculation to justify the failure of the Court to find this circumstance as a mitigating one.

POINT XVIII

IT WAS ERROR FOR THE LOWER COURT TO FAIL TO FIND THAT THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

The State argues herein that Appellant was free to place witnesses on the stand that could say that he had been drinking and acting strangely. This is in contravention of exactly what the Defendant's attorney endeavored to introduce and displays the State's misconstruction

relative to this point. As specifically delineated in the initial brief the Court precluded the introduction of any testimony regarding the appellant's capaciity to appreciate the criminality of his conduct:

> "....Mr. Long....It showed they'll testify because of the way he was acting, they believe that he was drinking."(R3048 L13-14)..."
> "....Mr. Long....and the way the witnesses will testify that he was acting matched how he acted when he was under the influence...."(R3052 115-17).
> "....Mr. Long....Becasue these witnesses know how he acts when he drinks. They know he was acting very, very strange that morning. Very, very strange that weekend, that previous weekend. That's how he acted when he drank. Plus, you know, the pills. (R3052 L22-25: R3053 L1-2).
> "...The Court: I think so. I'll deny the admission of that type of evidence."(R3056 118-19).

The State's contention that the Defendant could have called witnesses is in error. The Court clearly precluded him from presenting any type of evidence whatsoever in support of this mitigating circumstance.

In Hitchcock v State, 413 So2d 741 (Fla 1982) the Appellant was allowed to present testimony that he had once "sucked on gas and that afterwards his mind seemed to wander occasionally and that he had been drinking heavily and smoking marijuana prior to committing the crime. Whether or not such testimony in the instant case would have been sufficently compelling to cause mitigation of the death sentence imposed following the murder conviction will not be ascertained as the Trial Court precluded the introduction of this evidence. The preclusion of this evidence was especially crucial to this sentencing phase of the trial as it clearly prejudiced the Appellant's right to a fair and impartial

hearing.

As previously emphasized Florida Statutes s.921.141(1) provides in pertinent part that any evidence may be presented to any matter that the Court deems relevant as to the nature of the crime and character of the defendnt. It is submitted that this evidence, which has been entertained by this Court in other cases, is of a relevant and material nature to this issue of mitigation and the failure of the Court to permit it's introduction constituted reversible error and warranted a new trial.

SUMMARY

Appellant respectfully requests this Court consider the other Points addressed in his initial brief which were not addressed herein due to the constraints imposed by the Florida Rules of Appellate Procedure. He further submits to the Court that he is not abandoning the viability of those arguments not addressed herein which were incorporated in the initial brief.

It is further respectfuflly submitted that the Lower Court committed significant fundamental error especially relative to the points delineated herein and specifically relative to the Court's preclusion of the inquiry during voir dire regarding the issue of mercy recommendation. Appellant requests this Court determine that the Lower Court's actions

constituted reversible error and warrants the granting of a new trial to Appellant.

Richard Saliba
Salilba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florida 32961
305 567 6111

CERTIFICATE OF SERVICE

I certify that copy of the reply brief of Appellant has been forwarded to The Office of the Attorney General, Assistant Attorney General Gregory C Smith, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 28th day of January, 1985.

Richard Saliba
Saliba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florida 32961
305 567 6111