JAMES DAILEY, :

Appellant, :

vs. : Case No. 71,164

STATE OF FLORIDA, :

Appellee. :

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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TOPICAL INDEX TO BRIEF

* APPELLANT RELIES ON THE ARGUMENTS IN HIS INITIAL BRIEF AS TO ALL ISSUES AND SUB-ISSUES NOT DISCUSSED IN THIS REPLY BRIEF.

TABLE OF CITATIONS

OTHER AUTHORITIES

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT THE APPELLANT EXERCISED HIS RIGHT TO AN EXTRADITION HEARING AND BY PERMITTING THE PROSECUTOR TO COMMENT ON THAT EVIDENCE DURING HIS OPENING ARGUMENT.

Appellee's basic premise -- that where evidence of flight is relevant to consciousness of guilt, resistance to extradition is relevant -- was based on faulty reasoning. Even if it were of some probative value that Dailey was living in California at the time of his arrest, the jury did not need to know that he refused to waive extradition. Halliday could have testified only that Dailey was arrested in California and returned to Florida.

Contrary to Appellee's contention, Dailey's refusal to waive extradition was not evidence of flight and did not show consciousness of guilt. We are not talking about his departure for Miami the day after the homicide,[1] or even his departure from Miami a day later. (R. 1001) We are talking about his extradition from California some six or seven months after the homicide. Dailey had lived in Florida only about three months prior to the homicide. (R. 243-H) He had spent most of his life in Kansas. (R. 1365-70) That he was living in California months after the crime was not evidence of flight, and that he was not anxious to return to Florida to face murder charges was not evidence of guilt.

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[1] Contrary to Appellee's statement, the evidence showed that Dailey did not use an assumed name when he registered at the hotel in Miami. Halliday testified that he registered as "J. Dailey." It was Jack Pearcy who registered under an assumed name. (R. 914)

Whether the right to refuse to waive extradition is a constitutional right is also irrelevant. Due process is a constitutional right which requires fundamental fairness. The admission of Dailey's refusal to waive extradition was fundamentally unfair because he was led to believe that his exercise of that right carried no adverse consequences. See Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) (where state implicitly promises that exercise of right will not be penalized, it is fundamentally unfair to allow state to breach promise by seeking to use defendant's exercise of right to convict); South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); Herring v. State, 501 So.2d 19, 21 (Fla. 3d DCA 1986) (admission of defendant's refusal to take "hand swab test for gunshot residue" unfair if police led defendant to believe he had right to refuse). Because Dailey was not told about any adverse consequences for refusing to waive extradition, he had no motivation not to behave as he did; thus, his refusal was so ambiguous that it had no probative value. See Herring, 501 So.2d at 21.

There is no requirement that an error be a "feature of the trial" or that the result "would probably have been different" for the error to be harmful. (See brief of Appellee at 5) The correct test is the well-known DiGuilio test -- whether it was shown beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In this case, where the evidence was primarily "snitch" testimony, it cannot be said that the error did not contribute to the verdict.

ISSUE II

THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE A BOOK-IN PHOTOGRAPH OF DAILEY THAT WAS NOT PROVIDED TO DEFENSE COUNSEL DURING DISCOVERY WITHOUT HOLDING A RICHARDSON HEARING.

Appellee's contention that Dailey's counsel "abandoned" his objection to the state's discovery violation by declining the judge's offer to allow him to voir dire the witness is absurd. The objection was not that the booking photograph was not authentic but that it was not listed in discovery. Voir dire of the witness would have answered none of the inquiries required by Richardson v. State, 246 So.2d 771 (Fla. 1971).

Defense counsel was not required to specifically request a Richardson hearing. His objection -- that the photograph was not provided in discovery -- was sufficient. That he had access to the booking photograph was irrelevant. He had no reason to suspect that the prosecutor would introduce the photograph into evidence.

Appellee's argument that Dailey was not prejudiced because another photograph taken before the homicide (R. 1473) depicted him "no differently" is also unavailing. First, the other photograph, which depicted Dailey standing on the beach, was not a close-up shot and revealed little about his appearance. Second, a showing of prejudice is unnecessary. The court's failure to hold a Richardson hearing was per se reversible error.[2]

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[2] Justice Grimes's specially concurring opinion in Brown v. State, 515 So.2d 211, 213 (Fla. 1987), cited by Appellee, was actually a dissent to this Court's prior holding that failure to hold a Richardson hearing is not subject to the harmless error

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE BASED ON OUT-OF-COURT STATEMENTS BY THE CODEFENDANT WHO DID NOT TESTIFY AT TRIAL, THUS VIOLATING DAILEY'S RIGHT TO CONFRONTATION.

