IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT KRITZMAN,

Appellant,

v. CASE NO. 69,058

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

References to Appellee's Answer Brief will be by (AB). All other references remain the same.

II STATEMENT OF THE CASE AND FACTS

Appellant objects to appellee's "factual" assumption that Appellate counsel "obviously agrees that the aggravating circumstances outweigh the mitigating circumstances . . ." (AB-4). Counsel's opinion is that the entire trial was so fundamentally flawed before the penalty phase that there was no need to dissect the sham proceeding.

III SUMMARY OF ARGUMENT

Appellant addresses the arguments in his Reply brief to issues I, II, IV, and V. He disputes appellee's contention in Issue I that the trial judge properly exercised his discretion in denying a severance and that no prejudice was demonstrated. Having the prosecution's eyewitness assist in picking appellant's

jury offends common sense and makes a mockery of the notion of a fair and impartial trial.

In Issue II appellant reasserts that materiality, relevance, and prejudice are the modern test under the evidence code for admission of collateral acts. Appellee's "entire context" argument is nothing more than a "res gestae" concept and an improper attempt to show criminal propensity.

In Issue IV appellant acknowledges this Court has recently addressed a similar state/federal jurisdiction question. He urges that no essential element of the murder was committed in Florida.

Finally in Issue V he concludes that the novel and bizarre procedure utilized by the trial judge so tainted the trial up to and including the penalty phase, so as to render the advisory stage bereft of any fairness and due process.

IV ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN NOT SEVERING KENT MAILHES' CASE FROM APPELLANT AND IN ALLOWING MAILHES TO PARTICIPATE IN JURY SELECTION WHEN HE HAD PREVIOUSLY ENTERED GUILTY PLEAS, THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee concedes this case is "unique" and one of "first impression." (AB-6). Other than saying the trial judge has the discretion whether or not to grant a severance and that the state does not believe there was any demonstrated prejudice (AB-10), appellee did not address the issue raised.

Appellant wholeheartedly agrees with Appellee's statement, "co-defendant Mailhes, having plead guilty to first degree murder, was entitled to a separate sentencing proceeding for a determination of punishment," (AB-7)[emphasis supplied] but separate from appellant's trial. As appellee noted in quoting McCray v. State, 416 So.2d 804, 806 (Fla. 1982):

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary 'to promote a fair determination of the guilt or innocence of one or more defendants . . .' . . . the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence

which applies to only one of several defendants.

Sub judice the state simultaneously litigated two separate matters, a guilt or innocence determination and a sentencing recommendation. Those two distinct processes were comingled in such a way that no jury instructions could intelligently guide a jury in fairly deciding two dissimilarly situated defendant's issues. Neither counsel for appellee nor counsel for appellant were aware of any appellate cases on point with the trial procedure herein. Although such a bizarre scenario was not contemplated by this Court in McCray, clearly the spillover effect between guilt and penalty phase demonstrated the confusion and improper influence of evidence applicable to only one defendant.

Indeed, appellee concedes that the trial court should "order severance whenever necessary 'to promote a fair determination of the guilt or innocence of one or more defendants.'" (AB-9). Yet to save a few days time and a few thousand dollars, the trial judge ignored the most fundamental principles of our justice system - due process of law and the right to a fair trial.

Whether the defendant be a Stalin, a Hitler, or the devil himself, he must be afforded the dignity and the rights available to all citizens. To approve such reckless and caprious procedures under the guise of "exercise of discretion" reduces the trial court to just another lawless and tyrannical system so prevalent in world history. Surely for the judge to deny a

severance sub judice constitutes an abuse of discretion. To hold otherwise means a little personal inconvenience and some taxpayers dollars warrant more concern than life and liberty.

The error is not harmless. No curative instruction could mask the stench of this fouled proceeding. The trial was rigged, the dice weighted. To claim, as appellee does, that there was no prejudice is amazing.

Appellee concludes there was "no violation of any Florida Statute, rule of procedure or constitutional provision." (AB-10). However there was absolutely no authority for the state to allow its star witness to assist in picking the jury both he and the prosecutor wanted to convict appellant. Nor is judicial discretion without bounds. Without permissible procedures, such actions deny due process and the fundamental right to a fair trial. See Majors v. State, 247 So.2d 446 (Fla. 1st DCA) cert. den. 250 So.2d 898 (Fla. 1971).

ISSUE II

THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING THE STATE TO INTRODUCE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE REFLECTING UPON APPELLANT'S CHARACTER, WHERE APPELLANT HAD NOT PLACED HIS CHARACTER IN ISSUE, AND IN ALLOWING COLLATERAL CRIME EVIDENCE TO BE INTRODUCED, THEREBY DEPRIVING APPELLANT HIS FOURTEENTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The evidence of escape, a Louisiana robbery, and plans to rob other businesses were not relevant and not admissible under section 90.404(2), Florida Statutes (1985). They have no bearing on any material fact in issue but merely proved propensity and were pure prejudice.

Appellee argued the collateral acts showed "the entire context out of which the criminal episode occurred." (AB-11).[1] The state harkens the return of "res gestae" and contends that all acts occurring within a certain time frame are somehow relevant and material. Yet appellee never demonstrated the probative value of the collateral bad acts which have no logical relation to the murder. They just occurred within a couple of days of each other and were a continuing pattern of criminality.

A complete account of the murder could have been accomplished without any reference to an escape and thoughts about other robberies. Proof that Mr. Jones' gun and car were stolen was immaterial to Mr. McKeen's death. This evidence simply was not necessary to explain anything which transpired in the vicinity of Gulf Breeze on September 8, 1985. That the state desired to paint a complete picture of everything that happened leading up to the murder does not mean a trial judge can ignore considerations of prejudice, relevance, and materiality.

As argued initially, the collateral acts were not relevant to any fact in issue, were not similar to the offenses charged, were inadmissible, and constituted prejudicial error.

ISSUE IV

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER EVENTS OCCURRING ON FEDERAL PROPERTY.

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[1]Appellant notes that the state sub judice did not argue this, but concedes the trial judge did base his ruling on that principle.

Although Appellee did not cite Keen v. State, 12 FLW 138 (Fla. 1987), appellant is aware that a similar issue was presented to and rejected by this Court in Keen. Appellant reiterates the cases previously cited. Further he notes that unlike Keen there was no showing that an essential element of murder occurred in Florida.

ISSUE V

THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED IN ISSUES I, II, AND III DEPRIVED APPELLANT OF HIS RIGHTS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS TO A FAIR TRIAL BY AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW.

Appellant incorporates his argument in Issue I as it relates to the penalty phase. Appellee chose not to respond to what counsel considered a "catch-all" issue (AB-24). That a person had a fundamentally unfair trial and sentencing proceeding is hardly a trivial matter especially in a capital case. When so unique and experimental a procedure is utilized, the Courts should be even more vigilant in affording each and every defendant due process at all phases of the trial.

Appellant urges this Court to recognize what the Arizona Supreme Court suggested, procedural experimentation in capital cases should be avoided. State v. Lambright, 673 P.2d 1 (Ariz. 1983).

V CONCLUSION

In issues I and II appellant seeks a new trial. In issue IV he seeks discharge for lack of jurisdiction. Finally in issue V, he seeks a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to the Honorable Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida and mailed to appellant, Mr. Donald R. Kritzman, #102878, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 13th day of May, 1987.

ANN COCHEU