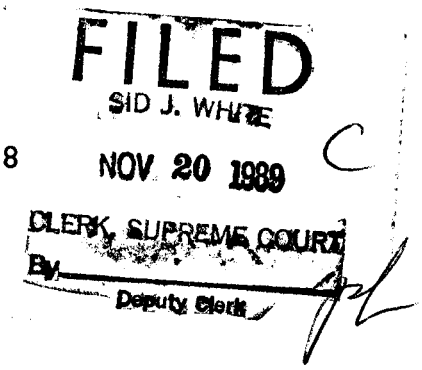
IN THE SUPREME COURT OF THE STATE OF FLORIDA

TRAVIS GILLION, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.74,708



PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

R = Record on Appeal

AB = Answer Brief of Respondent

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon his statement of the case and facts as set forth in his initial brief on the merits.

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE AREA WHERE PETITIONER WAS OBSERVED IS KNOWN FOR STREET LEVEL NARCOTICS TRANSACTIONS AND THAT PETITIONER HAD SEVERAL PRIOR CONTACTS WITH A SPECIAL NARCOTICS AGENT THEREBY SUGGESTING THAT PETITIONER WAS A KNOWN DRUG DEALER

Nowhere in respondent's answer brief does the state suggest that the contested evidence was relevant to prove petitioner's guilt. Rather, respondent claims that admission of evidence that petitioner was seen in an area known for its narcotics activity, other street level drug dealers were present, the incident at bar occurred in that area and petitioner was known to an agent specializing in this type of crime was not error due to fine distinctions between the instant cause and case law. These purported distinctions however are both contrary to settled case law and inconsequential.

Respondent first suggests that since the testimony related to the scene of the incident, rather than the scene of arrest, admission was not error. AB 5. However, review of judicial opinions demonstrates that error is not predicated upon the particular location impugned but rather the use of pejorative terms to describe it. For instance, in Young v. State, 141 Fla. 529, 195 So. 569 (Fla. 1939) the location maligned was the home of the accused which was not the scene of her arrest. See also Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982) (scene of incident); White v. State, 547 So.2d 308 (Fla. 4th DCA 1989) (locale where defendant and co-defendant met).

Likewise, a second distinction urged by respondent based upon

domicile is unsupported by case law. See Periu v. State, 490 So.2d 1327 (Fla. 3d DCA 1986) (defendant's business); Eberhardt v. State, 14 F.L.W. 2272 (Fla. 1st DCA Sept. 26, 1989) (victim's business). The castle doctrine does not supply the rationale for exclusion of such evidence. Rather, prejudice arises because an accused is associated with the infamous region which is irrelevant to the issues for resolution. Cabral v. State, 14 F.L.W. 1976 (Fla. 3d DCA Aug. 22, 1989). From this irrelevant evidence, the trier of fact is free to infer that a defendant observed in a drug zone is guilty. His character is disparaged not by his particular act but because he is placed in an area frequented by known criminals.

Further, while both law abiding and illwilled persons may be found standing side by side in almost any corner of the world, that does not diminish the prejudice which arises from admission of a derogatory description. By use of pejorative terms, the danger of spill over arises causing the jury to digress from the question of guilt or innocence. Cf. Fulton v. State, 335 So.2d 280 (Fla. 1976). "The danger of 'guilt by association' is a real one, which ought to be minimized whenever possible." Id. at 285.

Respondent next endeavors to justify admission of the irrelevant and prejudicial testimony upon the basis that it shows the context of the crime. Respondent claims that the testimony "give(s) the jury a feel for what was going on at the time." AB 7. The only "feel" that jury is given is that petitioner is on the street along with other narcotics dealers so he must be one as well. This is an improper use of the inseparable crime evidence

rationale.

In 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) this Court approved admission of evidence to show the entire context of an offense. Repeatedly, however, this Court has stressed that relevancy is the pinnacle of admissibility of inseparable crime evidence. Bryan v. State, 533 So.2d 744, 746-747 (Fla. 1988). Thus, in Craig v. State, 510 So.2d 857 (Fla. 1987) this Court paused to write:

> A verdict of guilt of a criminal charge should be based on evidence pertaining specifically to the crime. The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters.

Id. at 863. In each of these cases, the proof related to collateral crimes of the defendant, not those of unidentified third parties. Reference to such offenses were relevant to an issue in each cause and thus incidental to proving the charged crime.