Appellee argued that Leitner's testimony -- that he "didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed, especially a 14 year old" (R. 1026) -- was admissible under § 90. 803 (18)(b), Fla. Stat. (1987), as an adoptive admission by a party opponent because of Dailey's "acquiescence to the inculpatory nature of Pearcy's statement." (Brief of Appellee at 10) Presumably, Appellee meant "Leitner's statement" because there was no mention of any specific statement made by Pearcy to which Dailey could have "acquiesced." If so, the argument is meritless because Dailey was not required to testify. An alleged admission in a criminal case is not admissible under this exception when the defendant is privileged to remain silent. State v. Galasso, 217 So.2d 326 (Fla. 1968).

The same is true of Leitner's statement that "Jack [Pearcy] wanted me to explain to you what happened in his trial and he wanted me to explain to you what you need to do in his trial." (R. 1060-61) Even if Dailey had not been privileged to remain silent, however, he could not have rebutted Pearcy's statements to Leitner because he was not there when Pearcy allegedly made the

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rule. Thus, it was the antithesis of the law.

statements to Leitner.

Leitner's statements would not have been admissible under the co-conspirator's exception either because the trial court did not determine by independent evidence that Pearcy and Dailey were coconspirators, engaged in a conspiracy, as required by § 90.803 (18)(e), Fla. Stat. (1987).

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING THE KNIFE SHEATH AS AN EXHIBIT, AND ACCOMPANYING EVIDENCE CONCERNING ITS DISCOVERY, BECAUSE THE KNIFE SHEATH WAS NOT CONNECTED TO THE APPELLANT OR TO THE CRIME AND, THEREFORE, WAS IRRELEVANT AND INADMISSIBLE.

After admitting that the connection between the knife sheath and Dailey's participation in the murder was "tenuous," Appellee cited two cases in which other tenuous evidence was found admissible even though it could not have been used to commit the crimes. See Harris v. State, 129 Fla. 733, 177 So. 187 (1937) (pistols found in defendant's car); Rayburn v. State, 188 So.2d 374 (Fla. 2d DCA 1966) (tear gas pencil). (Brief of Appellee at 13) Appellee neglected to mention, however, that in the instant case the knife sheath was not connected to the defendant or the crime.

Although defense counsel tried to alleviate the harm done by arguing that the evidence only incriminated Pearcy, the error was not cured. The jury surely wondered, "Why, then, was the knife

sheath introduced into evidence at Dailey's trial? There must be some connection." Appellee argues that, "[s]ince appellant was able to argue the relative weakness or strength of this evidence to the jury, then it cannot be said that the admission of the sheath prejudiced appellant's cause." (Brief of Appellee at 13) If this were true, we would need no rules of evidence. Everything would be admissible.

ISSUE VIII

THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR MADE TWO COMMENTS ON THE DEFENDANT'S FAILURE TO TESTIFY DURING HER CLOSING ARGUMENT.

Appellee's argument that defense counsel failed to follow the proper procedure for objecting to the prosecutor's first comment on Dailey's right not to testify is without merit. (See brief of Appellee at 21) Defense counsel both objected and moved for a mistrial. The trial court denied his "motions." (R. 1287) It would have been futile and a waste of time for counsel to have requested a curative instruction after the judge denied his objection and mistrial motion. Furthermore, there is no requirement that defense counsel specifically request a curative instruction. Only an objection and motion for mistrial are required to preserve an objection to a comment on the right to remain silent. Clark v. State, 363 So.2d 331, 335 (Fla. 1978). If the objection is overruled, a motion for mistrial is not even

required. Simpson v. State, 418 So.2d 984, 987 (Fla. 1982) ("We hold that where a timely objection is made to an improper comment concerning defendant's right to remain silent, and the objection is overruled, thus rendering futile a motion for mistrial, the issue of the admission of such comment is properly preserved for appeal). In the case at hand, defense counsel followed exactly the right procedure, objecting and then requesting a mistrial.

Appellee's assertion that both comments were proper rebuttal is even more absurd. Certainly, the law is not such that the prosecutor may freely comment on the defendant's failure to testify if in rebuttal to defense counsel's observations concerning the state's lack of evidence. If it were, the prosecutor could just tell the jury that the state had no evidence that the defendant committed the crime only because the defendant refused to get on the stand and admit his guilt. This scenario is exactly what the fifth amendment prohibits.

ISSUE IX

THE TRIAL COURT ERRED IN QUALIFYING DETECTIVE HALLIDAY AS AN EXPERT IN HOMICIDE INVESTIGATION AND SEXUAL BATTERY BECAUSE HIS OPINION WAS BASED ON NOTHING MORE THAN COMMON INTELLIGENCE AND SPECULATION.

