IN THE SUPREME COURT OF FLORIDA

ROBERT SAPP,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,622

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Robert Sapp, was the defendant in the trial court; this brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. "IB" will designate Petitioner's Initial Brief. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as accurate and complete as to issue one. However, Respondent adds the following facts which are necessary for a full and fair review of issue two.

Shawn Whittaker a participant in the crimes took the witness stand. (T 510).

Whittaker testified that 20 minutes before the robbery - killing, Whittaker, Petitioner, Hanks and Powell went by the Axson house and someone was in the yard, so the group went to Donnell Quaterman's house. (T 515). Hanks, Powell, and Petitioner gout out of the car -- Whittaker stayed behind in the car. (T 515-16). They has masks, vest and guns. (T 515-16). According to Whittaker, if the door wasn't opened, the plan was to force their way in. (T 516). The door was knocked on; a crackhead opened the door and the group forced their way in. (T 516). Whittaker could not see what happened inside. (T 517). After 5 to 10 minutes, they came running out with money, drugs, and jewelry. (T 517). They got back into the car and Hanks was asking Petitioner why he pistol-whipped the man and shot him in the leg. (T 517). According to Whittaker, Petitioner said he shot the guy because he didn't want to give it up, he was "bucking." (T 518). Whittaker received $100.00 and ten pieces of crack (T 517).

SUMMARY OF ARGUMENT

ISSUE I

The Miranda-Edwards rule requires the invocation of rights to be in response to custodial interrogation. This Court should reaffirm its position that invocations which occur outside of custodial interrogation do not trigger Miranda-Edwards protection. Therefore, the certified question should be answered in the negative.

ISSUE II

Respondent asserts that this Court should not reach issues which are beyond the certified question. However, if the Court examines the issues it should find that the lower tribunal did not err when it affirmed the trial court's denial of petitioner's motion for judgement of acquittal.

The evidence in this case established petitioner was an active partner in a group which engaged in home invasion armed robberies. On the day in question, two home invasion robberies were attempted. In each of the robberies, individuals who resisted the robbery were shot. Appellant actively participated in the robbery resulting in the murder and never renounced the agreed upon criminal purpose. Further, there is no evidence that the shooting was an independent

act outside the inherently violent planned armed home invasion robbery. Therefore, relief should be denied.

ISSUE III

Respondent asserts that this Court should not reach issues which are beyond the certified question. However, if the Court examines the issues it should find that the lower tribunal did not err when it denied relief.

The arguments of counsel did not deprive petitioner of a fundamentally fair trial. The arguments related to the facts of this case and did not go beyond permissible bounds. The rebuttal arguments made by the prosecutor were invited by the argument of petitioner's counsel and as such are not a basis for reversal. Finally, if error was committed during argument, it was harmless and did not deprive petitioner of a fundamentally fair trial. Therefore, this Court should deny relief.

ARGUMENT

ISSUE I

WHETHER AN ACCUSED IN CUSTODY EFFECTIVELY INVOKES HIS FIFTH AMENDMENT RIGHT TO COUNSEL UNDER MIRANDA WHEN, EVEN THOUGH INTERROGATION IS NOT IMMINENT, HE SIGNS A CLAIM OF RIGHTS FORM AT OR SHORTLY BEFORE A FIRST APPEARANCE HEARING, SPECIFICALLY CLAIMING A FIFTH AMENDMENT RIGHT TO COUNSEL?

This case is before this Court on a question certified by the District Court of Appeal, First District, as a question of great public importance. The certified question presented is:

> WHETHER AN ACCUSED IN CUSTODY EFFECTIVELY INVOKES HIS FIFTH AMENDMENT RIGHT TO COUNSEL UNDER MIRANDA WHEN, EVEN THOUGH INTERROGATION IS NOT IMMINENT, HE SIGNS A CLAIM OF RIGHTS FORM AT OR SHORTLY BEFORE A FIRST APPEARANCE HEARING, SPECIFICALLY CLAIMING A FIFTH AMENDMENT RIGHT TO COUNSEL?

