IN THE SUPREME COURT OF FLORIDA

DAVID YOUNG,

Appellant,

v. CASE NO: 72,106

STATE OF FLORIDA,

Appellee
_____/

REPLY BRIEF OF APPELLANT

An Appeal from the Fifteenth Judicial Circuit
In and For Palm Beach County, Florida
Circuit Case No: 86-8682 CF

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I

Appellant is not Guilty of Premeditated Murder

The evidence presented against the Appellant with respect to premeditation absolutely failed to meet the test posed in McCutchen v. State, 96 So.2d 152 (Fla. 1957). The factors which show that there was no fully formed and conscious purpose to take human life are as follows:

1. The co-defendant Gerald Harris suggested the trip to Jupiter in order to steal a car. Therefore, it is obvious that John Bell was unknown to the Appellant at the time of his slaying.

2. The Appellant had placed the shotgun in the car prior to co-defendant Harris' announced intention to steal a car (R 2879). Therefore, the Appellant did not bring the shotgun in order to assist in the felony, or with any purpose to kill Bell (R3413-3427).

3. The Appellant begged Mr. Bell to allow him to leave prior to the exhcange of fire. (R 2296).

4. Mr. Bell held the Appellant at gun point for as long as twenty minutes (R 2968). Mr. Bell also threatened, cursed and generally acted like an irrational man. (R 2623-2624, R 2968) Mr. Bell threatened to shoot Appellant in the head if any of the Appellant's friends ran (R 3448). Juvenile Harris ran, and Bell fired the first shot (R 3433), Young obviously believed that he

had reason to fear for his life.

For the above reasons, the conclusion that Appellant Young had formed any preconceived intent to kill Bell defies logic.

II

There is Insufficient Evidence to Sustain a Conviction of Felony Murder

The State failed to present sufficient evidence for a conviction of felony murder. The Appellant wished to call to the Court's attention that on page 29 of the State's Answer Brief the Appellee admitted that the purpose of going to the apartment "was to try to get a car" citing (R 2423). Grand Theft Auto is a third degree felony and not a felony that will support a conviction of felony murder.

Further, the facts that (1) Appellant Young withdrew from the attempt to steal the car; that (2) Mr. Bell acted in an irrational and violent manner after he had subdued the Appellant and his friends; and (3) Bell fired a shot which was reasonably preceived bythe Defendant as an attempt to kill him support the proposition that Bell was not killed during the attempted Grand Theft but rather during a gun fight brought on by Bell himself.

PENALTY PHASE ISSUES

I

The Murder was not Committed in a Cold, Calculated and Premeditated Matter Without any Pretense of Moral or Legal Justification.

The homicide in question could not be one of heightened premeditation since the Appellant did not know the victim and it certainly was not an execution or contract murder. Bates v. State, 465 So.2d 490 (Fla. 1985).

The shots were exchanged after a warning from the victim that he would kill the Appellant if one of his friends ran. A friend ran and the victim fired a shot. Although the Appellant did fire a second time, it cannot be argued that there was a particulary lengthy or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See Floyd v. State, 497 So.2d 1211 (Fla. 1986) There is no evidence of a careful plan or prearranged design such as required by Rogers v. State, 511 So.2d 526 (Fla. 1987). Appellant continues to rely on Eutzy v. State, 541 So.2d 1143 (Fla. 1989). In that case, the trial court relied upon the fact that Eutzy took the murder weapon with him to the murder scene and that victim died of a single shot to the head at a close range.

In her decision Justice Barkett pointed out that the circumstances of a failed robbery do not meet the Rogers standard. That is exactly what happened in the case at hand.

II

The Murder was not Committed for the Purpose of Avoiding or Preventing Lawful Arrest

The State has acknowledged that in order for this aggravating factor to be met when the victim is not in law enforcement, the state must prove beyond a reasonable doubt that the dominate motive for the murder was the elimination of a witness. Correll v. State, 523 So.2d 562 (Fla. 1988). The facts surrounding the homicide of Mr. Bell do not demonstrate that Young's motion was the elimination of Bell as a witness. There is no evidence adduced from the testimony that the victim knew and could identify the Appellant. See Floyd v. State, 497 So.2d 1211 (Fla. 1986) and Bates v. State, 465 So.2d 490 (Fla. 1985). Appellate contends that Mr. Bell was killed in a combat situation and not to effect an escape or to eliminate a witness.

III

The Death Penalty is Disproportionate in the Case at Bar

Appellant has argued that two of the aggravating circumstances found by the Court are without merit. These are that "the murder was committed in a cold, calculating, premeditated manner without any pretense of moral or legal justification" and "the murder was committed for the purpose of avoiding or prevent a lawful arrest". The court found three

statutorily mitigating circumstances (R 4567-4568). Three juveniles who participate in the burglary were not charged with the homicide. The Appellant was involved in church activities and the Appellant could conform to prison rules and regulations as demonstrated by his conformity at the Palm Beach County Jail.

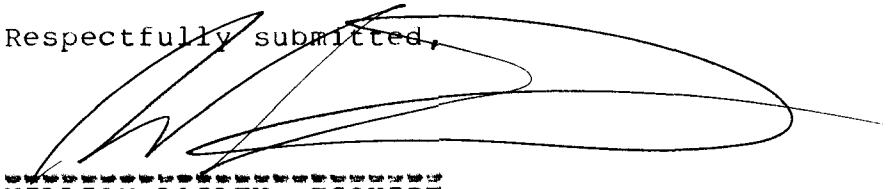
In addition there is ample evidence to support an additional mitigating circumstance that Bell contributed to and provoked his own death. These circumstances may be considered as mitigating. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

A review of Supreme Court decisions require a finding that the imposition of the death penalty on this record is proportionally incorrect and consequently the death penalty should be vacated and a life sentence imposed. See Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

CONCLUSION

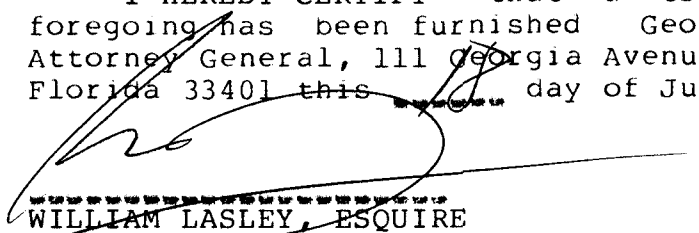
By the foregoing reasons, Mr. Young's conviction should be reversed, and the sentence vacated or reduced and a new sentencing ordered.

Respectfully submitted,



WILLIAM LASLEY, ESQUIRE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished Georgina Jiminez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 18 day of June, 1990.



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