IN THE SUPREME COURT OF FLORIDA

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RALPH KERMIT ELLIS, :

Appellant, :

v. : CASE NO. 75,813

STATE OF FLORIDA, :

Appellee. :

_____/

ON APPEAL FROM TEH CIRCUIT COURT,
OF THE FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant relies on his initial brief to respond to the State of Florida's answer brief except for the following additions concerning Issues I, II and X.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN CONSOLIDATING THE TWO MURDER OFFENSES AND THE ATTEMPTED MURDER OFFENSE FOR TRIAL.

Contrary to the state's assertion, the trial court abused its discretion in consolidating these cases for trial. First, the court incorrectly equated the standard for consolidation of offenses for trial with the relevancy standard for admitting collateral crimes evidence under the Williams Rule. (TR 236-254, 1810-1811). In fact, when the issue was raised again on a motion for new trial, the court specifically stated, "...whether the matters therefore were to go before a jury by way of admission under the Williams Rule or by consolidation, I think it ultimately makes little difference." (TR 1810-1811). This was precisely the theory the prosecution argued on the motion to consolidate -- that the standard for consolidation and the standard for admitting collateral crimes evidence -- was the same. (TR 236-254). However, the standards are not the same. See, e.g., Fotopoulos v. State, Case No. 77,016 (Fla. October 15, 1992); Crossley v. State, 596 So.2d 447 (Fla. 1992); Garcia v. State, 568 So.2d 896 (Fla. 1990); State v. Williams, 453 So.2d 825 (Fla. 1984). Nothing in the record demonstrates that the trial court used the correct standard for consolidation of offenses, rather than the Williams Rule standard as the trial court explicitly stated.

Ellis realizes that an abuse of discretion standard is involved in reviewing an issue concerning an erroneous consolidation of offenses. However, the exercise of that discretion presumes that the trial judge in fact employed the correct legal standard. The discretion to be exercised is the trial court's determination if offenses qualify under the correct legal standard for consolidation. Such is not the case here.

The State also suggests that the trial court's error in consolidating these offenses was harmless. This argument rests on the premise that the evidence of the offenses would have been admissible in separate trials under the Williams Rule standard. (State's brief at pages 16-17). However, this ignores the safeguards that would apply to evidence admitted under the Williams Rule: prohibition against the evidence becoming a feature of the case, cautionary instructions to the jury, and strict relevancy to issues in the pending trial. See, Sec. 90.403(2), Fla. Stat.; Williams v. State, 117 So.2d 473 (Fla. 1960).

While the admissibility of the evidence of the other crime under the Williams Rule is a factor to be considered in applying the harmless error standard, it is not the sole criteria. See, Crossley v. State, 596 So.2d at 450. The touchstone for evaluation if consolidation is harmless must be the impact of a joint trial on the fairness of the guilt determination. As this court noted in Crossley,

> the danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of

> bolstering proof of the other. While the testimony of one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may have also committed another crime can have the effect of tipping the scales.

596 So.2d at 450. Consolidation of offenses in this case impaired the fairness of the guilt-determining process. The evidence in the Evans murder charge was legally insufficient and the jury was no doubt swept along by the evidence presented in the other cases. (See, Initial Brief, Issue III). As noted in the initial brief, the State's witnesses' testimony was confused and inconsistent. When asked to judge guilt on three charges based on such evidence, the jury may have been lead to overlook the gaps in the evidence regarding one or more charges if convinced of Ellis's guilt on another.

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN CALLING RICHARD FEAGLE AS A COURT WITNESS, ALLOWING THE STATE TO IMPEACH HIM WITH A PRIOR SWORN STATEMENT GIVEN TO THE PROSECUTOR, AND ALLOWING THE TESTIMONY IN THE SWORN STATEMENT TO BE USED AS SUBSTANTIVE EVIDENCE.

On pages 19-24 of the State's brief in argument subsection (C), the State argues that Feagle's sworn statement given to the prosecutor was admissible as substantive evidence. However, the State does not cite the controlling case from this Court, upon which Ellis relied in his initial brief -- State v. Smith, 573 So.2d 306 (Fla. 1990). (See, Initial Brief at pages 55-56). In Smith, this Court specifically held such sworn statements inadmissible.

ISSUE X

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE BY GIVING AN INSTRUCTION THAT CONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE WHEN EVALUATING WHETHER THE CIRCUMSTANCE WAS PROVED.

The State argues that Ellis is not entitled to review on this issue because trial counsel failed to object to the heinous, atrocious or cruel jury instruction. (State's Brief at pages 40-41). While counsel did not object to the jury instruction (TR 1670-1671, 1787), counsel would have, no doubt, deemed such an objection a useless act based on the state of law at the time. This Court's decision in Smalley v. State, 456 So.2d 720 (Fla. 1989) issued just seven months prior to the penalty phase trial in this case. (TR 1668). The United States Supreme Court decision in Espinoza v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d 854 (1992), constitutes a change in the law which excuses counsel's failure to object. This Court has held that such changes in the law will excuse procedural default. See, Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092, 1093 (Fla. 1987); Mikenas v. Dugger, 519 So.2d 601 (Fla. 1988). (holding that Hitchcock v. Dugger, 481 US 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) was a significant change in the law excusing counsel's failure to preserve the issue.) Ellis is entitled to review on the merits of this issue.

CONCLUSION

For the reasons presented in the initial brief and in this reply brief, appellant asks this Court to reverse his convictions, or alternatively, to reduce his death sentence to life imprisonment.

Respectfully submitted,

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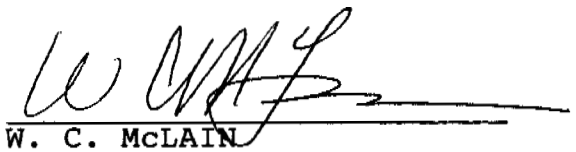
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to Mr. Mark Menser, Assistant Attorney General, 2020 Capital Circle, SE, Suite 211, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Ralph Kermit Ellis, on this 3 day of November, 1992.



W. C. McLAIN