Respondent asserts that this Court should answer the certified question in the negative.

It is important to understand what was presented to the trial and appellate courts and what was not presented. In the trial and appellate court, petitioner alleged a violation of the United States Constitution. Upon a motion for rehearing counsel attempted to broaden the issue. In its revised opinion, the District Court held that petitioner at oral argument disavowed any state law

claim. Sapp v. State, 660 So. 2d. 1146, 1150 (Fla. 1st DCA 1995) Thus, the issue presented is whether under the Fifth Amendment to the Federal Constitution the Miranda-Edwards rule bars the police from initiating contact with an individual who outside the scope of custodial interrogation and through the solicitation of an individual who was not his lawyer signed a document which states that he did not want the police to question him.

BACKGROUND

For years, the public defender's office in Duval County has filed so-called "Edwards Notices" (T 13-24, 65) The apparent goal of the notice being to convince the courts to merge the doctrines relating to custodial interrogation pursuant to the Fifth Amendment, under Miranda, and the right to counsel pursuant to the Sixth Amendment.

FEDERAL LAW

As petitioner acknowledges, the United States Supreme Court in McNeil v. Wisconsin, ___ U.S. ___, 111 S. Ct. 2204, 115 L. Ed. 2d. 158 (1991) has utterly rejected this attempted merger. In McNeil, the Court held that the right to counsel did not attach until formal proceedings were commenced and that the right to counsel was offense specific. It could not be prospectively expanded to cover future interrogations on non-charged offenses.

This court has adopted the same approach in a series of cases Durocher v. State, 596 So. 2d. 997 (Fla. 1992), Gore v. State, 599 So. 2d. 978 (Fla. 1992), Owen v. State, 596 So. 2d. 985 (Fla. 1992) Thus, the Sixth Amendment cannot be stretched in the fashion petitioner desires. Petitioner now attempts to expand Miranda to create a prospective bar to police interrogation.

Historically, the Fifth Amendment does not prohibit questioning of individuals; it only prohibits the use of compelled incrimination.

In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966) the United States Supreme Court enacted a prophylactic rule to alleviate coercion in police custodial interrogations. The rule was expanded in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d. 378 (1981), to provide that the invocation of Miranda to cut off questioning on an offense precludes future interrogations on that offense unless the defendant initiates the contact. In Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d. 704 (1988) the Court held that once the defendant in the course of a police custodial interrogation invokes his right to remain silent or deal with the police through counsel, any statement relating to uncharged offenses must be suppressed.

Roberson is the outer limits of the Miranda prophylactic rule. Attempts to expand Miranda further have been rejected. Davis v. United States, ___U.S. ___, 129 L. Ed. d. 362 (1994)

In McNeil, the United States Supreme Court was asked to do what this Court is now being asked to do, namely merge the Fifth and Sixth Amendment rights and to extend Roberson to situations outside its facts. The United States Supreme Court refused to do so because there is no basis in the constitution for doing so.

Petitioner's method of filing a once and for all time notice merging the Fifth and Sixth Amendments was suggested by the dissent in McNeil. The majority, however, addressed and completely rejected the claim in footnote 3. Id. 115 L. Ed. 2d. at 171.

The Court stated that it had never allowed the invocation of the Miranda rights outside the scope of police custodial interrogation, and that such constitutional rights cannot be exercised in the abstract but must be invoked when the state takes some action against the individual.

This position is analytically correct because application of the Miranda-Edwards rule requires both custody and interrogation. Indeed, the analysis employed in evaluating the admissibility of statements after Miranda has focused on three questions: was there custody, see Oregon v. Olmstead, 470 U.S. 298 (1985), was there

police interrogation, see Rhode Island v. Innis, 446 U.S. 291 (1980), and was there an invocation, see Davis v. United States, ___U.S. ___, 129 L. Ed. 2d. 362 (1994). When any of the elements are found to be missing, the Courts have declined to exclude the statements based on Miranda.

