IN THE SUPREME COURT OF FLORIDA

GARY ELDON ALVORD,

Petitioner,

v.

RICHARD L. DUGGER, et al,

Respondent.

Case No. 71,192



ON PETITION FOR WRIT OF HABEAS CORPUS

**SUPPLEMENTAL BRIEF OF RESPONDENT**

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/sas

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## PRELIMINARY STATEMENT

Petitioner, GARY ELDON ALVORD, JR., will be referred to as the "Petitioner" or "Defendant". The Respondent, the State of Florida, will be referred to as "Respondent" or "The State".

## STATEMENT OF THE CASE

Respondent accepts the statement of the case set forth by petitioner in his brief at pages 4-7.

## STATEMENT OF THE FACTS

On July 10, 1973, Detective Donald Dufour of the Lansing, Michigan, Police Department, interviewed the petitioner. Detective Dufour was assigned to the burglary squad of the detective division in Lansing. Before interviewing the petitioner, Detective Dufour advised petitioner of his constitutional rights. The testimony at trial with respect to this point is as follows:

> Q. Did you advise him he had the right to an attorney?
>
> A. Yes, sir, I did.
>
> Q. Did you advise that anything he said would be used in court against him?
>
> A. Yes, sir, I did.
>
> Q. Did he request an attorney to be present?
>
> A. No, sir.
>
> Q. Did he request to remain silent at that point?

A. No, sir.

Q. Did you or anyone in your presence promise him anything in order for him to make a statement?

A. No, sir.

Q. Did you or anyone in your presence threaten him in any way?

A. No, sir.

Q. Did you or anyone in your presence coerce him or promise him immunity if he would make a statement?

A. No, sir.

Q. Did he indicate that he understood his constitutional rights to you?

A. Yes, sir, he did. (R 940-941)

Petitioner was not advised that, if indigent, counsel would be appointed. After being advised of his rights and waiving same, petitioner made a statement which was introduced at trial as follows:

Q. Alright. And would you relate to the jury the conversation that you had with the defendant on that day?

A. I told Mr. Alvord that I wanted to talk to him about another matter.

Q. And what did he say to you?

A. His reply was, "I am a rapist, not a god-damn thief".

Q. And what did you say to that?

A. I asked what he meant by that.

Q. And what did he say?

A. He said, "I am wanted for three murders in Florida."

Q. And did you respond to that?

A. Yes, sir, I did.

Q. And what did you say?

A. I said, "I thought it was two."

Q. And what did he say, if anything?

A. He said, "maybe they forgot one."

Q. And did you respond to that?

A. I looked at him and said, "Did you do it?"

Q. And what did he say?

A. He just smiled at me and said, "They have got to prove it."

Q. Was there any further conversation with him?

A. No, sir. His next statement was that he didn't want to make any further statements to me. (R 941-942)

No objection was made by trial counsel as to the voluntariness of the waiver, nor was any objection made that petitioner failed to knowingly, understandingly or intelligently waive his rights.

At trial, the state presented a great quantum of evidence to prove the defendant's guilt. The following is a summary of the evidence adduced at trial during the state's case as originally set forth in the brief of the appellant filed with this Honorable Court on direct appeal. The following portions of appellant's brief appeared at pages 7-11 therein:

The evidence tending to connect the defendant with the murders consisted of the following:

First. While the state maintained that the murders were commmitted during the course of a burglary of Ann Herrmann's home, the state also offered evidence tending to show that the defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the defendant had stated to her quite a few times that he disliked Ann Herrmann (R 745, 747), and Jeanine Brautigan testified that about a month before the murders were committed the defendant told her he could or would choke Ann Herrmann (R 717).

Second. The state introduced evidence tending to show that the defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 1 1/2" to 2" high (R 609, 610). George Valahakis, Ann Herrmann's ex-husband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond, and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color, with diamonds on each side of the watch where the band joined the watch. The band was also white-gold in color and it was an expandable type band (R 680, 681).

The watch, the rings, and the lighter were never recovered and were not introduced in evidence at the trial. The state did, however, present testimony that the defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the defendant had a gold and purple cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed (R 757, 758). Terri Williams who had seen the defendant in Detroit, Michigan on June 25, 1973, testified that the defendant had in his possession at that time a small woman's diamond watch with a stretch band (R 881).

Third. The state introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the defendant and Zelma Hurley.

The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women (R 869), and a shirt which Zelma Hurley stated belonged to the defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.

