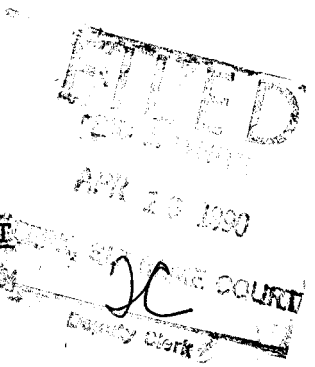
SUPREME COURT OF FLORIDA

DONNIE GENE CRAIG,	)	
Appellant,	)	
vs.	)	CASE NO. 72,591
STATE OF FLORIDA,	)	
Appellee.	)	
	)	



REPLY BRIEF OF APPELLANT

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POINT I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING EVIDENCE OF OTHER CRIMES

Representations regarding the death of Mr. Sisco and theft of his property ultimately traded for cocaine are inaccurate and not supported by any trial testimony before the Okeechobee jury and in any case unconnected to the death of Mr. Ellis. The trial testimony of the witnesses Nathaniel Brice (R-873 to 879, 973, 996) and Laura Mayo (R-908 to 972) is void of any evidence or inference thereof that appellant made any attempt to or did trade the twenty-five caliber raven pistol for rock cocaine. In fact trial witness Nathaniel Brice indicated that he never actually saw the twenty-five caliber raven pistol until the next morning after the person he knew as Baby Face had left (R-878, 879). Moreover, while trial witness Laura Mayo did indicate that she saw appellant with a gun, her testimony was that she thought her friend Wally had taken the gun from appellant (R-925). Appellee relies on Smith v. State, 365 So. 2d 704, 707 (Fla. 1978), cert. denied 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979), and Hall v. State, 403 So. 2d 1321 (Fla. 1981). The former allowed evidence of a second murder as a part of the context surrounding the murder for which Smith was tried. This testimony was relevant for establishing Smith at the scene of the first murder and placing him in a car which was directly linked to the scene of the first murder. Smith, supra, pg. 707. In addition, the murder

weapon in Smith was the same for the first and second murders. In Hall evidence of a second murder was allowed because the murder weapon of the first death was found under the body of the second murder. Neither Hall nor Smith are applicable to the instant matter.

Appellant's use of cocaine at or near the date of the offense in the instant matter was not connected to the death of Mr. Ellis. In addition, appellant's alleged use of rock cocaine with trial witnesses Mayo and Brice did not establish identity nor appellant's motive, intent or lack of mistake who murdered Ellis. Appellee's suggestion that it negated any self defense theory cannot be accepted. Further, the Federal cases cited by appellee are equally distinguishable for the fact that each allowed similar fact evidence of collateral crimes which established some element of the government's case or were connected to the crime charged. In this case there is absolutely no connection between the elements charging appellant with the death of Mr. Ellis and his subsequent or prior use of rock cocaine. The use of cocaine could have been easily eliminated and still permitted the trial witnesses to testify regarding appellant's identity and whereabouts.

See Richardson v. State, 528 So. 2d 981 (1 DCA 1988) where on charges for possession and sale of cocaine evidence of metal matchbox containing cocaine residue which was found on defendant at time of his arrest reversible error as nothing tied the matchbox to the charges against the

defendant and said evidence was admitted solely to show propensity to possess cocaine at an earlier time and not tied to charged crimes of controlled buys of cocaine made several hours before the arrest. Also, Lee v. State, 508 So. 2d 1300 (1 DCA 1987) where defendant on charges for kidnapping and sexual assault testimony concerning participation in a bank robbery should have not been admitted where there was no evidence connecting the stolen car to the bank robbery and no evidence that the gun used in the two crimes was the same. Also, Weitz v. State, 510 So. 2d 1060 (4 DCA 1987) where on prosecution for trafficking, testimony of defendant's prior airplane trips carrying false identification and failure to declare currency was inadmissible and not relevant as no connection to charged offense. Also, Wilson v. State, 497 So. 2d 1062 (5 DCA 1986) where on charge of delivery and possession of cocaine, evidence of another undercover drug purchase of cocaine from defendant at same address as narcotic transaction for which defendant was being tried was inadmissible to show defendant's knowledge of the nature of the controlled substance.