The Florida analysis exemplified by Gore, Durocher, and Owens, is identical. This Court's decision in Durocher is particularly significant, indeed it is onpoint. Durocher was in custody awaiting sentencing on a first degree murder in a case in which the public defender had filed an Edwards notice. Durocher contacted a detective regarding another crime and eventually gave a statement confessing to additional offenses This Court held that Durocher had not validly invoked his Fifth Amendment rights.

Other jurisdictions apply the same rule. In State v. Warness, 893 P. 2d. 665 (Wash 1995) the court rejected the idea that Miranda protections can be invoked outside custodial interrogation. It stated:

> The Miranda protection is premised on custodial interrogation. Both factors must be present for Miranda protection to attach. A suspect who is not in custody does not have Miranda rights. See Stansbury v. California, --- U.S. ----, ----, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d. 293 (1994). A suspect who is in custody but not being interrogated does not have Miranda rights. See United States v. LaGrone, 43 F. 3d 332, 339 (7th Cir.1994).

Warness attempted to invoke his right to counsel during a noncustodial conversation with a police officer. At that time his right to counsel had not yet attached. Nevertheless, Warness argues that this invocation had the effect of prohibiting any future custodial interrogation.

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Several jurisdictions have held that a suspect cannot anticipatorily invoke his or her Miranda right to counsel. See, e.g., State v. Stewart, 113 Wash 2d 462, 471, 780 P. 2d. 844 (1989), cert. denied, 494 U.S. 1020, 110 S. Ct. 1327, 108 L. Ed. 2d. 502 (1990); LaGrone, 43 F. 3d at 339-40 (citing other jurisdictions as well); Alston v. Redman, 34 F. 3d 1237, 1244, 1249 (3d Cir.1994) (finding that suspect in custody must at least be subject to impending interrogation to invoke Edwards protection), cert. denied, --- U.S. ----, 115 S. Ct. 1122, 130 L. Ed. 2d. 1085 (1995); Tipton v. Commonwealth, 18 Va. App. 832, 447 S. E. 2d 539 (1994); People v. Vigoa, 841 P. 2d. 311 (Colo.1992). Those courts determined that an attempt to invoke the right to counsel when the suspect is either not in custody or not being interrogated has no effect. For example, in Stewart the court held that Stewart's invocation of his right to counsel at arraignment did not invoke his Fifth Amendment right to counsel regarding a subsequent interrogation concerning different charges. Stewart, 113 Wash. 2d. at 471, 780 P. 2d. 844. The court noted that "[t]he Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation, which was not occurring at the time Stewart requested counsel." Stewart, 113 Wash. 2d. at 478, 780 P. 2d. 844.

We find these cases persuasive, and hold that the Fifth Amendment right to counsel cannot be invoked by a person who is not in custody. The right is not itself provided by the Constitution, but is designed to counteract the coercion inherent in custodial interrogations and protect the constitutional right to be free from compelled self-incrimination. See Davis v. United States, --- U.S. ----, ----, 114 S. Ct. 2350, 2354, 129 L. Ed. 2d. 362 (1994). The need for Miranda

> protection does not exist except in a custodial interrogation situation. The right cannot be invoked before it exists.

Other states take the same position. In State v. Bradshaw, 457 S. E. 2d 456, 467 (West Vir. 1995), the court stated:

> As suggested above, the Miranda right to counsel has no applicability outside the context of custodial interrogation. [FN8] Therefore, until the defendant was taken into custody, any effort on his part to invoke his Miranda rights was, legally speaking, an empty gesture. We believe the "window of opportunity" for the assertion of Miranda rights comes into existence only when that right is available.