Fourth. The state introduced evidence indicating that the defendant had possession of a gun before and after the murders

were committed. Charles Harpe the manager of the Gold Triangle Sporting Goods Store in Tampa testified that his log of ammunition sales showed a sale to Paul Robert Brock, and Daniel Hernandez, a salesman at the store stated that he had made the sale of .38 caliber bullets to Paul Brock on June 16, 1973. He tentatively identified the defendant as Paul Brock (R 674). Frank Dalia then testified that the defendant sold him a .38 caliber pistol and a box of shells for $25 to raise money so that the defendant could go up north to see his sick father (R 687).

Fifth. The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony (emphasis added), and Zelma Hurley's testimony provided the basis for much of the state's other evidence allegedly linking the defendant to the murders. It was Zelma Hurley who claimed that the defendant had in his possession a watch, a lighter, and two rings which appeared to correspond in appearance with those owned by Ann Herrmann; it was Zelma Hurley who testified that the defendant had manifested a dislike for Ann Herrmann prior to the commission of the murders; and it was Zelma Hurley who contacted the police and showed them where in the apartment she had shared with the defendant they could find the pieces of cord and the defendant's shirt.

Zelma Hurley was the defendant's girlfriend and had lived with the defendant from January, 1973, until they split up in July of 1973 (R 743).

On the night of Saturday, June 16, 1973, the defendant and Zelma arrived home, and according to Zelma the defendant drove off alone about 1:30 a.m. (R 748, 749). The defendant was gone all night and came back into the apartment at about 6:30 the next morning (R 749). When Zelma Hurley got up, she observed that the defendant had over $100 in cash on his person. She saw a $100 bill and a torn half of a dollar bill (R 751). The defendant was not working at that time.

That night, according to Zelma, the defendant told her "I had to rub out three people last night, Zelma." When she asked him who they were, the defendant replied that it was "Ann and Lynn and her mom" (R 753; emphasis added).

According to Zelma Hurley, the defendant then went on and told her the details of the murders. He first said he had gone to "Ann's house" "to rub them out" and that he had gotten in the house by kicking the door in (R 754; emphasis added).

The defendant said that he first put the three women in separate rooms and that he then decided not to shoot the women because that would make too much noise but to strangle them instead (R 755). The defendant also stated that he did not want to kill the old lady because he liked her, but he felt that he couldn't leave any witnesses (R 754, 755; emphasis added).

He also said that he wore gloves to avoid leaving any fingerprints and that after he had killed the women, he took money, a lighter, two rings and a watch (R 755; emphasis added).

According to Zelma Hurley the defendant told her that he had to get out of town because of the incident, and he and Zelma thereupon left Tampa for Pennsylvania with Zelma's young son (R 756). It was on this trip that Zelma Hurley allegedly saw the watch, the rings, and the lighter.

## SUMMARY OF THE ARGUMENT

The decision rendered by this Honorable Court in Caso v. State, 524 So.2d 422 (Fla. 1988), does not represent the type of major constitutional change in the law which would require retroactive application of the Caso decision to the instant case. Alternatively, your respondent submits that the introduction of petitioner's statement made to Detective Dufour, if erroneously admitted, was harmless error beyond a reasonable doubt. The nature of the evidence adduced by the state at trial supports the conclusion that the admission of petitioner's statement to Detective Dufour did not affect the jury verdict.

## ARGUMENT

### ISSUE

WHETHER THE DECISION RENDERED BY THIS HONORABLE COURT IN CASO V. STATE, 524 So.2d 422 (Fla. 1988), IS TO BE APPLIED RETROACTIVELY TO THE INSTANT CASE AND, IF SO, WHETHER THE ADMISSION OF A VOLUNTARY STATEMENT OBTAINED WITHOUT WARNING THE DEFENDANT OF HIS RIGHT TO APPOINTED COUNSEL WAS HARMLESS ERROR WHICH COULD NOT HAVE POSSIBLY AFFECTED THE VERDICT OF THE JURY.

In April of this year, this Honorable Court rendered its decision in Caso v. State, 524 So.2d 422 (Fla. 1988). In Caso, this Court reexamined the decision rendered in Alvord v. State, 322 So.2d 533 (Fla. 1975), which held that a confession of a defendant was admissible in the state's case-in-chief where the defendant was not advised of his right to appointed counsel if the defendant was indigent. This Honorable Court has requested supplemental briefs in the instant case to discuss the applicability of Caso to the instant case. For the reasons expressed below, your respondent submits that petitioner is not entitled to habeas relief on this point.

