IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,334

JAMES A. MORGAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARTIN COUNTY.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R"	Record on Appeal
"T"	Transcript of Trial Proceedings

STATEMENT OF THE CASE

Appellant will rely on his original Statement of the Case.

STATEMENT OF THE FACTS

Appellant will rely on his original Statement of the Facts in addition to and in conjunction with the Statement of the Facts as submitted by the Appellee in its Answer Brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR CHANGE OF VENUE, SECOND MOTION FOR CHANGE OF VENUE, AND AMENDED SECOND MOTION FOR CHANGE OF VENUE.

The Appellee's attempts to distinguish the case sub judice from Oliver v. State, 250 So. 2d 888 (Fla. 1971) are simply without merit. Although this Court did announce in Straight v. State, 397 So. 2d 903, 906 (Fla. 1982) that "Oliver has been restricted and refined", it is clear that that case bears little resemblance to the issue which was raised in Oliver. In Straight (supra), the issue dealt with the featured confession of a co-defendant which didn't implicate the accused. In the case before this Honorable Court today and in Oliver (supra), the issue before the Appellate Court dealt with the featured confession of the accused himself. The Appellee's reliance on Dobert v. State, 328 So. 2d 433 (Fla. 1976) is also without merit in that this case did not involve a confession which was featured in the media. Lastly, the Appellee's attempt to distinguish the case sub judice from Oliver (supra), by citing Hoy v. State, 353 So. 2d 826 (Fla. 1977), is also misguided. That case dealt with a published report based upon the statement of a detective which merely summarized three different and contradictory statements made by the accused. Also, the Court specifically pointed out in Hoy (supra) that there existed other publications of equal prominence wherein the accused retracted his confession. Clearly, this is different from Oliver (supra) and from the case sub judice.

Additionally, the State attempts to distinguish this case by relying upon the trial court's finding that the confession of the accused had not been the "feature" of news media coverage in the case. (R 345) This finding, however, simply contradicts the true facts. The title of the newspaper article which appeared in the May 16, 1985, Martin County Edition of the Palm Beach Post and which was attached as Exhibit "A" to the Amended Second Motion for a Change of Venue is "VIDEOTAPE ON MORGAN . . . ". As such, the title of the article clearly refers to a taped recording of the accused. The article itself goes on to say that "during the session, Morgan described how he hit Mrs. Trbovich several times with a crescent wrench. Then, while she fought him, he dragged her into the kitchen and stabbed her dozens of times with a bread knife. He then sexually molested her, according to the recording". (R 326) The article then goes on to explain the alleged motive for the murder. The article says that the accused "said under hypnosis he thought Mrs. Trbovich was writing a letter to his mother to tell her she had seen him drink a beer". (R 326)

For the trial court to have found, and for the Appellee to assert, that these detailed confessions were not "featured" in the local news media is simply absurd and without support.

POINT II

THE TRIAL COURT ERRED IN SUSTAINING THE APPELLEE'S OBJECTION TO THE TESTIMONY OF DR. CADDY AND DR. KOSEN AND IN FURTHER PRECLUDING THE APPELLANT'S TWO PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THE STATEMENTS MADE BY THE APPELLANT WHILE UNDER HYPNOSIS AND IN FURTHER PRECLUDING THESE TWO EXPERT PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THEIR OPINION AS TO THE APPELLANT'S INSANITY AT THE TIME OF THE KILLING.

The Appellee's conclusion that the evidence sought to be admitted was properly excluded by the trial court under the "per se inadmissibility rule" of Bundy II is clearly incorrect. Both Bundy I and Bundy II dealt with the issue of the admissibility of "hypnotically refreshed" testimony. In the case sub judice, the issue before the trial court was not the admissibility of hypnotically refreshed or hypnotically induced testimony, but rather the admissibility of the testimony of the psychologist and the psychiatrist as to the insanity of the defendant. Clearly, the testimony of both expert witnesses was based upon and the expert opinions and conclusions were drawn from the statements made by the defendant while under hypnosis. This is clearly distinguishable, however, from the issue of the admissibility of hypnotically refreshed or hypnotically induced testimony. Strained or not, Bundy I and Bundy II simply do not control in this case.

When all is said and done, the issue before this Court is whether or not the Appellant is ever going to be provided with the opportunity to assert the defense of insanity. The Appellant would submit that the reason that this case has come before this Honorable Court for the third time, in effect, for the same reason, is that the Appellee is scared to death to allow the Appellant the opportunity to convince a jury that he

was insane at the time of the commission of the crime for which he was convicted and sentenced. The Appellant was precluded from offering into evidence that testimony which would support the defense of insanity during his first trial, during his second trial and now during his third trial. The Appellant would submit that it is time for this Honorable Court to remand this case to the trial court with the specific instructions to allow the Appellant the opportunity to present the necessary evidence in support of the defense of insanity. The Appellant would submit that the insistence and intransigence of the Appellee is based upon the patent and obvious fear that the Appellant would succeed in alleging the defense of insanity. The Appellant would further submit that the facts of this case speak for itself in establishing an obvious, meritorious defense of insanity.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, in addition to the reasons and Points and Authorities cited in the Appellant's Initial Brief, the Appellant respectfully requests that the judgment and sentence of the trial court be reversed and that this case be remanded to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished, by United States Mail, to JOAN FOWLER ROSSIN, Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 6th day of May, 1986.

ROBERT G. UDELL, ESQUIRE