The federal courts are in agreement. The Ninth Circuit addressed this issue in United States v. Wright, 962 F. 2d 953 (9th Cir. 1992). In Wright, a defendant's counsel at the plea hearing indicated that she wanted to be present at all future interviews of Wright. The court held that counsel's request did not trigger the Miranda-Edwards rule for subsequent custodial interrogations regarding unrelated criminal activity. The court referred to its decision in United States v. Kilgroe, 959 F. 2d. 802 (9th Cir. 1992) where the court stated that the rule announced in Miranda comes into play only in situations which share two essential elements, custody and official interrogation.

The Third Circuit in Alston v. Redman, 34 F.3d 1237 (3rd Cir. 1994) has adopted the same position. In Alston, after talking to

the police, defendant executed a form letter presented by the public defender's office stating he did not want to talk to the police. Subsequently, the police talked to him again and obtained another admission of guilt. In conducting habeas review, the Court reviewed the history of the Miranda-Edwards rule and held that in the absence of both custody and interrogation a prospective execution of the form did not trigger the prophylactic rule of Miranda. Thus, the police were not precluded from questioning Alston.

The Seventh Circuit adopted the identical position in the case of United States v. LaGrone, 43 F. 3d. 332 (7th Cir. 1994). The court held that in order for a defendant to invoke his Miranda rights the authorities must be conducting interrogation or interrogation must be imminent. The Court adopted the Alston court's rationale that the procedural safeguards outlined in Miranda are not required where a suspect is simply taken into custody. No other analytical position is supportable due to the nature of the Miranda decision.

The rejection of anticipatory invocation of the Miranda rights in all these cases is consistent with its underlying principles. The rule does not operate independent of custodial interrogation; it only seeks to protect against the coercing atmosphere of in-

custody interrogation. See Alston Furthermore, as the court stated in LeGrone, requiring the defendant to invoke his Miranda rights when interrogation is occuring or is imminent advances the twin goals of Miranda: (1) an opportunity for the defendant to dissipate the compulsion, and (2) allow law enforcement to conduct investigations. This is accomplished without placing an undue burden on the defendant while still preventing law enforcement from coercing defendant. LeGrone, at 340. The case law of the Circuit Courts of Appeals is founded in the Miranda decision. Petitioner has not provided this Court with a rational basis for this Court to reject the interpretations of every court which has addressed this issue. Therefore, the certified question should be answered in the negative.

Applying the law to the facts of this case establishes that no valid invocation of the Miranda-Edwards rule was possible because there was no interrogation at the first appearance.

When arrested on the unrelated robbery charge, petitioner was advised of his Miranda rights. He agreed to speak to the police. (T 57) He was in custody but not being interrogated when a public defender, who was not his lawyer or even appointed to represented him, gave a pre-arraignment speech on the unrelated robbery. Petitioner signed the standard form presented to him but testified

that he understood the form to mean only that he did not have to speak to anyone he didn't want to speak to. (T 64) Such knowledge adds nothing to the Miranda rights. Later, when the police officers spoke to him on the new offense, he was properly advised of his rights and waived them. At NO TIME during any police custodial interrogation did petitioner invoke his Miranda rights and tell the police that he did not want to talk to them. Because, federal and state case law recognizes only the personal invocation during a current or impending interrogation, petitioner cannot obtain relief under Miranda-Edwards.

FLORIDA'S CONSTITUTION

Petitioner should not be heard on this argument. In the trial court, petitioner raised only United States Constitutional rights and affirmatively represented to the appellate court that his argument was based solely on the United States Constitution. Sapp v. State, 660 So. 2d. 1146, 1150 (Fla. 1st DCA 1995)

This Court has long held that appellate courts only review decisions of lower tribunals. State v. Barber, 301 So. 2d. 7 (Fla. 1974) The district court held that this argument was not presented to it and this Court should also decline to hear it. Hearing the argument for the first time here would condone the practice of withholding arguments from lower levels of the Court system in the

hope of obtaining Supreme Court review and then bootstrapping the unraised issue. This practice violates the principles found in Art. V of Florida's Constitution.

In any event, petitioner cannot prevail. The Miranda decision was a prophylactic rule which courts have recognized is not a constitutionally mandated exclusionary rule.

