IN THE SUPREME COURT OF FLORIDA

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ULRECK OMELUS,

Appellant,

v. CASE NO. [illegible]

STATE OF FLORIDA,

Appellee/Cross Appellant
_____________________________________/

CROSS REPLY BRIEF OF APPELLEE/ CROSS APPELLANT

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SUMMARY OF ARGUMENT

I: The Williams rule evidence of the Indian River murder should have been admitted in the Mitchell murder trial because it was relevant, and showed identity, motive, plan, preparation and absence of mistake. The trial court was not bound by a prior erroneous evidentiary ruling.

II: The heinous, atrocious or cruel aggravating factor applies to a principal in a contract murder because he is directly responsible for all acts of his agent. This situation is analogous to conspiracy and felony murder situations which hold the non-triggerman responsible for all acts of co-defendants.

III: The state requests this court's opinion on certain evidentiary rulings made by the trial court in order to avoid future controversy.

POINT ONE ON CROSS APPEAL

THE TRIAL JUDGE IN THE SECOND TRIAL WAS NOT PRECLUDED FROM ADMITTING WILLIAMS RULE EVIDENCE.

Omelus argues that the second trial judge was precluded from admitting Williams rule evidence because the first trial judge ruled the evidence inadmissible. This is basically a "law of the case" argument.

A trial court has the power to reconsider and correct an erroneous ruling which was made at a previous trial. Strazulla v. Hendrick 177 So.2d 1 (Fla. 1965). It would be manifestly unjust to bind a trial judge to an erroneous evidentiary ruling made by a prior trial judge who had been recused after he stated he would not impose the death penalty regardless of the jury recommendation. The Williams rule evidence should have been allowed, and any contrary ruling was error.

The common points shared in the Indian River murder and the Mitchell murder may not be sufficiently unique or unusual when considered individually, to establish a common modus operandi; nevertheless, these points, when considered one with another, establish a sufficiently unique pattern of criminal activity to justify admission of evidence of Omelus' collateral crime as relevant to the issue of identity and the crime charged. Chandler v. State, 442 So.2d 171, 173 (Fla. 1983). See also State v. Maisto, 427 So.2d 1120 (Fla. 3d DCA 1983). The evidence regarding the Indian River murder was admissible to show appellant's common scheme or plan, and the absence of mistake in identifying appellant as the perpetrator under Williams v. State,

110 So.2d 656, 663 (Fla. 1959). See also Rossi v. State, 416 So.2d 1166 (Fla. 4th DCA 1982).

It is axiomatic that evidence of another crime is admissible if it casts light on the character of the act under investigation by showing either motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality, so that the evidence of such other crime would have a relevant or material bearing upon a essential aspect of the offense being tried. Ashley v. State, 265 So.2d 685 (Fla. 1972), Williams v. State, supra; and Sireci v. State, 399 So.2d 964 (Fla. 1981). The test for determining whether a defendant's prior crimes are admissible is relevancy, and, as long as the evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. Ashley v. State, supra. Identity was a material issue and the evidence of the Indian River murder was admissible and relevant as to the issue of identity and common modus operandi. Chandler v. State, 442 So.2d at 173. See also Mayberry v. State, 430 So.2d (Fla. 3d DCA 1982).

POINT TWO ON CROSS APPEAL

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE APPLIES TO OMELUS.

Omelus argues that because he did not intend the murder to be heinous, atrocious, and cruel, that aggravating circumstance cannot be applied to him. The legislature provided that aggravation was appropriate when "the capital felony was especially heinous, atrocious, or cruel". §921.141(5)(h), Fla. Stat. (1987). The statute does not require that a murderer must intend the capital felony be heinous, only that the murder is heinous. Omelus cites the state's answer brief at 49 in an attempt to demonstrate that the state concedes lack of intent; however, the cited passage was to the supplemental record which is the memorandum of law submitted by defense counsel. In the memorandum, defense counsel argued that Omelus intended for Mitchell to be killed with a gun, not a knife.

There is no question that Omelus intended to kill Mitchell. If this were a felony murder case, there is no question that Omelus would qualify for a death sentence under the standards of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona ___U.S. ___, 107 S.Ct. 1676 (1987), which require that a participant must intend to commit a murder in order to receive the death penalty. But whether Omelus intended to kill Mitchell with a knife or gun is irrelevant. Under a principal theory, he is responsible for all acts of his agent. General agency law provides that a principal is liable for acts of his agent, even though not authorized, if the agent was acting within the scope

of his employment or apparent authority. Burnett v. Brito, 478 So.2d 845 (Fla. 3rd DCA 1985). As stated in the answer brief, this general rule holds true in criminal cases.

Drawing an analogy to the law of conspiracy, every act of a conspirator is an act of all members of the conspiracy. Honchell v. State, 257 So.2d 889 (Fla. 1971). And under the doctrine of "transferred intent" the original malice is transferred from one against whom it was entertained to the person who actually suffers the consequence of the unlawful act. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). Although this case may be a case of first impression as to whether the aggravating circumstance of heinous, atrocious, or cruel can be applied to the contract principal for the murder committed by his agent, the situation is analogous to a felony murder where a non-triggerman is sentenced to death. In White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987), the court held that the heinous, atrocious, or cruel factor can be applied to a non-triggerman and that such application is not unconstitutionally overbroad.

The murder of Willie Mitchell was heinous, atrocious, and cruel. Omelus set Jones in motion, and is responsible for every act of Jones in furtherance of Omelus' purpose of killing Mitchell to obtain the insurance proceeds.

POINTS III, IV, AND V

THE TRIAL COURT ERRED IN CERTAIN EVIDENTIARY RULINGS FOR WHICH THE STATE REQUESTS A RULING TO AVOID FUTURE CONTROVERSY.

Omelus addresses these points briefly in his summary of argument in the answer brief on cross appeal. The redress the state seeks by raising certain issues on cross-appeal is an indication from this court whether there was error in certain areas solely to avoid future conflict. The state obviously does not seek reversal or new trial, but in the case this case ever were tried again, or proceeds to collateral review the state requests this court's guidance in the outlined areas.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee/Cross Appellant has been furnished by U.S. Mail to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, counsel for appellant, this 13 day of March, 1990.

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