IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

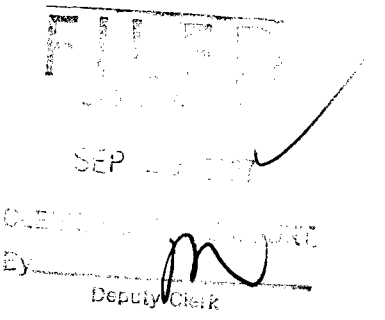
Petitioner,

vs. CASE NO. 70,882

SYLVESTER O'NEAL LEE,

Respondent.

_____/




RESPONDENT'S BRIEF ON THE MERITS

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I PRELIMINARY STATEMENT

SYLVESTER O'NEAL LEE was the defendant below and will be referred to herein as respondent. The State of Florida was the prosecution below and will be referred to herein as petitioner or as the state. The record on appeal consists of seven volumes, which will be referred to as "R."

The opinion below is reported as Lee v. State, 508 So.2d 1300 (Fla. 1st DCA 1987).

## II STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is accepted as substantially correct. In addition, respondent would submit the following:

At the pre-trial hearing on respondent's motion in limine directed to petitioner's notice of intent to introduce evidence of other crimes, wrongs, and acts, the state argued that the fact that petitioner used a pistol in the subsequent Tallahassee bank robbery was relevant to show that he was armed during the earlier Panama City offenses. (R-31, 35-36, 455-463).

The collateral crime evidence was emphasized by the state in both its opening and closing statements to the jury:

> And if all this wasn't enough, what the defendant did is take her car and drove to Tallahassee that same morning. And he got to Tallahassee and somewhere he got paired up with his partner, a man named Charles Johnson. And shortly before 2:00 o'clock, Tallahassee time, they go into the Security First Federal Bank on West Tharpe Street in Tallahassee and he's got a gun and he's wearing a disguise. He's got a fake mustache and a hat and dark glasses and a tie and a sport coat. Goes in the bank in Tallahassee with a gun and with his partner, who's armed, and they rob the bank in Tallahassee. And they leave in W[redacted] J[redacted]'s car which F[redacted] M[redacted] was driving. In the stolen car they leave there and they ditch it in the woods nearby the bank and they make good their escape. They get away from the bank robbery.
>
> But again, he didn't get away forever because they had bank surveillance cameras, they had cameras in the bank that photographed him wearing this disguise. There were three tellers in the bank who identified him

despite the disguise as being the man who was there in the bank robbing them with the gun.

(R-187-188).

The next thing that happens in this case is the car is found. The car is found in Tallahassee. That same day. Early in the afternoon. And that car is found in the woods. About a mile away from the Security First Federal Bank. What is significant about that? What's significant about that is that that bank was robbed. Well, what's significant about that? It was robbed by two men one of whom had a gun and you can see it, that black gun. That black snubnosed gun with a round thing that looks the like the gun that the detectives carry.

Well, how did her car get from Panama City to Tallahassee? Somebody had to drive it. Who drove it? The man who kidnapped her, raped her, and stole it. Why would he steal her car? Why would he steal a car in Panama City? To use in a bank robbery.

Now, the defense apparently objects to the fact that I called three tellers, three bank tellers. You saw the ladies who testified. They don't like the fact that I called them in court to testify. I wouldn't like it either if I was a defendant. Because every one of those women, and two of them were closer than I am to the closest one of you right now, every one of those women definitely, positively, without any doubt or any hesitation or any equivocation, each one identified this defendant, this man, as the one who was robbing their bank at 2:00 o'clock in the afternoon that same day, carrying this pistol in his hand.

* * *

. . . What this case is about is about a man who kidnapped a woman, a man who had been previously convicted of first degree murder, robbery, and escape, kidnapping a woman with a firearm, taking her out in the woods, raping her, putting her out, taking her car off, coming back after a few minutes, not finding her, getting back in the car, driving to Tallahassee, getting with his partner and robbing the Security First Bank at gunpoint wearing a disguise, a fake mustache, and dark glasses and that hat. Leaving behind a hair that somehow fell off his head onto that towel and his fingerprints on the door. That's what this case is about.

(R-412-413, 419).

As the District Court pointed out in its opinion, Lee v. State, supra at 1302, contrary to the representations made by the prosecutor in argument, the evidence presented at trial failed to establish any link between the stolen Camaro found in Tallahassee and the bank robbery and failed to establish that same gun was used during the commission of both offenses.

## III SUMMARY OF ARGUMENT

Respondent's constitutional right to a fair trial was compromised by the introduction of improper collateral crime evidence. Since the state has failed to show beyond a reasonable doubt that the error did not affect the verdict, a new trial was properly awarded.

## IV ARGUMENT

ISSUE PRESENTED

DOES THE ERRONEOUS ADMISSION OF EVIDENCE OF COLLATERAL CRIMES REQUIRE REVERSAL OF APPELLANT'S CONVICTION WHERE THE ERROR HAS NOT RESULTED IN A MISCARRIAGE OF JUSTICE BUT THE STATE HAS FAILED TO DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THERE IS NO REASONABLE POSSIBILITY THAT THE ERROR AFFECTED THE JURY VERDICT?[1]

Faithful application of the DiGuilio test[2] requires that the certified question be answered in the affirmative. Since the state failed to establish beyond a reasonable doubt that the impermissible collateral crime evidence did not affect the jury's verdict, reversal was properly mandated.[3]

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[1] Initially, respondent contends the Court should decline to exercise jurisdiction in this case. Jurisdiction was sought by the state based on a certified question of great public importance. In its brief, however, the state asserts that the court should "refrain from answering the certified question which raises nothing more than an academic question and certainly nothing of great 'public' importance." (Brief p. 11). In effect the state seeks merely a second appeal. The state should not be allowed to seek review on one basis and then not only fail to proceed on that basis but, in fact, totally disclaim that jurisdictional basis. Cf. State v. Thompson, 413 So.2d 757 (Fla. 1982) (court declines to accept case for review on one basis and then reweigh evidence reviewed by the district court in order to avoid ruling on real issue that brought case to court).