Florida cases discussing this issue of the scope of Miranda discuss it in terms of the controlling Federal case law excluding voluntary statement in light of the bright line Miranda-Edwards rule. Traylor v. State, 596 So. 2d 957 (Fla. 1992) adopted the Miranda-Edwards rule as part of Florida jurisprudence. Durocher, a post Traylor case, applies a traditional Miranda analysis consisting of an analysis of whether there was both custody and interrogation.

Durocher was in custody awaiting sentencing on a first degree murder. The public defender filed an Edwards notice. Durocher contacted a detective regarding another crime and eventually gave a statement confessing to additional offenses. This Court held that Durocher had not validly invoked his Fifth Amendment rights by filing a prospective Edwards notice. Thus, Durocher confirms that the test under Florida law is the traditional one requiring

custody, interrogation and invocation. See also, Peoples v. State, 612 So. 2d 555 (Fla. 1992).

This Court should decline to reach petitioners state law claims. If it does reach such claims, it should deny relief by answering the certified question in the negative.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL FOR ATTEMPTED ARMED ROBBERY.

Petitioner asserts that this Court should review other issues which the District Court declined to certify. Respondent recognizes that this Court has jurisdiction to address the questions. However, these issues involve only the application of well settled principles of law and this Court should not exercise its jurisdiction.

Petitioner alleges that the trial court erred by denying its motion for judgement of acquittal. He is wrong.

Standard of Review

A trial court's ruling come to the appellate court with a presumption of correctness. When an appellate court reviews the sufficiency of the evidence after a trial court's denial of a motion for judgment of acquittal, the standard of review is controlled by Tibbs v. State, 397 So. 2d. 1120 (Fla. 1981). In Tibbs, this Court set the standard stating:

> [T]he concern on appeal must be whether after all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to

> evidentiary weight, is the appropriate concern of an appellate tribunal.

Id., at 1123.

This Court has reaffirmed this ruling many times. See Grossman v. State, 525 So. 2d 833 (Fla. 1988). Only the sufficiency of the evidence and not its weight is reviewable on appeal.

Certain other rules also apply when an appellate court is reviewing the denial of a motion for judgment of acquittal. When a defendant moves for a judgment of acquittal, he admits all facts in evidence and all reasonable inferences that may be drawn from those facts. Anderson v. State, 504 So. 2d 1270 (Fla. 1st DCA 1986). Necessarily, facts and inferences must be reviewed in the light most favorable to the state. Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985).

Florida courts have also repeatedly held that the credibility of witnesses and the weight of conflicting testimony should not be examined on a motion for judgment of acquittal. Busch v. State, 466 So. 2d. 1075, 1079 (Fla. 3d DCA 1984); Lynch v. State, 293 So. 2d. 44, 45 (Fla. 1974). These issues are for the jury to decide. Heiney v. State, 447 So. 2d. 210 (Fla. 1984). Moreover, when the issue raised by the defense is one of intent, that question is also for the jury. Edwards v. State, 213 So. 2d. 274

(Fla. 3d DCA 1968); Jones v. State, 192 So. 2d. 285 (Fla. 3d DCA 1966).

In evaluating this issue, this Court has repeatedly stated that the question to be answered is whether there is evidence to support the state's legal theory. State v. Law, 559 So. 2d. 187 (Fla. 1990). Lynch. Applying these rules, petitioner cannot show error.

MERITS

When the law is applied to the facts of this case, the only conclusion that can be drawn is that the motion for judgement of acquittal was properly denied. Petitioner and his cohorts planned to rob a well known local drug dealer. Petitioner participated in the planning and preparation of this offense. While mere preparation is not sufficient to prove attempted robbery, petitioner's participation went far beyond mere preparation.

After planning the robbery, (T 324-329) petitioner and his cohorts obtained firearms and a vehicle and headed for the intended victim's house to execute their plan. They delayed the robbery attempt because they observed someone in the yard. Instead they drove down the street and picked out an alternate victim, robbed and shot him, and then returned to the vehicle.

