IN THE SUPREME COURT OF FLORIDA

MIGUEL HERNANDEZ,

Appellant, CASE NO. 75,127

vs.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

Appellant relies upon the statement of case and facts contained within his initial brief.

# A R G U M E N T

## POINT I

### THE TRIAL COURT ERRED IN EXCUSING A JUROR FOR CAUSE WHILE PROHIBITING DEFENSE COUNSEL FROM QUESTIONING THE JUROR.

Appellee argues that potential juror Kutlic was adamant and resolute in his opposition to the death penalty. The record does not reveal this. Mr. Kutlic initially implies that he had not thought about the question of capital punishment and indicated to the prosecutor that he did not believe in capital punishment. However, Mr. Kutlic was never given the opportunity to elaborate upon this response or to be rehabilitated by defense counsel.

Appellee also argues that Mr. Kutlic's adamancy was more readily ascertainable in the jurors' presence than in "... these cold transcripts, ... ". However, this Court must judge this case on the record, and there is nothing in the record to support Appellee's assertion.

Appellee's argument that Mr. Kutlic was adamantly opposed to the death penalty is not demonstrated by the record. In fact, upon the prosecutor stating that Mr. Kutlic was "pretty adamant" about the death penalty, the trial court stated, "He might have figured out the right answer to get excused." (R 457-8)

The key issue is not what Mr. Kutlic said, but rather the fact that defense counsel was prohibited from questioning

Mr. Kutlic on the issue of capital punishment. Mr. Kutlic had not indicated any opposition to capital punishment until questioned by the prosecutor. Once that opposition was initially stated, defense counsel should have been afforded an opportunity to question the juror. This error is particularly egregious in a capital case where defense counsel was prohibited from questioning the juror about capital punishment. This Court is certainly familiar with numerous transcripts wherein potential jurors initially state their opposition to capital punishment but are rehabilitated upon further questioning from defense counsel and/or the trial court.

Two cases cited by Appellee in its answer brief actually support Appellant's argument. O'Connell v. State, 480 So.2d 1284 (Fla. 1985), held that the trial court excused two "death-scrupled" jurors for cause without providing counsel for the defendant any opportunity to question them. In Morgan v. Illinois, 504 U.S. ____, 119 L.Ed.2d 492 (1992), the United States Supreme Court held that the trial court erred in refusing to question jurors as to whether they would impose the death penalty on an automatic basis upon finding the defendant guilty.

Florida Rule of Criminal Procedure 3.300(b) mandates that counsel for both the State and the defendant shall have the right to examine jurors orally on their voir dire. Counsel

for Appellant was denied this right. This deprived him of his right to a fair trial under the Florida and United States Constitutions and so tainted the jury selection process that Appellant's convictions must be reversed.

## POINT II

## THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENTS OF ACQUITTAL.

Appellee claims in its argument that defense counsel failed to preserve two specific grounds for appeal in regard to Appellant's motion for judgment of acquittal. The first ground is that the circumstantial evidence linking Appellant to the crimes was not sufficient to exclude all reasonable hypotheses of innocence. The second ground is that no evidence is presented linking Appellant to jewelry taken from the Gold Junction store. Appellee contends that these specific grounds for Appellant's motion for judgment of acquittal are not cognizable in this appeal because they were not raised by counsel for Appellant at trial.

Appellant submits that in making a motion for judgment of acquittal as to all counts and in renewing said motion, trial counsel for Appellant challenged the sufficiency of the evidence and therefore preserved the issue for appellate review. See Wright v. State, 573 So.2d 998 (1 DCA 1991), in which it was held that a motion for judgment of acquittal that asserts only that the State's proof was "insufficient" and "failed to establish a prima facie case" is legally sufficient to challenge the sufficiency of the evidence.

Therefore, based upon Appellant's arguments in his initial brief, his conviction should be vacated, and Appellant should be discharged.

## POINT III

## THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON "FLIGHT".

Appellee argues that Appellant did not object to the instruction on flight. However, in its own brief, Appellee refers to pages 1431 and 1432 of the record, in which counsel for the Appellant objected to the instruction on flight.

Even if this Court were to determine that a proper objection to the flight instruction was not made by counsel for Appellant, the giving of the instruction constitutes fundamental error on the part of the trial court. Fundamental error is error which goes to the foundation of the case. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Application of the fundamental error doctrine is warranted in the instant case because there was insufficient evidence to support the flight instruction and insufficient evidence independent of flight to support the convictions.

