

**FILED**

SD J. WHITE

NOV 24 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT  
By JC  
Clerk Deputy Clerk

FERNANDO FERNANDEZ,

CASE NO. 84,700

Appellant,

vs.

STATE OF FLORIDA,

Appellee.  
\_\_\_\_\_ /

SUPPLEMENT TO AMENDED INITIAL BRIEF OF APPELLANT

COMES NOW APPELLANT, Fernando Fernandez, by and through his undersigned attorney, and pursuant to the order of this Honorable Court dated October 2, 1997, certifies that counsel for Fernando Fernandez has obtained and reviewed the Third Supplemental Record On Appeal in this case consisting of the statement/confession of Appellant Fernando Fernandez (hereafter referred to as the "confession/statement"). In light of the review of the "confession/statement", counsel for Mr. Fernandez will file the following Supplement to the Amended Initial Brief Of Appellant. Attached to this Supplement is a copy of pg. 311 of the Third Supplemental Record On Appeal which did not photocopy properly and which the Clerk of the Circuit Court will be transmitting to this Court and to the State of Florida.

1. On page 7 of the Sentencing Order (R. 547) (discussing the mitigator that the defendant acted under extreme duress or under the substantial domination of another person), the trial court stated that Mr. Fernandez committed a "blatant lie" when, in his confession, he stated that he did not know that he and his co-Defendants were going to rob the bank on the morning of the robbery. Page 294 and 295 of the confession/statement demonstrates that Mr. Fernandez was told, for the first time that morning, that they were on their way to rob the bank.

2. The trial court further went on to find that Mr. Fernandez's statement was a "blatant lie" because it was Mr. Fernandez who brought the idea of robbing the bank to the others (R. 547). Appellant would point out that this finding fails to account for the fact that even if Mr. Fernandez brought the idea of robbing the bank to the others, which Mr. Fernandez denies, it is still possible that Mr. Fernandez did not know that the bank was to be robbed that morning and certainly it is possible that even if Mr. Fernandez brought the idea to the others, he could still have decided to back out at the last moment, as his statement shows that he did.

3. Accordingly, the very foundation of the trial court's analysis in failing to find that Mr. Fernandez acted under extreme duress or under the substantial domination of another person is flawed and the evidence shows that this mitigating circumstance should have been found in favor of Mr.

Fernandez as a review of the confession/statement (pgs. 295, 305, 310, 321) demonstrates that Mr. Fernandez acted under extreme duress or under the substantial domination of another person.

4. Page 301 of the confession/statement further demonstrates that Mr. Fernandez was told at the scene of the robbery that it would be a security guard who would be coming out with the tellers and not a policeman. On page 308, Mr. Fernandez stated that Officer Bauer was dressed in a "security uniform" and that was what it looked like. On page 321, it is stated that the shooters thought that they were shooting at a security guard. On page 332, it is further stated that the Defendants did not find out that Officer Bauer was a police officer until later on and that is when Mr. Fernandez "really got scared".

5. As was argued in pgs. 26-29 of the Amended Initial Brief of Appellant, the fact that Mr. Fernandez did not know that Officer Bauer was a police officer, as opposed to a security guard, prevents the application of the aggravating circumstances that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from justice and that the victim was a law enforcement officer engaged in the performance of his official duties.


6. Furthermore, page 321 of the confession/statement demonstrates that when co-Defendant Franqui yelled "freeze", Officer Bauer reached for

his gun. On page 333, it is stated that there was never any talk that the security guard would just be shot.

7. This is extremely important because as argued in pgs. 25-26 of the Amended Initial Brief, the fact that Officer Bauer was shot after going for his weapon demonstrates that the motivation for his murder was the fact that a shootout began and not the fact that the capital felony was committed for pecuniary gain. Furthermore, the fact that there was no plan to shoot anybody and that Officer Bauer was initially told to freeze, demonstrates that the original plan was to commit a robbery and not to kill anybody. As argued in pg. 49 of the Amended Initial Brief of Appellant, the fact that the original plan did not include using deadly force prevents a finding of the Enmund/Tison culpability requirement.

8. The confession/statement also included compelling evidence of remorse (pg. 318 where Mr. Fernandez stated that it was not worth it because it cost somebody their life and left a wife and two children behind and pg. 333 where Mr. Fernandez stated that the reason that he was talking to the police was because he wanted to see co-Defendant Franqui caught and not have another police officer die), which the trial court completely failed to consider thus requiring a remand for reconsideration of the mitigating circumstance of remorse.

Respectfully Submitted,

  
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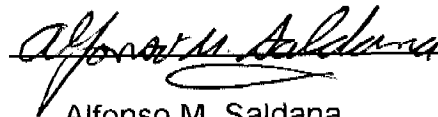
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 20th day of November, 1997 by United States Mail to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131.



Alfonso M. Saldana  
Attorney for Appellant

A No.

Q Was anyone wearing gloves?

A It was, ah, Ricky and the guy that was with me (unintelligible).

Q Ricky, and the guy that was with you had gloves on?

Yeah.

Q They did?

A Yeah.

Q What kind of gloves were they?

A Like rag gloves.

Q How many shots were fired, Fernando?

A I couldn't tell. I was too nervous. All I can tell you is that the first shot was Frankie's. I was too nervous to, you know. Everything happened so quick.

Q Did you see the police officer fall?

A Yeah.

Q Hmm?

A Yes.

Q Did you see where the officer was shot, in what part of his body?

A No.

Q You just saw him fall?

A Yes.

Q What color were the money trays?

A I think they were black.

Q Do you know what happened to them?

A No, I don't.