In Witt v. State, 387 So.2d 922 (Fla. 1980), this Honorable Court held that only cases that produce major constitutional changes in the law may be retroactively applied on collateral attack. Therefore, if a new case represents a misapplication or misapprehension of existing law, such cases should not be applied retroactively to other cases which are on collateral review. For example, in Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), this Court recently held that the decision rendered in Michigan v.

Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), was not to be applied retroactively to cases on collateral review.[1] See also, Jones v. State, 13 F.L.W. 403 (Fla. June 23, 1988) (Haliburton principle concerning access to attorney not to be retroactively applied). Similarly, in the instant case, the decision in Caso does not represent a major constitutional change in the law which may be retroactively applied on collateral review. In Caso, this Court determined that the decision in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), was misinterpreted in the Alvord decision. Thus, your respondent submits that misinterpretation or misapplication of existing law is not a "major constitutional change" which requires retroactive application.

Alternatively, should this Honorable Court determine that the Caso decision represented a major constitutional change sufficient to require retroactive application to the instant case, the state submits that petitioner is entitled to no habeas relief. In Caso, this Court specifically determined that the erroneous admission of statements obtained in violation of Miranda rights is subject to harmless error analysis. Caso at 425. At the trial of Mr. Caso, the testimony of the police officers concerning Caso's confession was the only evidence presented at trial connecting Caso to the murders. Therefore, this Court

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1/ It is interesting to note that the Miranda decision was not to be the subject of retroactive application. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

could not find harmless error beyond a reasonable doubt in that this Court could not say that the contents of Caso's confession did not affect the jury verdict. Caso at 426. In the instant case, however, the evidence adduced by the state at trial establishes, beyond a reasonable doubt, that the admission of the statement made by Alvord to Detective Dufour was harmless beyond a reasonable doubt. It should be noted that prior to the admission of Detective Dufour's testimony defense counsel objected, not on the basis that Alvord failed to make an effective waiver of his Miranda rights, but rather because of the "collateral crimes" nature of the testimony. The admission into evidence of Alvord's statement to Detective Dufour was not a major component of the state's case. This fact was acknowledged by appellate counsel for Mr. Alvord on direct appeal where it was stated in the brief of the appellant: "The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony." (Appellant's Brief on direct appeal at p.9). In order to establish the harmless nature of the admission of Alvord's statement to Detective Dufour, it is necessary to set forth the evidence adduced at trial. To do so, the state would rely on a portion of the brief of the appellant filed on direct appeal by counsel for Mr. Alvord:

"The evidence tending to connect the defendant with the murders consisted of the following:

First. While the state maintained that the murders were commmitted during the course of a burglary of Ann Herrmann's home, the state also offered evidence tending to show that the defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the defendant had stated to her quite a few times that he disliked Ann Herrmann (R 745, 747), and Jeanine Brautigan testified that about a month before the murders were committed the defendant told her he could or would choke Ann Herrmann (R 717).

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756). It was on this trip that Zelma Hurley allegedly saw the watch, the rings, and the lighter." (Appellant's Brief on direct appeal at pp.7-11).

It can readily be seen from a recitation of the facts that petitioner confessed to Zelma Hurley. Thus, the statements made to Detective Dufour were merely cumulative to those matters already presented to the jury. Therefore, petitioner's assertion in his supplemental brief at pages 22-23 that, "Indeed, the statement admitted against Mr. Alvord was the only such statement made by him", is clearly erroneous. The state submits that it is irrelevant whether multiple statements were made to the police or rather, as in the instant case, a statement was made to the police and to another witness. There is no contention, nor could there be, that the testimony of Zelma Hurley as to the defendant's confession was inadmissible. Ms. Hurley specifically testified that Alvord said that he had to "rub out three people" and he identified the victims (R 753). Alvord then told Ms. Hurley the details of the murders (R 754-755). Your respondent submits, therefore, that the admission of Alvord's statements to Detective Dufour were clearly harmless error beyond a reasonable doubt. The evidence presented to the jury results in but one conclusion, that is, that the testimony of Detective Dufour did not affect the jury verdict. Other substantial and compelling evidence was presented to the jury concerning statements made by Alvord which conclusively established his murders of the three victims. This Court's test announced in State v. DiGuilio, 491

So.2d 1129 (Fla. 1986), has been met in the instant case. There is no reasonable possibility that the erroneous admission of Alvord's statements to Detective Dufour affected the jury's verdict.

## CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the petition for writ of habeas corpus sought herein should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William J. Sheppard, Esquire and Elizabeth L. White, Esquire, 215 Washington Street, Jacksonville, Florida 32202, this 31st day of October, 1988.

OF COUNSEL FOR RESPONDENT