Appellant's fingerprints were found by the point of entrance on the roof of the Farmer's Market and on a Coca Cola canister which was inside the Farmer's Market, but not inside any individual store. The only other evidence linking Appellant to the crimes was a witness's testimony regarding two individuals she saw running in the early morning hours near the Farmer's Market. She did not identify Appellant as one of those two individuals. Therefore, all the evidence linking Appellant to these crimes was circumstantial in nature.

Furthermore, a significant portion of that evidence dealt with alleged flight. The State argued that Appellant was one of the two individuals fleeing from the Farmer's Market shortly after the crimes.

Therefore, the giving of the flight instruction could not be deemed to be harmless beyond a reasonable doubt.

In its answer brief, Appellee also claims that Fenelon v. State, 594 So.2d 292 (Fla. 1992) should not be used to invalidate "convictions long since obtained where no objection was made and the evidence supports the instruction." For this proposition, the State cites Power v. State, 17 FLW S572 (Fla. Aug. 27, 1992). Power does not stand for that proposition. In Power, this Court merely held that giving the flight instruction, even if error, was harmless beyond a reasonable doubt in the circumstances of that particular case. Power did not direct that Fenelon could not be used as precedent when dealing with a case which was tried prior to the decision in Fenelon. In Power, a circumstantial evidence instruction was given by the trial court. This court stated as follows: "In any case, the circumstantial evidence instruction, along with the testimony adduced at trial that Power was 'casually' walking through the field prior to his encounter with Deputy Welty, diminished any negative effect from the flight instruction." Power, supra, at 574. However, in the instant case, no circumstantial evidence instruction

was given by the trial court. In addition, the evidence of flight was that two men, one with a gun, were running through a parking lot near the scene of the crime. The evidence of alleged flight was much more significant in the instant case than it was in **Power**.

The instruction on flight, given in the instant case, was inappropriate for the evidence elicited at trial. Further, it constituted a comment on the evidence to the jury by the trial court and was fundamental error. Therefore, Appellant's convictions should be reversed.

## POINT XXI

## THE DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT DID NOT MAKE WRITTEN FINDINGS REGARDING THE DEATH SENTENCE AT THE TIME OF SENTENCING.

Appellee acknowledges this Court's decisions in Christopher v. State, 583 So.2d 642 (Fla. 1991); Stewart v. State, 549 So.2d 171 (Fla. 1989), cert denied, 110 S.Ct. 3294 (1990): and Grossman v. State, 525 So.2d 833 (Fla. 1988), cert denied, 49 U.S. 1071 (1989), in which this Court clearly stated that all written orders imposing the death sentence must be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. In Stewart, supra, this Court stated that "[s]hould a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence." Because the imposition of the death sentence in the instant case was subsequent to this Court's decision in Grossman, it is absolutely clear that the instant case should be remanded for imposition of a life sentence.

However, Appellee suggests that this Court ignore its own precedent and reverse itself. Appellee claims that the mandate of Christopher, Stewart, and Grossman "simply does not follow from a fair reading of the statute." Appellee argues that this Court "exalts form over substance" in the aforementioned decisions.

In making these arguments, Appellee ignores this Court's holding in Christopher, wherein this Court stated:

> Our holding in this respect is more than a mere technicality. The statute itself requires the imposition of a life sentence if the written findings are not made ... the preparation of written findings after the fact runs the risk that "sentence was not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate..."

This Court again set forth the reasoning behind the aforementioned decisions in the recent case of Spencer v. State, #77,430 (Fla. March 18, 1993) (still subject to motion for rehearing). This Court stated the following:

> We contemplated the following procedure be used in sentencing phase proceedings. First, the trial court should hold a hearing to: (a) give the defendant, his counsel, and the State, an opportunity to be heard; (b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; (c) allow both sides to comment on or rebut information in any presentence or medical report; and (d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with §921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file his sentencing order.

Accordingly, the death sentence in the instant case

must be vacated. A sentence of life imprisonment must be imposed in its stead if Appellant's conviction is not reversed by this Court.

## POINT IV thru POINT XX

## POINT XXII thru POINT XXXI

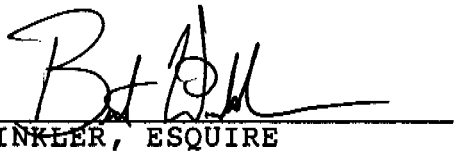
As to Point IV through Point XX and Point XXII through Point XXXI, Appellant relies upon the arguments presented in his initial brief.

## CONCLUSION

Based upon the foregoing facts and legal authority, Appellant requests this Court to reverse Appellant's convictions, remand and vacate the sentence of death.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished SARA BAGGETT, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32399-1050, by Federal Express on this 29th day of March, 1993.



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