IN THE SUPREME COURT OF FLORIDA

PATRICK ALAN SALGAT, :

Petitioner, :

v. : CASE NO. 83,216

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Respondent has addressed only Point I, the certified question, and expressly waived argument on the remaining issues, including those addressed by the district court. This Court may in its discretion address the nonjurisdictional issues, as its jurisdiction extends to the entire case. Jacobson v. State, 476 So. 2d 1282 (Fla. 1985); Savoie v. State, 422 So. 2d 308 (Fla. 1982). The Court has exercised that prerogative recently. Feller v. State, 19 Fla. L. Weekly S196 (April 21, 1994). Full-scale review is appropriate here, in which, like Feller, the court is reviewing a capital felony conviction.

Herein, record citations are as in the initial brief. References to the initial and answer briefs appears as (IB[page number]) and (AB[page number]).

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT INCONSISTENT EXCULPATORY STATEMENTS CAN BE USED TO AFFIRMATIVELY SHOW CONSCIOUSNESS OF GUILT AND UNLAWFUL INTENT.

A. SUBSTANCE

Respondent portrays the prohibition of judicial comment on the evidence as a legislative mandate. (AB18) However, the Court did not pin its holding in Fenelon v. State, 594 So. 2d 292 (Fla. 1992) on any statutory provision. Evidently, the Court acted pursuant to its constitutional authority to regulate practice and procedure in the state's courts. Art. 5, Sec. 2(a), Fla. Const. This is the same authority under which the Court adopts and modifies standard jury instructions, bringing the relief sought by petitioner within reach.

The state argues the distinction between presumptions and inferences, mandatory and permissive. The issue instead is one of fairness. As with the flight instruction in Fenelon, one strains to comprehend why the trial court should be permitted to call special attention to the accused's inconsistent exculpatory statements as opposed to other evidence at trial. To press the point, why retain a pro-prosecution charge on a particular type of circumstantial evidence in the standard instructions when the general charge on circumstantial evidence, widely perceived as pro-defense, has been excised? Re: Use of Trial Courts of Standard Jury Instructions, 431 So. 2d 594 (Fla. 1981). If, as the Court has reasoned, the reasonable doubt instruction fully encompasses the circumstantial evidence instruction, so too do instructions defining the elements of the offense charged

encompass the charge on inconsistent exculpatory statements. Contrary to the state's assertions (AB20), the prosecution is entitled to no more help in overcoming the difficulties of circumstantial proof than is the defendant in overcoming the difficulties in refuting such proof.

Respondent correctly observes that the tenuousness of the connection between predicate and inferred fact was a significant concern in Fenelon. That concern arises here where the inferred fact -- consciousness of guilt or unlawful intent -- does not necessarily flow from the predicate fact of inconsistent statements. (IB20-21) In the answer brief, the state never really addresses the tendency of the instruction to direct juries away from innocent or less culpable inferences flowing from the predicate fact.

The harm in the instruction was evident. The jury rejected the state's theory of premeditation, leaving the first-degree murder to rest on the underlying felony of burglary. As shown in Points IV and V of the initial brief, proof of burglary was slight to nonexistent, resting on a dubiously expanded definition of curtilage. Consequently, the jurors may have used the instruction on consciousness of guilt and unlawful intent to resolve a close question on the existence of the burglary, a specific intent crime, in favor of guilt. There is more than a reasonable possibility that the error contributed to the verdict.

B. PROCEDURE

Respondent cites precedent holding that objections to jury instructions must be timely, and that a constitutional challenge

to an instruction cannot be raised initially on appeal. (AB8-10) Neither principle applies here. Defense counsel objected during the charge conference, and the argument on appeal rests on non-constitutional grounds. Respondent next claims that trial counsel objected on factual distinctions, not legal grounds. (AB11) Indeed, the bulk of counsel's objection distinguished the instant facts from those to which the instruction was better suited, i.e., the facts of Johnson v. State, 465 So. 2d 499 (Fla. 1985). Appellate counsel has elaborated on those distinctions. Cf. Walker v. State, 573 So. 2d 415, 416 (Fla. 1991) (addressing issue presented by different counsel on appeal with different emphasis and in light of case law issued during appeal).

As the state points out, trial counsel did not expressly assert that the instruction was an improper comment on the evidence. Counsel did, however, mount a general objection in which he referred to Johnson, supra. (R1252) There the Court rejected the general claim of improper comment on the evidence. Further argument on the general invalidity of the instruction would have proved futile in light of Johnson. Cf. Hopkins v. State, 19 Fla. L. Weekly S162, 163 (Rev. opinion March 31, 1994) (counsel should not be required to continue arguing over sufficiency of factual basis for ruling once general objection has been lodged on appropriate ground).

Respondent divines six separate grounds in petitioner's argument on this point. (AB12) These are artificial distinctions. The first four of the grounds identified by the state are general defects inherent in the instruction. The fifth

is case specific, and the sixth applies both in the abstract and in the particular. Whatever the specific grounds this Court finds preserved as to Mr. Salgat, all -- either directly or by example -- are reasons the instruction at issue here should go the way of the flight instruction.

The Court should reject the state's plea that it decline jurisdiction. The issue will recur until it is addressed. This Court may address preservation independently of the certified question, as it did recently in Townsend v. State, 19 Fla. L. Weekly S202 (April 21, 1994).

Finally, in determining whether this issue is preserved as to petitioner, the Court may observe that during the charge conference, the prosecutor focused on consciousness of guilt as the basis for the instruction, while the trial court looked toward intent. (R1252-1253) Petitioner has argued before this Court that neither is a proper inference for the court to draw for the jury. Therefore, as in Walker, 573 So. 2d at 416, the issue on appeal was brought into focus and fairly well stated by the parties and court in determining whether to give the instruction.

Consequently, the certified question should be answered in the affirmative, and petitioner's convictions should be reversed and the case remanded for a new trial.

III. AN APPELLANT DOES NOT WAIVE THE LEGALITY OF MULTIPLE CONVICTIONS IN VIOLATION OF THE CONSTITUTIONAL BAN ON DOUBLE JEOPARDY SOLELY BY FAILING TO RAISE THE ERROR IN THE TRIAL COURT.

This Court recently held that while a defendant waives a double jeopardy claim as to multiple convictions in entering into a plea bargain, no waiver attaches to an unbargained plea. Novaton v. State, 19 Fla. L. Weekly S136 (March 24, 1994). No waiver can then arise from the failure to make a double jeopardy claim by an accused who otherwise contests his guilt on the pertinent offenses.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court, answer the certified question in the affirmative, and remand the case with directions that his convictions be reversed and the case returned to the circuit court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 6th day of May, 1994.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER