

IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,)
)
 Appellant,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Appellee.)

CASE NO. 71,982

FILED

SEP 7 1988

CLERK, SUPREME COURT

By *[Signature]*

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	<i>i</i>
TABLE OF CITATIONS	<i>ii</i>
POINT I	
IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.	1
POINT III	
IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.	3
POINT IV	
IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED BY CONSIDERING A REQUEST FOR ADDITIONAL TESTIMONY BY THE JURY WITHOUT CONSULTING APPELLANT OR DEFENSE COUNSEL.	5
POINT VII	
IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND THE REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED JURY INSTRU- CTIONS.	6

TABLE OF CONTENTS (CONT.)

	<u>PAGE NO.</u>
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

<u>Delap v. Dugger,</u> — F.Supp. —, Slip Opinion Case No. 87-907-CIV-ORL-10 (D.Fl. April 21, 1988)	6
<u>Drake v. State</u> 400 So.2d 1217 (Fla. 1981)	2
<u>Hitchcock v. Dugger</u> 481 U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)	6
<u>Ivory v. State</u> 351 So.2d 26 (Fla. 1977)	5
<u>Straight v. State</u> 397 So.2d 903 (Fla. 1981)	2

OTHER AUTHORITIES:

Fifth Amendment, United States Constitution	1,3,5
Fourteenth Amendment, United States Constitution	6
Fourteenth Amendment, United States Constitution	1,3,5
Article 1, Section 9, Florida Constitution	1,3,5,6
Article 1, Section 16, Florida Constitution	6
Article 1, Section 17, Florida Constitution	6
Article 1, Section 22, Florida Constitution	1,5

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.

A. ADMISSION OF OTHER BAD ACTS

Appellee argues that the admission of the evidence regarding a prior incident between Appellant and Robert McKnight was admissible because it was relevant to show McKnight's state of mind and was also relevant to prove "motive, opportunity, intent, absence of mistake, and show a common plan or scheme on the part of the appellant." (Brief of Appellee at page 11). While stating that McKnight's state of mind was relevant, Appellee offers no reasons for asserting such relevance. Appellant maintains there simply was no relevance. McKnight's state of

mind was not an issue. The state did not charge McKnight as a principal. While McKnight did stab Scott and assisted in cleaning the room, his motivation for doing so was in no way relevant to the question of Appellant's guilt. As for Appellee's assertion that the prior act was relevant to show motive, opportunity, intent, absence of mistake, or a common plan or scheme on the part of Appellant, again this bare assertion is totally devoid of any factual basis. Certainly the similarities between the two acts were insufficient to meet the test set forth in Drake v. State, 400 So.2d 1217 (Fla. 1981). And finally, and once again contrary to Appellee's suggestion, the admission of such highly irrelevant and prejudicial evidence is presumed to be harmful error. Straight v. State, 397 So.2d 903, 908 (Fla. 1981).

POINT III

IN REPLY TO THE STATE AND IN SUPPORT
OF THE PROPOSITION THAT IN VIOLATION
OF THE FIFTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION AND
ARTICLE 1, SECTION 9 OF THE FLORIDA
CONSTITUTION, THE TRIAL COURT ERRED
IN DENYING APPELLANT'S MOTION TO
SUPPRESS.

Appellee states that it is clear that the trial court did consider the voluntariness of Appellant's statements. Appellant maintains, however, that the record refutes this claim. The evidence before Judge Musleh was fraught with inconsistency and inexplicable irregularities. First both purported "waiver" forms had been tampered with. Each had been dated the day following the actual date the statement was given. These dates were then crossed out and re-dated with the "correct" date.

Second, Investigator Don Kennedy of the Public Defender's Office in Lake City testified that he talked to Appellant at 1:25 p.m. on January 5, 1987. (R2348-2349) At that time, Appellant told Kennedy that he had been requesting an attorney all night long, but to no avail. (R2351) When Kennedy returned to the jail at 3:30 p.m., he was refused permission to speak with Appellant. (R2352) The officials at the jail confirmed the fact that Kennedy was denied permission to speak with Appellant. (R2376, 2383-2385) This was done despite the jail policy of allowing members of the Public Defender's Office to visit any inmate in the jail whether they are appointed or not. (R2378)

Third, when Polk County Deputy Putnell spoke with Appellant on January 16, 1987, Appellant refused to speak and

invoked his right to counsel. It certainly seems odd that Appellant would all of a sudden invoke his right to counsel after he has already given two very incriminating statements.

In light of the above-mentioned irregularities and inconsistencies, Appellant maintains that the trial court failed to properly determine the admissibility of his statements. Such admissions are clearly harmful. Appellant is entitled to a new trial.

PAGE(S) MISSING

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE ADMISSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE AND THE REFUSAL OF THE TRIAL COURT TO GIVE PROPER REQUESTED JURY INSTRUCTIONS.

C. THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY THAT THEY MAY CONSIDER NON-STATUTORY MITIGATING EVIDENCE IN DETERMINING THE PROPER PENALTY RECOMMENDATION.

Appellee argues that the failure to give this instruction is harmless because the prosecutor and defense counsel informed the jury about the non-statutory mitigating evidence and the trial judge considered the evidence. However, it must be noted that despite the eloquence, argument of counsel remains just that - argument. It cannot replace adequate instructions from the trial judge. Further, the clear dictates of Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) have been violated. Whether such violation can be considered harmless was recently addressed by the United States District Court in Delap v. Dugger, ___ F.Supp. ___, Slip Opinion Case No. 87-907-CIV-ORL-10 (D.Fl. April 21, 1988) wherein Judge Fawsett granted a Writ of Habeas Corpus on a Hitchcock issue factually similar to the instant case. As the court noted, the introduction of nonstatutory mitigating evidence is meaningless absent proper instructions to the jury on how to consider it. For purposes of brevity, Appellant has attached as an appendix hereto a copy of that

portion of the slip opinion in Delap v. Dugger, (pages 32-49) which address the Hitchcock issue. A new penalty phase is mandated.

CONCLUSION

Based on the foregoing reasons and authority, and that in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the following relief:


As to Points I through V, reverse Appellant's judgments and sentences and remand for a new trial.

As to Points VI and VII, vacate the death sentence and remand for a new penalty phase before a newly empanelled jury.

As to Points VIII and IX, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Fla. 32399-1050, and to Mr. Edward Castro, #110488, P.O. Box 747, Starke, Fla. 32091 on this 6th day of September 1988.

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