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IN THE SUPREME COURT OF FLORIDA

LARRY ANTHONY CROSSLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPREME COURT CASE NO: 78,032
DCA CASE NO. 90-1559

PETITIONER'S REPLY BRIEF

J. CRAIG WILLIAMS, ESQUIRE
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TABLE OF CITATIONS

SUMMARY OF THE CASE AND FACTS

Respondent accepted Petitioner's Statement of the Case and Facts with several "additions." Petitioner accepts those additions.

ARGUMENT
ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION TO SEVER A ROBBERY OF A CASHIER IN A CONVENIENCE STORE FROM AN EARLIER ROBBERY AND KIDNAPPING OF A WOMAN IN A PARKING LOT?

The Respondent claims that "despite Petitioner's assertion to the contrary, the crimes here are factually similar, as both incidents involved Petitioner (wearing the same cap, sunglasses and clothes) approaching the victims and then pulling a gun on them. Finally, because the victims' descriptions of the perpetrator of the crimes are almost identical and because the only issue in dispute at trial was whether the Petitioner was the man who committed the crimes severance was not necessary." for a fair determination of Petitioner's guilt or innocence. Answer Brief at page 11. The assertion that the Petitioner was wearing the same cap, sunglasses and clothing in each incident is not supported by the Record. Subsequent to a Pre-trial Suppression Hearing the Court made an initial determination to deny the Motion to Sever. (T-117) Betty White gave the following description of the cap.

Answer. It was -- I didn't get a good look at that cap.

Question. O.K. Can you recall what type of cap?

Answer. A net looking cap, it wasn't no--it was blue or red, I can't remember honest to God I can't. (T-33)

She further described the shirt as a medium colored blue, button-up front shirt and wearing grey shorts which were not cut-off blue jean shorts. (T-41) She described the person as six feet tall, 170 pounds. (T-63) She described a light complexion, however, the officer noted that "she wasn't sure of the complexion, that most of what she had gotten to see was the underside of his arm." She described no beard, no moustache. She also initially gave a description of light blue shorts. (T-64) Jacqueline Jones in a Pre-trial deposition had described blue jean shorts and indicated she wasn't sure of the color when she was giving her deposition. (T-86) She indicated that she was not referring to the color but to a material. (T-88) Ms. Jones gave a description of a black male, 28 to 35, five foot six to five foot eight, needed a shave, light moustache, dark complexion, grey shorts, white sneakers and a blue jacket without sleeves. (T-90) The jacket was further described as a sweat type jacket with a zippered not a buttoned front. (T-70) Vagaries in the description clearly do not support the statement that the individual was wearing the same cap, sunglasses and clothing or that the victim's descriptions were almost identical. Answer Brief at page 10

The Respondent relies on Livingston v. State, 565 So.2d 1288 (Fla. 1988) and notes in their brief one basis for

consolidation in Livingston was that the pistol stolen in the burglary became the instrument effecting the armed robbery and murder. This Court in Livingston noted that the evidence against Livingston was overwhelming: He confessed to both the burglary and robbery/murder; he told friends he needed money and showed them the stolen pistol; when arrested, he was wearing the stolen jewelry; his fingerprints were found on the murder weapon; he made admissions to a friend; eye witnesses identified him." Id. 1291 In the instant case there is no confession, no weapon has been recovered, nor has there been testimony indicating the same weapon was used in both offenses, nor was Betty White's stolen vehicle ever identified as being used in the robbery of Jacqueline Jones. No admissions were made by the Petitioner to anyone in the instant case. The Respondent submits that the case at bar is more compelling for joinder, however, the prejudice to the Petitioner by the joinder is readily apparent in light of the suggestive nature of the identification procedure. The trial court clearly abused it's discretion by denying the Petitioner's Motion to Sever.

The Respondent argues that Jones v. State, 497 So.2d 1268 (Fla. 3rd DCA 1986) was wrongly decided. Jones like the instant case is clearly distinguishable from Livingston. The Respondent continues to ignore the critical language in Jones that "the only connection between the two criminal episodes was the use of the stolen car and the accused's alleged participation." Id. 1272 The Petitioner would

submit that the only connection between the two offenses in the instant case is the accused's alleged participation in the offenses. There has been no evidence that the same vehicle was used in both offenses or that a vehicle was used in the robbery of the convenience store. The Petitioner would submit that the cursory discussion of Jones by the Respondent is indicative of an inability to distinguish it from the case at bar.