Citing Dragon v. Grant, 429 So.2d 1329, 1330 (Fla. 1st DCA 1983), Appellee argued that "appellant's difference of opinion with the weight accorded the testimony of an expert is not a matter properly reviewed on appeal . . . ." (Brief of Appellee at 24)

This was not the issue. The issue was whether the trial court erred by qualifying Halliday as an expert and allowing him to speculate in front of the jury concerning whether a sexual battery or attempted sexual battery occurred, based upon the victim's nudity and the placement of her clothing on the beach.

Appellee's further assertion, that the admissibility of an expert's opinion is a matter solely within the discretion of the trial court, is a glaring and obvious misstatement of the law. Contrary to Appellee's assertion, Dragon correctly states that whether a witness is "a qualified expert permitted to give opinion testimony is generally within the discretion of the trial judge" and that "the admissibility of it is within the properly exercised discretion of the trial judge." 429 So.2d at 1330.

The trial court's discretion is not unfettered and is subject to reversal upon a finding that the judge abused his discretion. See e.g., Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 774 (1984). The trial court's qualification of Halliday as an expert witness in the case at hand presents a clear abuse of the trial court's discretion. Accordingly, if a new trial is not granted, based on other issues in this case, Dailey is entitled to a new penalty phase trial with a newly empaneled jury, followed by a new sentencing.

ISSUE X

THE TRIAL JUDGE ERRED BY FINDING THREE AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY THE EVIDENCE AND BY CONSIDERING A NONSTATUTORY AGGRAVATING FACTOR IN HIS DISCUSSION OF POSSIBLE MITIGATING FACTORS.

A.

The crime for which the defendant is to be sentenced was committed while the defendant was engaged in sexual battery or attempted sexual battery.

Appellee's attempt to distinguish this case from Atkins is easily refuted. (See brief of Appellee at 26-27) Appellee failed to note that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by a judge or jury." Atkins v. State, 452 So.2d 529, 533 (Fla. 1984). The trial court found that no evidence of sexual battery was presented during the guilt phase of the trial. (R. 1206-09) He attempted to circumvent the problem presented by his prior ruling by qualifying Detective Halliday as an expert in the field of sexual battery and allowing him to speculate during penalty phase that a sexual battery occurred. As discussed in Issue XI, supra, the trial judge abused his discretion when he qualified Halliday as an expert and permitted him to testify. Halliday's opinion that a sexual battery occurred was not evidence; it was merely speculation, which he admitted was based on nothing more than "common sense." (R.1349)

Without Halliday's erroneously admitted testimony, there would have been no evidence that a sexual battery or attempted sexual battery occurred. The testimony of Dr. Wood and Mary Cortez that they would not expect to find evidence of sexual battery because the body was floating in the water was clearly not evidence that a sexual battery occurred. (See brief of Appellee at 27) One would not expect to find dirt on a body floating in the water either. This does not prove that in fact the victim's body was buried in dirt before being placed in the water.

B.

The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

The cases cited by Appellee to support this aggravating factor are clearly distinguishable from the case at hand. In Adkins v. State, 497 So.2d 1200, 1201 (Fla. 1986), the evidence revealed that the defendant killed the child victim because he threatened to tell his parents about the sexual acts performed on him by the defendant. In Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), the defendant told a friend that he shot the victim because "dead men can't tell lies." In Garcia v. State, 492 So.2d 360, 367 (Fla. 1986), the evidence showed that the defendant and his three accomplices planned in advance of the farm market robbery to murder the witnesses because at least one of the robbers was known by the owners and employee.

In this case, there was no evidence suggesting a motive

for the homicide. The judge's reasoning was only his version of the evidence that led him to speculate that the murder was a witness elimination. This factor was clearly not proven beyond a reasonable doubt.

C.

The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

None of the "series of events" allegedly leading up to the homicide, as described by Appellee (see brief of Appellee at 29-30), show heightened premeditation. Moreover, the conclusion of the trial court, cited by Appellee, that the Appellant "raped or attempted to rape" the victim, is unsupported by the evidence. (See subsection A of this issue, supra) The evidence suggests, instead, that Dailey was intoxicated and lost control.

D.

Nonstatutory aggravating factor that for the past twenty years Dailey had been a drifter going from city to city and job to job.

Appellee's assertion that the defense presented evidence that Dailey was a drifter is unfounded. (See brief of Appellee at 31) There was no such evidence presented by either side. As mentioned in our initial brief, the only possible source of this inference is the PSI which was prepared by the Department of Corrections. (R. 243-H) Even this information does not justify the trial court's labeling of Dailey as a "drifter."