Later, they returned to the original victim's residence. This armed group, including the petitioner, exited the vehicle and knocked on the door, stating they wanted to buy drugs. When the victim refused to open the door, one of the robbers fired through the door killing the robbery target. (T 343-355)

Petitioner argues that there was no attempted robbery and he had abandoned his criminal purpose. Interestingly, petitioner cites no cases holding that his actions did not amount to an attempted robbery or that such actions amount to an abandonment. Petitioner provides little authority for his position and the case law suggests for his assertion.

The facts of this case are stronger than those of Mercer v. State, 347 So. 2d. 733 (Fla. 4th DCA 1977). There the defendant decided to rob a gas station. He was unsuccessful in recruiting an employee to assist him, but told the employee that he would be there to rob the station the next morning. Mercer showed up the next morning and asked for the manager. When he was told the manager was not there, he left stating he would be back later. The employee notified the manager and the police apprehended Mercer when he returned to the vicinity of the station. In Mercer, the Court held that the fact were sufficient for the trial

court to deny a motion for judgement of acquittal and for the jury to find the defendant guilty of attempted robbery.

Likewise in M.M. v. State, 610 So. 2d. 55 (Fla. 3rd DCA 1992), the Court upheld a finding that a juvenile had committed an attempted burglary when he and several others walked up to a house intending to burglarize it, and knocked on the door. The court upheld an attempted burglary conviction even though the juvenile ran away during the robbery and did not enter the house.

Moreover, petitioner could not be said to have abandoned the attempt to rob. The abandonment defense is a creature of statute and not available under Florida's common law. Dixon v. State, 559 So. 2d. 354 (Fla. 1st DCA 1990). Abandonment requires a complete and voluntary renunciation of criminal purpose. Bates v. State, 465 So. 2d. 490 (Fla. 1985). One does not legally abandon a criminal effort merely by being foiled and walking away because there is no voluntary renunciation of criminal purpose. In fact, there is no showing that petitioner ever renounced any purpose to commit the robbery. Based on the group's previous behavior of switching targets and then returning to the original victim, the most probable interpretation of petitioner's actions is that it was a ruse to get the victim to open the door. (T 346, 347) In any event, his actions are insufficient to substantiate a factual

or legal claim of abandonment or withdrawal. Miller v. State, 503 So. 2d. 929 (Fla. 3rd DCA 1987).

Likewise, the argument that petitioner is not responsible for the death is legally incorrect. Petitioner participated in the planned armed robbery after taking part in an armed robbery a short time before where the victim resisted and was shot by petitioner. (T 450,517-518) Petitioner knew that the weapons they were carrying were for use, not show. As a participant, petitioner was statutorily responsible for the death which occurred in the course of the attempted robbery. Young v. State, 579 So. 2d. 721 (Fla. 1991), Hall v. State, 403 So. 2d. 1321 (Fla. 1981), Hampton v. State, 336 So. 2d. 378 (Fla. 1st DCA 1976). Thus, the evidence to establishes felony murder.

Petitioner argues that the murder was not a foreseeable result of the attempted robbery. Under the facts of this case, the argument is frivolous. Petitioner admits to armed robberies with a gang which shot their victims for resisting. Knowing this, he chose to continue to participate in this second armed robbery of the day. Any assertion that the use of violence was not contemplated in the armed robbery is a frivolous claim and must be rejected.

Petitioner has failed to show that the trial court erred, or that the lower tribunal incorrectly applied settled principles of law to the facts of this case. Therefore, this Court should decline to address this claim or, alternatively, affirm the District Court's denial of relief as to this issue.

ISSUE III

WHETHER THE CLOSING ARGUMENT OF THE PROSECUTOR DEPRIVED PETITIONER OF A FAIR TRIAL. (Restated)

Petitioner asserts that this Court should review other issues which the District Court declined to certify. Respondent recognizes that this Court has jurisdiction to address the questions but points out that they involve only the application of well settled principles of law. The Court should not exercise its jurisdiction

Petitioner alleges that the trial court erred by denying its objections to the prosecutor's closing argument and as a result he was denied a fair trial. Petitioner is wrong and the lower tribunal properly denied relief.