Therefore, evidence of appellant's use of rock cocaine before and near the time of the crime charged was offered for the sole purpose to show bad character or propensity and appellant's sentence in this matter should be vacated and a new trial granted.

POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL

Appellant was charged with capital murder. The State's main theory was murder in the first degree by premeditation.

> "Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing." (R-1414)

Premeditation therefore consists of the following elements:

1. After conscientiously deciding to do so.

2. Decision must be present at the time of the killing.

3. A period of time must pass which is long enough to allow reflection.

4. The premeditated intent to kill must be formed before the killing.

Review of the trial testimony reveals none or insufficient evidence touching on any elements of premeditation. Multiple stab wounds are more indicative of a crime of passion rather than those of premeditation. In short, the State failed in making a prima facie case as to premeditated murder and the court should have granted appellant's motion to acquit as to this count. The error was not harmless because the appellant was put to the burden of

defending the capital offense. Submission to the jury was prejudicial to appellant. Therefore, sentence in this matter should be vacated and appellant be remanded for a new trial.

POINT III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT

The rights waiver form was introduced as Exhibit 1 in the motion to suppress statement (R-72) and also as Exhibit 49 during the trial (R-1280). Therefore this rights waiver form is reviewable by the court facially to determine the intelligent and voluntary nature of appellant's waiver. Coupled with the police tactic of arresting appellant on a minor charge of technical violations of probation for the purpose of questioning on a capital offense which the State ultimately seeks the death penalty does not permit a defendant an opportunity to intelligently and voluntarily waive his rights The trial court's finding that appellant had been arrested on prior occasions and therefore provided a basis for a valid waiver of the Miranda warnings is not justified. These are external circumstances and evidence not before the trial court and his reason for denying appellant's motion to suppress based on this aspect should be excluded. Further, there is no finding in the record that there was a voluntary, knowingly and intelligent waiver of the Miranda warnings (R-88,89). The absence of such findings coupled with the police officer's tactics on arrest and altering of the standard rights waiver form establishes appellant's failure to make an intelligent and knowing waiver of his rights per Miranda. Therefore, trial court's ruling denying appellant's motion to suppress statement should be reversed

and the case remanded for new trial.

POINT IV

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE

Appellee justifies the seizure of appellant's shoes under the plain view doctrine citing United States v. Titus, 445 Fed. 2d 577 (2 Circuit 1971), cert. denied, 404 U.S. 940 (1971). This case is distinguishable in that officers seized two jackets which were in fact capable of distinguishing characteristics and the money was in fact in plain view on the floor. In this case appellant's high top tennis shoes were not in themselves distinguishable in any way save for the subsequent examination of the soles which Detective LaFlam after seizure and examination found to be similar to the shoe print left at the scene. The shoe print left at the scene of the death of Mr. Ellis did not in any way lend itself to a description of the shoe itself, i.e. whether it was high top or a particular color, as in Titus, supra. Furthermore the seizure in this matter had to take place before the shoes could be examined by the officer. This seizure was based on nothing more than the officer's curiosity (R-33). That the shoes had been washed by appellant's mother thirteen days after the killing of Mr. Ellis would not give probable cause to seize appellant's shoes.

In conclusion, the officer's curiosity did not suffice as probable cause to the seizure and search of appellant's shoes. Therefore appellant moves this Honorable Court for an

order reversing the trial court's denial of appellant's motion to suppress appellant's shoes and remanding the matter for a new trial.

POINT V

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS

Appellant was not on notice as to the variance by deposition of the discovery of Mr. Ellis' body through the depositions of Jack Deitz, Eugene O'Neill, Charles Edell, and Dr. Leonard Walker. None of these depositions reveal the date of death but relate to the time of discovery. In fact in Dr. Leonard Walker's pretrial deposition he indicated only "(death) less than twenty-four hours" but qualified in further explanation (R-1846, 1847). Furthermore reliance on the discovery through the deposition of Laura Mayo (R-1892 & 1925) is totally unjustified since appellant was not able to depose this witness until six days into trial and thereby affording appellant no reasonable notice through this trial witness. The State knew exactly of the date and their failure to provide a date, time and place was equally not justified. In fact during the motion hearing the State gave no reason not to supply such information stating merely that the information was included in the indictment. This information did prove to be incorrect and furthermore the denial overlooks the mandatory requirements of FRCrP 3.140(n) which states

> "The court upon motion shall order the prosecuting attorney to furnish statement of particulars..." emphasis added.