By contrast, the improper evidence sub judice related to the conduct of others who were not on trial. Lacking was any nexus between the illicit behavior and the crime of which petitioner stood accused so as to render the evidence relevant. State v. Lee, 531 So.2d 133, 135-136 (Fla. 1988). See also Elkin v. State, 531 So.2d 219 (Fla. 3d DCA 1988) (in murder prosecution, error to admit testimony of insurance agent as to manner of death of defendant's first husband where no "connexity" to defendant). Diaz v. State, 467 So.2d 1061 (Fla. 3d DCA 1985) (in defendant's marijuana trial, error to admit evidence of other marijuana found in nearby car

owned by defendant's brother).

Respondent also suggests that remedial actions were taken by the instant trial court. AB 6-7. Petitioner however is quick to note that the colloquy referred to by respondent occurred outside of the presence of the jury. R 144-146, 158-161. More importantly, directing the prosecutor to move to other areas hardly equates with a curative instruction which commands the jury to disregard the irrelevant and prejudicial testimony in its deliberation. Compare Marek v. State, 492 So.2d 1055 (Fla. 1986) (no error to deny motion for mistrial where defendant's objection based on relevancy was sustained and trial court gave curative instruction to jury to disregard testimony which was sufficient to dissipate its prejudicial effect). Despite respondent's assertion to the contrary, the remarks of the trial court sub judice to counsel in the jury's absence was not remedial action which is designed to dissipate the effect of the evidence on the jury

In its invited error analysis, respondent relies upon Haager v. State, 83 Fla. 41, 90 So. 812, 815 (1922). However, the issue in Haager did not involve the invited error doctrine. Rather, defense counsel was precluded from inquiring on cross-examination of a state witness, "Did he say or do anything then?" Id. at 815. This Court found that there was no error in refusing to permit the inquiry since the question was not designed to elicit a relevant response. Moreover, defense counsel failed to apprise the trial court of the purpose of his inquiry when provided with an opportunity to do so. He could not then, upon appeal, supply the

opportunity to do so. He could not then, upon appeal, supply the testimony which he sought to obtain. The context of the error in Haager is distinguishable from the issue at bar. Similarly, the issue before this Court in East Coast Lumber Co. v. Ellis-Young Co., 55 Fla. 256, 45 So. 826, 827 (1908) also cited by respondent was not whether an error was invited by a party. Thus, these cases are inapposite of the instant cause.

Last, respondent's harmless error analysis is specious. Respondent reverts to an overwhelming evidence of guilt test. Respondent, by viewing the evidence in the light most favorable to the state, reaches the conclusion that identification was not at issue since it was clear that petitioner was the culprit. Respondent, however, never explains why there is no prejudice or harm to petitioner by virtue of the erroneous admission of irrelevant testimony. Rather, respondent presents an argument which fails to focus upon the effect on the trier of fact. As this Court wrote in State v. Lee, 531 So.2d at 136-137:

> We agree that the properly admitted evidence was sufficient to support a jury verdict of guilty. However, we decline to modify the **DiGuilio** test to require only a showing that the permissible evidence would support the conviction in order to find the erroneous admission of improper collateral crime evidence harmless. [footnote omitted]. As this Court has previously recognized the focus of harmless error analysis must be the effect of the error on the trier of fact. [citation omitted]. We again emphasize that "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." [citation omitted].

At bar, in the trial court, the state elicited testimony that

shortly before the incident petitioner was observed in an area infamous for its narcotics activity, other street level drug dealers were also present, this drug-related offense occurred in that vicinity and petitioner is known to a special narcotics agent. The prejudice, which arises from such testimony, is unsurmountable particularly in light of petitioner's defense of misidentification. See e.g. Zerguera v. State, 14 F.L.W. 463 (Fla. Sept. 28, 1989). One cannot conclude, beyond a reasonable doubt, that this pejorative description did not have a spill over effect upon petitioner which colored the jury's finding of guilt. Certainly, the state, by its reliance upon evidence of guilt alone, did not meet its burden to show as it must that petitioner was not engulfed in this disparaging but irrelevant testimony. Thus, the harmless error doctrine does not alleviate the error at bar or preclude reversal of petitioner's judgement and sentences. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

In light of the testimony elicited in the cause sub judice, the long standing rules precluding its admission and consideration of the harmless error analysis as it applies to the instant cause, petitioner requests tat this Court answer the certified question in the affirmative and reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Alfonso M. Saldana, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 15th day of November, 1989.

Of counsel