Johnson v. State, 438 So.2d 774, 778 (Fla. 1983) cited by the Respondent involved a robbery/homicide of a taxi driver and the robbery/homicide of a second victim as well as a homicide of a deputy sheriff reporting to the scene of the second robbery/homicide. The victims had been robbed and shot in the head. Clearly, the connection between the homicide involving the second victim and the law enforcement officer who was dispatched to investigate the shooting by a female companion of the victim who had escaped clearly make a more compelling case for joinder than the instant case contrary to the Respondent's contention. The Respondent's reliance on Johnson is misplaced.

The Respondent's footnote on page 16 notes "that the evidence showing that the Petitioner had fled the stolen car and that he had money on his person that tied him to the convenience store robbery" and that under the Williams Rule would be admissible to establish the identity of the perpetrator of the convenience store robbery is incorrect. As noted herein the descriptions were not identical. The

$315.00 found on the Petitioner was not identified as being from the convenience store robbery or Betty White. Jacqueline Jones testified about $300.00 was taken from her. (T-302) Betty White testified around $100.00 was taken. (T-154) The basis for the admission of Williams Rule evidence is its similarity and uniqueness and clearly the robbery/abduction of an individual in her vehicle in a restaurant parking lot is not identical to a robbery of a sales clerk in a convenience store, sans vehicle. The offenses are clearly dissimilar and would not have been admissible.

The Petitioner's defense was that he had gotten the vehicle from another person and had no knowledge as to the commission of the offenses not that the same person committed both offenses as the Respondent would attempt to argue. Trial counsel for the Petitioner argued during closing argument that this was a case of mistaken identity and specifically stated in argument prior to closing argument "all along our defense has been mistaken identification, logically someone else is the perpetrator if you follow that theory which has been the theory throughout this case."(T-444)

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE IN-COURT AND OUT-OF-COURT IDENTIFICATION OF TWO WITNESSES PREDICATED UPON A SHOW-UP AND A DISTINCTIVE PHOTOGRAPH OF THE PETITIONER

The Respondent argues that this Court's discretionary jurisdiction should be restricted solely to the issue certified and that the Court should not exercise its discretion to consider the other five issues. Respondent cites Jenkins v. State, 385 So.2d 1356 (Fla. 1980), a case that dealt with review of conflict certiorari of per curiam affirmeds. Ansin v. Thornton, 101 So.2d 808 (Fla. 1958) was a civil case. In State v. Thompson, 413 So.2d 757 (Fla. 1983), involved a sentencing issue. In Trushin v. State, 425 So.2d 1126 (Fla. 1982), it is noted that this Court would refrain from using that authority unless those issues affect the outcome of the petition after review of the certified case. Id. 1130 This Court noted in Savoie v. State, 422 So.2d 308 (Fla.1982) that "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal. This authority to consider issues other than those upon which jurisdiction is based is discretionary with this Court and should be exercised only when these other issues have been properly briefed and argued and are dispositive of the case." Id. 312 The Court further noted "we have addressed this issue because, once we accept jurisdiction over a cause in order to

resolve a legal issue and conflict, we may, in our discretion consider other issues properly raised and argued before this Court." Id. 310 Tillman v. State, 471 So.2d 32 (Fla. 1985), noted "once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented." Id. 34 The Petitioner would submit that the issues raised in the Initial Brief have been properly preserved and properly presented. The Petitioner would further submit that were the Court to find error as to this issue and issues four and five that they would be dispositive and a new trial should be granted. As to issues three and six, in reference to sentencing errors, judicial economy would compel considering those issues as under Florida Rule of Criminal Procedure 3.800 were the sentences illegal a Motion to Correct could be filed at any time, thus necessitating additional or piecemeal review. This Court should consider all of the issues raised in the Initial Brief.

The Respondent appears to rely heavily upon the fact that the witness Betty White was not told that a suspect was in the photo array. She was aware however that her brother's vehicle had been recovered and an individual had been arrested, therefore, implicit in those facts is the understanding that a suspect had been arrested. (T-25,40) Logic would dictate that she would have to assume that if they were showing her a spread that the suspect would have been contained therein based upon her knowledge that the car was found and a suspect arrested. The fact that the witness,

Betty White, was initially unable to give an accurate description of the complexion and clothing, along with the limited period of time she would have had to view the individual and the circumstances under which the identification would have occurred clearly indicate that the suggestive procedure did give rise to the substantial likelihood of irreparable misidentification. One must query why a photograph of the Petitioner with his eye partially closed would have been utilized when another photograph, Exhibit No. 9, clearly showed the Petitioner with his eyes fully open. If this were not an effort by Detective Watson to suggest the identification then what possible purpose could have been served by including the selected photograph?