Furthermore, requiring appellant to show good cause for use of a rule of criminal procedure denies appellant due process

and effective assistance of counsel.

In conclusion, the trial court abused its discretion in denying appellant's motion for bill of particulars and not following the rule's mandatory requirements denying appellant due process and effective assistance of counsel. Therefore appellant moves this honorable court for an order vacating conviction in this matter and remanding for a new trial.

POINT VI

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING TESTIMONY OF WITNESS AND INTRODUCTION OF DOCUMENT VIOLATIVE OF DISCOVERY FRCrP 3.220

Appellee states that the discovery violations were minor and were information already known by appellant.

Failing to fully comply with these discovery rules results in appellant's deprivation of effective assistance of counsel and due process of law. Of the complained discovery violations all except for the testimony of Officer Wilburn were relied on by the State to prove an essential element of the case and thus of major importance. Ownership of the vehicle permitted the testimony of Laura Mayo regarding observation of personal papers and a checkbook belonging to Mr. Ellis and recovery of a print identified as belonging to appellant from the rear view mirror. Trial witness Shirley Johnson did not know whether or not Mr. Ellis owned a Buick or a Cutlass. Trial witness Laura Mayo could not identify the vehicle either and stated that she was positive that the vehicle had a console when in fact the photographs at trial showed the vehicle not to have a console.

The sudden production of the photograph of Oswald Jones was equally crucial in establishing the chain recovering the twenty-five caliber raven pistol. The record is clear that both appellant and appellee knew that the trial witness Oswald Jones was dead and therefore would not be presented as a witness for trial. Appellee's argument that appellant should have known that the State would have been able to

prove these matters is contrary to the prosecutor's obligation and encourages a policy of withholding evidence. This sequence of events regarding the complained of evidence was cumulative and violations of FRCrP 3.220.

Therefore appellant moves this Honorable Court to vacate his sentence of conviction and remand this matter for a new trial.

POINT VII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN OVERRIDING THE JURY ADVISORY OPINION OF LIFE BY IMPOSING A SENTENCE OF DEATH

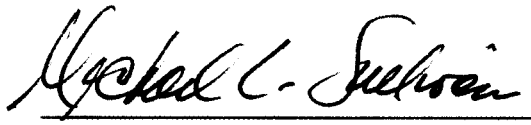
Appellee argues on this matter that weighing heavily on the judge's mind had to be the death of another victim in West Palm Beach shortly after the death of Mr. Ellis. This was not in evidence, and therefore appellee's reliance on this as justification in overriding a jury advisory opinion cannot be considered and should not have been even mentioned in this trial brief. Aggravating circumstance of robbery was known to the jury and duly considered and the trial court's finding as an aggravating circumstance is not sufficient to outweigh the mitigating circumstance of appellant's mental retardation and reject the advisory opinion of the jury. Furthermore as an aggravating circumstance this is in effect finding an aggravating circumstance for which every defendant found guilty of felony murder would share. Therefore use of the underlying felony as an aggravating circumstance fails to satisfy Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 346 (1972), which requires the sentence of death to only be imposed in those cases where the murder is set apart from the norm of capital felonies, State v. Dixon, 283 So. 2d 1 (Fla. 1973). The trial court's reliance on Ellis' experiencing a pre-death apprehension of physical pain and impending death is highly speculative and is based solely on the testimony from Dr. Leonard Walker that the victim may have remained conscious for a period of five minutes. The

term conscious is ambiguous and certainly the crime scene belies any consciousness on the part of Mr. Ellis in that the body did not change from its place of attack until possibly moved after death. Also, in the pretrial deposition Dr. Walker stated that there was a distinct possibility that Mr. Ellis was rendered unconscious from a trauma to the head (R-1838). Also, in the penalty phase trial witness Kay Hendrickson, school psychologist, testified regarding appellant and persons with the same mental range and their ability to conform their acts to the law.

In conclusion, the trial court relied basically only on appellant's prior record as additional evidence upon which to override the jury's advisory recommendation. Therefore imposition of appellant's sentence for death should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Carol Asbury, Esq., Dept. of Legal Affairs, 111 Georgia Ave., Room 204, West Palm Beach, FL 33401, this 11th day of April, 1990.



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