[2] State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

[3] Petitioner has still failed to establish the relevancy of the Tallahassee bank robbery to the Panama City offenses. Petitioner claims the evidence was relevant to motive - "Lee stole the car to use it in a bank robbery so he would not have to use his car as a get away vehicle." (Brief p. 9). However, the evidence does not support this claim: "Contrary to the

(Footnote Continued)

Florida law has consistently deemed inadmissible evidence tending to show that the accused was suspected of crimes for which he was not on trial, the theory being that a jury is bound to be unfairly prejudiced against the accused by reason of their knowledge of the unrelated crime. Marrero v. State, 343 So.2d 883 (Fla. 2nd DCA 1977). Accord, Kelly v. State, 371 So.2d 163 (Fla. 1st DCA 1979); Harmon v. State, 304 So.2d 121 (Fla. 1st DCA 1980); Clark v. State, 337 So.2d 858 (Fla. 2nd DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla. 2nd DCA 1973). See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), where this court stated:

> [t]his testimony is precisely the kind forbidden by the Williams rule and section 90.404(2). As the Third District Court of Appeal said in Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 953 (Fla. 1977),
>
> [t]here is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the

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(Footnote Continued)
assertion in the state's brief . . ., there was no testimony or other evidence presented at trial which linked the stolen Camaro found in Tallahassee to the bank robbery. Nothing in this record established that appellant even drove the car to Tallahassee, much less used it in the robbery." Lee v. State, supra at 1302. The fact that respondent was armed in Tallahassee does not tend to prove that he used or carried a firearm earlier in Panama City. Further the state has failed to show that the two incidents were so inextricably intertwined that they constituted a single criminal episode.

> defendant to commit the crime charged, it must be excluded [citing to Williams].

This prohibition also stems from the fundamental principle that unless a defendant has first chosen to place his good character in issue, the state is not permitted to attack his character. E.g., Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965); Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965); Roti v. State, 334 So.2d 146 (Fla. 2nd DCA 1976); Perkins v. State, 349 So.2d 776 (Fla. 2nd DCA 1977); Wilt v. State, 410 So.2d 924 (Fla. 3rd DCA 1982); Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1970). In Mann v. State, 22 Fla. 600, 606-607 (1886), this Court explained the rationale of this prohibition as follows:

> Particular acts of his, or commission of other crimes in no way related to the one trial, cannot be proved against him. Evidence of the bad character of the defendant, as a foundation upon which to raise the presumption of guilt in the particular case, is not permitted. Every case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may be suspected of having been guilty of committing other crimes than the one charged.
>
> * * *
>
> It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking people that you cannot blacken the character of a party who is on trial for alleged crime. Prisoners ordinarily come before the court and jury under manifest disadvantages. . . . It is quite inconsistent with the fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character to show that he is

> worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care.

The improper admission of collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So.2d 903, 908 (Fla. 1981). See also, Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925), where this Court noted:

> Evidence that the defendant committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

The highly prejudicial nature of collateral crime evidence and its potentially devastating impact upon the fairness of the trial necessitate a stringent, harmless error analysis when such evidence has been improperly admitted at trial.

In Keen v. State, 12 F.L.W. 138 (Fla. 1987), this Court applied the DiGuilio harmless error analysis to improperly admitted collateral crime evidence. The court therein noted that the focus of harmless error analysis must be the effect of the error on the trier of fact.

> Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict . . . The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court

> cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. State v. DiGuilio, 491 So.2d 1129, 1138-1139 (Fla. 1986).

Keen v. State, supra at 141. The state's burden is properly a heavy one since "[t]here is perhaps no value more basic to our system of criminal justice than the right of every citizen accused of a crime to receive a fair trial before an impartial jury sworn to follow the law and decide the guilt or innocence of the accused based solely on the evidence produced at trial," not upon evidence showing bad character or propensity. Id.

In the present case, the state concedes its failure to meet the DiGuilio burden.[4] (Brief p. 14). Although the state seeks to characterize the evidence as overwhelming, the state acknowledges that the sole evidence of armed sexual battery consisted of a single witness "of questionable virtue." (Brief p. 9). Thus, even assuming that overwhelming evidence were the harmless error test, but see State v. DiGuilio, supra at 1139, the present case, particularly with respect to the charge of armed sexual battery, would not meet that test. Since the evidence was not overwhelming, and more importantly, since the state has failed to show that the evidence of Lee's bad character and propensity for crime did not affect the verdict,

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[4] The state has presented no persuasivae argument for overruling that test, and has suggested no workable alternative to that test.

compromising his right to a fair trial, a new trial was properly ordered.

## V CONCLUSION

The decision awarding Lee a new trial should be affirmed.

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 Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Sylvester O'Neal Lee, #005567, L-1-S-12, Post Office Box 747, Starke, Florida 32091, on this 15th day of September, 1987.

GLENNA JOYCE REEVES