The Respondent acknowledges that one person show-ups such as that attended by Ms. Jones are by their very nature "suggestive" in that the witness is presented with only one possible suspect for identification. Answer Brief at pages 23,24. Reliance is placed upon the fact that as she rang up the customer's purchase, he was about two feet away from her and the lighting was good. It is interesting to note that during the Suppression Hearing there was testimony elicited by the State from the witness as to when she observed the person and how far away he was, however, they never asked if she were paying any attention to him or was able to make any identification of the person during this period of time. (T-69,70,71) Jacqueline Jones testified that the first time she observed the person was immediately before she rang up the six pack of beer. During this period of time she was taking his money,

opening the register and then when she looked up he pointed a gun at her and she became fixated on the gun. (T-79) She did not recall the shape of the man's face. She indicated it all happened quickly. (T-79) The officers further imparted to her, as they came back to pick her up for purposes of making an identification, that they caught a person fitting the description that she gave who they had chased from 45th and Moncrief to a school where he had been apprehended. (T-80) She arrived at the location and she observed a vehicle rammed into a fence and a lot of police cars and people standing around. (T-81) She was then transported downtown and told that she was being taken downtown to make a positive identification. (T-81) Then with two police officers and a detective and a uniformed officer standing next to her and two officers standing next to a handcuffed individual who appeared to have just been in a fight, she made her identification. The person appeared to have been filthy as he had grass and "everything" in his hair and was real dirty. (T-83) It is incredulous to believe that the Respondent can argue that under Grant v. State, 390 So.2d 341,343 (Fla. 1980) 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981) that the circumstances did not give rise to substantial likelihood of irreparable misidentification.

Ms. Jones stated that the person that was in custody was not wearing the jacket, sunglasses or the hat he had been wearing during the alleged robbery nor were these items worn by the Petitioner at the time of his arrest or recovered from the vehicle. (T-58)

The Respondent further considers it important that the Petitioner was allegedly wearing the same gray shorts that the person had on during the robbery. Officer Senterfitt testified at the Suppression Hearing that the Petitioner had on long blue jeans when arrested. (T-58) There was much discussion during the Suppression Hearing as to whether at a prior deposition the witness had indicated that the person had on a pair of blue shorts or blue jean shorts. (T-85,88) The Respondent has failed to address the facts imparted to the witness as to the police chase, the viewing of the car, the transporting of the suspect, the fact that there were four officers present during the identification and the fact that there was debris in the person's hair and he looked like he had been fighting, and the allegedly accurate description of the individual was a general appearance that could have fit any number of individuals.

ISSUE IV

WHETHER THE FAILURE OF THE TRIAL COURT TO DECLARE A MISTRIAL PREDICATED UPON THE PROSECUTOR'S REPEATEDLY PERSONALLY VOUCHING FOR THE CREDIBILITY OF THE VICTIMS AND POLICE OFFICERS CONSTITUTED A DENIAL OF DUE PROCESS

The prosecutor in closing argument stated "those officers told you under oath that the reason they left their dinner is they felt certain Officer Lewis was behind this man and he was the same suspect that fit these descriptions." (T-481) The prosecutor specifically alluded to the oath and the officers opinions. The Petitioner would submit that the inference drawn by the jury was that because the officers were under oath and felt that the Petitioner was the person that fit the descriptions, therefore, he was the individual who had committed the offenses and is clearly an improper reference to the oath as well as vouching for the witnesses testimony. It is the Petitioner's position that the cumulative effect of the impropriety in opening statement, coupled with the numerous comments made during closing argument constituted a manifest injustice and deprived the Petitioner of a fair and impartial trial. The cumulative effect of the arguments constitutes fundamental error. The Petitioner would submit that neither rebuke nor retraction would destroy the sinister influence of the evidence that was admitted constituting fundamental error.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR DURING CLOSING ARGUMENT TO COMMENT ON THE FAILURE OF THE PETITIONER TO CALL ALIBI WITNESSES