ISSUE XI

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE A CERTIFIED COPY OF DAILEY'S 1979 CONVICTION FOR AGGRAVATED BATTERY, INCLUDING A NOTATION THAT ANOTHER CHARGE HAD BEEN DROPPED PURSUANT TO A PLEA BARGAIN.

Appellee's second contention -- that defense testimony that the conviction involved a bar fight where Dailey defended himself voided any prospective harm from the reference to another charge -- might have merit, except that the jurors cannot be presumed to know that the charge that was dropped arose from the same offense. Indeed, it might not have. It is conceivable that the prosecution dropped a charge relating to an entirely different case during plea negotiations.

If, as Appellee has asserted in the third contention, we must presume that jurors always follow the jury instructions given, this Court would have to find almost all errors harmless. For example, because juries are instructed that the defendant does not have to testify, all comments on the defendant's right not to testify would automatically become harmless. The prosecutor could spend his entire closing argument arguing that the defendant must be guilty because he did not take the stand. Fortunately, this is not the law.

ISSUE XII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER STATUTORY AND NONSTATUTORY MITIGATION PRESENTED BY THE DEFENSE.

B.

Any other aspect of the defendant's character or record and any other circumstance of the offense.

Because the trial court ignored most of the mitigating evidence in his sentencing order and concluded that none of the factors mitigated the crime (R. 237), there is no reason to believe, as Appellee asserted, that the trial court "adequately considered" the mitigating evidence but concluded that it "did not rise to a sufficient level to be weighed as a mitigating circumstance." (Brief of Appellee at 34) After reading the trial judge's order, it is equally reasonable to believe that he did not consider the mitigation at all. Failing to consider the mitigating evidence and refusing to weigh it against the aggravating factors is reversible error. Lamb v. State, 532 So.2d 1051 (Fla. 1988).

ISSUE XIII

THE TRIAL JUDGE ERRED BY BASING HIS SENTENCE, IN PART, ON OFF-THE-RECORD INFORMATION FROM THE CODEFENDANT'S TRIAL, THE CODEFENDANT'S PSI, AND THE PROSECUTOR'S SENTENCING MEMORANDUM, THUS VIOLATING THE APPELLANT'S RIGHT TO CONFRONT THE WITNESSES.

Although disparate sentencing may be justified when the evidence at trial reveals the defendant as the "dominating force,"

Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986), the judge cannot make such a determination by using evidence from a totally separate trial. Had Judge Penick not also presided at Pearcy's trial, he would not have been privy to that evidence. Much of the evidence presented at Pearcy's trial would have been irrelevant inadmissible hearsay at Dailey's trial, in which Pearcy did not testify.[3]

The three cases cited by Appellee are all clearly distinguishable. In Marek, the evidence showed that the co-defendant's participation in the homicide itself was questionable. This evidence was presented during Marek's trial -- not at the codefendant's trial. 492 So.2d at 1058.

In Williamson v. State, 511 So.2d 289 (Fla. 1987), one codefendant pled guilty and testified at Williamson's trial in exchange for a life sentence. The other codefendant and Williamson were tried together. 511 So.2d at 291. Thus, the evidence that Williamson was the "dominating force" was presented at the defendant's trial. It was not evidence from a totally separate trial of a codefendant, presided over by the same judge.

In Diaz v. State, 513 So.2d 1045 (Fla. 1987), this Court found that the disparate sentence was justified not because Diaz was the dominant force but because the codefendant's life sentence

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[3] Appellee commented in the "Conclusion" that the trial evidence "indicates that appellant was the dominating force behind the homicide." (See brief of Appellee at 37) There was insufficient evidence to determine who was the "dominating force," assuming both Pearcy and Dailey were involved, because the incriminating evidence against Pearcy was omitted from Dailey's trial. Appellee cannot draw such a conclusion after having read only half of the evidence.

was the result of plea bargaining. 513 So.2d at 1049.

Obviously, this Court must only presume that the judge followed the law when there is no reason to believe otherwise. (See Brief of Appellee at 36) If his order indicates that he did not follow the law, then this Court must reverse that order.

CONCLUSION

For the above reasons and those presented in our Initial Brief, the Appellant, JAMES DAILEY, respectfully requests that this Court reverse his conviction and remand for a new trial. If the Court does not grant this relief, Appellant requests that this Court vacate his death sentence and remand for the imposition of a life sentence or, in the lesser alternative, award him a new penalty phase trial before a jury impaneled for that purpose, followed by a new sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joseph R. Bryant, Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL., 33602, by U.S. mail, this 2nd day of February, 1990.

A. Anne Owens

A. ANNE OWENS

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