The procedures to be employed in resolving objections to closing arguments were set out in the case of Duest v. State, 462 So. 2d. 466 (Fla. 1985).

> The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks. Ferguson v. State, 417 So. 2d. 639 (Fla. 1982).

* * * *

> A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the error. Cobb v. State, 376 So. 2d. 230 (Fla. 1979).

Id. at 448.

In this instance, petitioner did object to remarks of counsel.

Standard of Review

The standard of review of a trial court's ruling on objections to a party's closing argument is an abuse of discretion. This Court has repeatedly stated:

> The control of comments in closing arguments is within a trial court's discretion and a court's ruling will not be overturned unless a clear abuse is shown.

Davis v. State, 461 So. 2d. 67, 70 (Fla. 1985), Jackson v. State, 498 So. 2d. 406 (Fla. 1986). The Court recently reiterated this standard in Crump v. State, 622 So. 2d. 963, 972 (Fla. 1993). Thus, petitioner must show the denial was an abuse of discretion.

Abuse of Discretion

Abuse of discretion was defined by the Florida Supreme Court in the case of Canakaris v. Canakaris, 382 So. d. 1197, 1203 (Fla. 1980) in the following manner:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

In order to establish an abuse of discretion, petitioner must show that reasonable people could not differ as to the prosecutor's argument. He cannot do so for the following reasons.

Merits

Several general principles must be remembered. First, counsel are afforded wide latitude in arguing their cases to the jury. Crump at 972. Furthermore, jury arguments must be examined in the context of all the argument made to the jury.

Petitioner complains of several comments in closing argument but reviews the comments in isolation, not in the context of the entire argument. The first comment concerns a discussion of petitioner's defense and his statements to the police. Petitioner did not remain silent. He gave several statements to the police which were incriminating and contradictory. Thus, it was fair comment to discuss these statements and indicate to the jury that his statements changed with the wind and lacked any semblance of

credibility. This argument was not a comment on silence because petitioner did not remain silent. Watson v. State, 504 So. 2d. 1267 (Fla. 1st DCA 1986), Further, the inconsistences in the statements are evidence of a consciousness of guilt which is relevant and may be commented on. It was also entirely proper for the prosecutor to argue that defendant's current defense was inconsistent with those statements. Minnis v. State, 505 So. 2d. 17 (Fla. 1987). A reference to what a defendant's lawyer said is not, as petitioner insists, a comment on silence. White v. State, 377 So. 2d. 1149 (Fla. 1979), Whitfield v. State, 479 So. 2d. 208 (Fla. 4th DCA 1985). The comments here were on the changing and contradictory nature of petitioner's statements and the defense asserted at trial. The trial court did not err in overruling the objection.

Petitioner's second claim is that the prosecutor improperly personalized the argument by indicating she had lots of files to prosecute and did not have time to frame the petitioner. The trial court interrupted the prosecutor during this argument and instructed her to restrict her comments to the case. When petitioner objected, the judge ruled that it was fair reply to his argument. (T 653-656)

It is axiomatic that an invited response cannot be the basis for a finding of reversible error. The prosecutor's response was a fair response to petitioner's argument. At page 638, petitioner began to review the testimony of the codefendants. He indicated that the codefendants changed their stories to improve the deal with the prosecutor. (T 641, 642) Regarding witness Hanks, Petitioner's counsel accused Hanks of perjury (T 644) and stated that the State did not learn of certain statements by Hanks, the day prior. (T 643) Counsel's argument certainly can be understood as accusing the state of manipulating the evidence and the prosecutor was entitled to respond to an accusation of suborning perjury. Schwarck v. State, 568 So. 2d. 1326 (Fla. 3rd DCA 1990).