The Respondent indicates that the prosecutor's comments in reference to the absent witness were invited or in response to closing argument by Petitioner's counsel. Answer Brief at page 22. The State had requested an advance ruling from the Court on the State's ability to argue missing witnesses in closing argument. (T-423) Lengthy argument ensued. (T-423,426) The prosecutor indicated the context of the argument that she would be making. (T-441) The Court then ruled that this argument would be permitted. (T-441) Therefore, the argument of defense counsel was in response to the Court's ruling that the State would be allowed to comment on the absent witness, therefore, when counsel stated "I am sure she will talk about it in her argument" there had been an advance ruling by the Court that this argument would be permitted and the State would attempt to make this argument. The comments, therefore, were not invited as the Petitioner's counsel was well aware that the Court was going to permit this argument by the State and was responding to that ruling. Petitioner's counsel also argued that the witness Arthur McCloud was not available for the reason that he would be incriminating himself through his testimony and therefore would not present himself for testimony. (T-434,435) Cross examination indicated that Arthur McCloud had lived at apartments behind Hilltop, "I don't know the name of those

particular apartments." Question: But you know that's where he lived? Answer: Yes. Question: Have you talked to him lately? Answer: No, I haven't. Question: He still lives in Jacksonville, doesn't he? Answer: I reckon he does. He also described him as not a friend but an associate that he used to work with. (T-409) The Court indicated that the fact that he was still in Jacksonville, according to his interpretation of the case law, made him available to the Petitioner. (T-434) The prosecutor further argued that Arthur McCloud would not have to implicate himself. (T-465) In Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975) the absent witness was a common-law wife of the Defendant who was present in the Courthouse throughout the trial and had been alluded to in opening statement by the Defendant's counsel who stated she would be called upon to testify on behalf of the Defendant. This clearly distinguishes the instant case from Jenkins. In Michaels v. State, 454 So.2d 560 (Fla. 1984) the absent witness was the daughter of the Defendant. Id. 562.

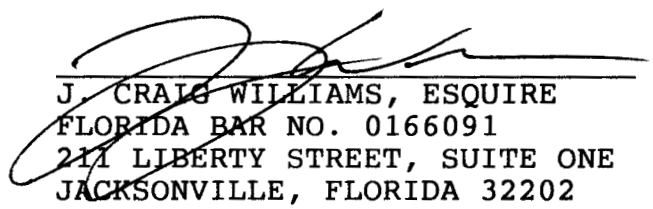
The State noted in footnote 6 on page 41 of the Answer Brief that "even if McCloud had appeared as a witness and invoked his Fifth Amendment right against self-incrimination this would have supported the Petitioner's theory of the events that occurred on the date he was arrested." In Faver v. State, 393 So.2d 49 (Fla. 4th DCA 1981) the Court refused to reverse a conviction based upon the Court's refusal to allow the defense to call a witness who had previously indicated a firm decision to invoke his Fifth Amendment privilege against self-incrimination. The Court cited United

States v. Johnson, 488 F.2d 1206,1211 (1st Cir. 1973) which stated: "if it appears that a witness intends to claim the privilege to essentially all questions, the Court may in its discretion, refuse to allow him to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from the witnesses assertion of the privilege either alone or in conjunction with questions that have been put to him..." Obviously, before excluding a witness the Court must first establish reliably that the witness will claim the privilege and the extent and validity of the claim. (Citations omitted.) In Deschler v. State, 298 So.2d 428 (Fla. 1st DCA 1974) objections were made as to prejudicial remarks during closing argument purportedly in anticipation of the possibility that defense counsel in his closing argument might comment on the failure of the State to call the accomplice to testify. The Court noted "while we consider it error for counsel on either side to comment on the failure to call an accomplice who could invoke his privilege against self-incrimination, we consider that the remarks were not of such a prejudicial nature to Petitioner that it was not cured by the trial judge's immediate instruction to the jury that it was immaterial and to disregard it." (Emphasis added.) Id. 430 In the instant case clearly Arthur McCloud could have invoked his Fifth Amendment privilege were he called to testify.

CONCLUSION

This Court should reverse Petitioner's conviction and remand for a new trial.

Respectfully submitted,



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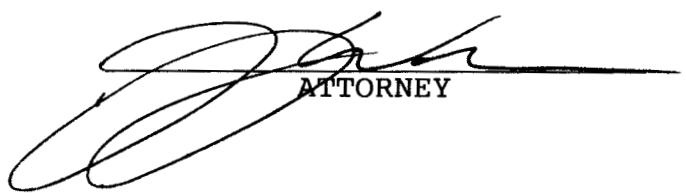
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, by mail, this 18th day of December, 1991.



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