The third matter raised was the assertion that if the jury had a problem with the credibility of the codefendants to write the state attorney. Petitioner argues that this is an improper extrajudicial solution. Petitioner mischaracterizes the argument. As noted above, a significant element of petitioner's argument was that the state gave the other responsible defendants a sweetheart deal. The state simply argued that the jury should decide the case based on the facts and not acquit the defendant based on whether the state gave the codefendants a good deal. Error, if any, was

inconsequential and was invited by the manner in which petitioner dwelled on the plea bargains in his prior closing argument.

Petitioner last claim is that the prosecutor tried to inflame the jury. Petitioner again takes the argument out of context. In summing up, the prosecutions reviewed the evidence of guilt: the planned robbery, the possession of a firearm, the knock on the door, the foiled robbery attempt, and the shooting. The prosecutor indicated that petitioner wanted the jury to tell him that what he did was not wrong and was not a crime. The prosecutor argued this was not right and was not the law. Petitioner objected at trial on the basis that the argument was a protection of the community argument. The state responded that it was not asking for the jury to send a message to the community or other criminals or to anyone other than the defendant. (T 619-620)

Argument asking a jury to send a message to the community is improper when it changes the focus of the jury from the facts of the crime charged to the question of condoning crime in general. The prosecutor did not violate that principle; he simply reviewed the facts and on those facts, argued the jury to convict because it was right and it was the law. The prosecutor did not go beyond the bounds of permissible argument.

Petitioner has not established any error and certainly no error that was not invited. The cumulative error argument does not provide a ground for reversal.

Further, if this Court finds error in the argument phase, any error was harmless. By his own admissions Petitioner agreed to participate in multiple robberies. His codefendants testified against him and no evidence was introduced to support petitioner voluntarily abandoned his criminal intent. There was no evidence he did not intend the logical consequences of carrying weapons in a robbery.

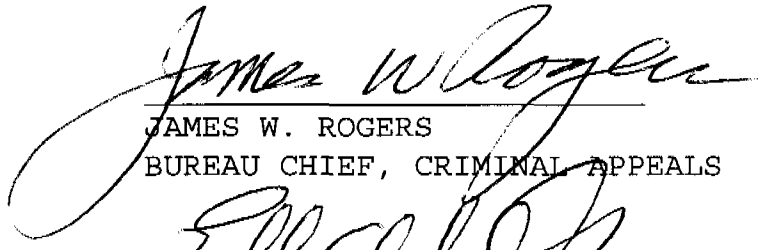
This Court should decline to exercise its jurisdiction to review this issue or, alternatively, deny relief.

CONCLUSION

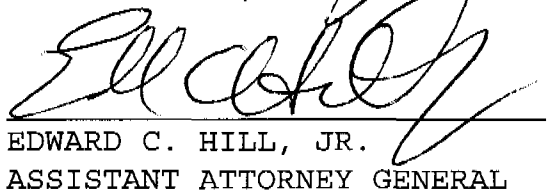
This Honorable Court should answer the certified question in the negative and decline to address the other issues. Alternatively, if these additional issues are addressed, this Court should affirm the decision of the lower tribunal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
BUREAU CHIEF, CRIMINAL APPEALS



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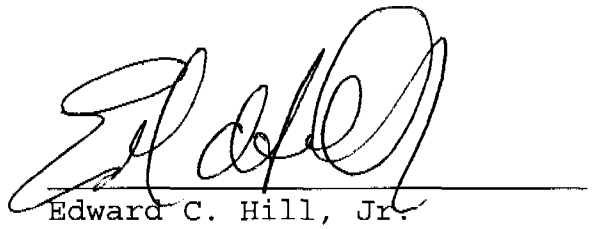
[AGO# 95-111915]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to James T. Miller, Esq., 233 East Bay Street , Suite 920, Jacksonville, Florida 32202 this 21st day of December, 1995.



Edward C. Hill, Jr.
Assistant Attorney General

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