IN THE SUPREME COURT OF FLORIDA

APPEAL NO. SC06-2090

LOWER TRIBUNAL NO.: 2004-01378-CFAWS

STATE OF FLORIDA

vs.

TROY VICTORINO

ON DIRECT APPEAL FROM THE SEVENTH CIRCUIT IN AND FOR VOLUSIA COUNTY

APPELLANTS REPLY BRIEF
CRIMINAL CASE

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1. THE STATE'S RESPONSE TO THE MOTION TO SUPPRESS D.N.A. EVIDENCE

On pages 53-56 of the Answer Brief, the Appellee rests his response on that of the trial court. The Appellant citing from *State V. Irizarry*, 948 So. 2d 39 @42 (5th DCA 2006), claims:

> "when reviewing a motion to suppress, the standard of review for the trial courts factual findings is whether competent, substantial evidence supports the findings. (while the trial court's application of the law is reviewed de novo)."

When the validity of a search rest on consent, the state has the burden of providing that the necessary consent was obtained and that it was freely and voluntarily given. See *Reynolds v. State*, 592 So.2d 1082 @ 1086 (Fla. 1992), *Washington v. State*, 633 So. 2d 362 (Fla. 1995).

In this instance, the Appellant agreed to talk to investigators and waived his rights to any attorney under Miranda, (supp. VI, P.12), at no time during or after the interview did the Appellant consent to the procuring of buccal swabs or nail scrapings (supp. VI, p 16). The Appellee at page 56 of its response claims "the trial court's order is not clearly erroneous", yet legally the trial courts and Appellee has failed to meet the established burden of proof regarding consent.

Furthermore, consent is lacking for it is non-existent and finding officer testimony more credible than the Appellant does not establish the burden of proof; or requirement of *Reynolds*, Supra, and *Washington*, supra. The Appellant has established harmful and clearly erroneous error resulting from abuse of discretion.

2. THE STATE'S RESPONSE TO THE MOTION TO SUPPRESS EVIDENCE FROM VICTORINO'S RESIDENCE

On pages 56-59, the Appellee supports the trial court's determination. Primarily, the State relied on the legal authority of a warrant to search the residence as testified to by investigator G. Laloo (V7 pp 1239-1253). See Exhibit A and B. The prosecutor submitted a consent to search, signed by the owner of the home R. Melendez. As a matter of law, precedence dictates:

> "where the prosecution seeks to rely on a legal authority of a warrant, they cannot upon determination that the warrant is invalid seek to rely on consent.:

See *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968), *Reynolds v. State*, 592 So. 2d 1082 & 1086 (Fla. 1992); *Smith v. State*, 904 So. 2d 534 (Fla. 1st DCA 2003). "A consent to a claim of legal authority cannot be justified by what it uncovers'. The prosecution contends the warrant to search was its legal authority. Pages 46-50 of the Appellant's brief proffers that the law of the court and the United

States Supreme court have condemned the use of false affidavits in applications for a search warrant; including those affidavits that are recklessly false; and after deletion of the statements the warrant would not issue, requiring suppression. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). The 'Good Faith Exception' established in *United States v. Leon*, 468 U.S. 897 @ 923, 104 S. Ct. 3405 (1984) held not applicable where:

> "A warrant may be so facially deficient, i.e. failing to particularize the place to be searched or the things to be seized, that the executing officers, cannot reasonably presume it to be valid.:

A law enforcement officer's misapprehension of the law does not equate to Good Faith. *Frank V. State*, 912 So.2d 329 (Fla. 5th DCA 2005) the 'plain view doctrine' is moot here, as a facially deficient warrant cannot be justified by what it turns up.

3. THE STATE'S RESPONSE TO THE MOTION TO SEVER

On pages 59-64, the Appellee rests his response on that of the trial court. The denial of severance of Co-Defendants is reviewed for an abuse of discretion. *Fotopoulos V. State*, 608 So.2d 784 @ 790 (Fla. 1992) and *Rutherford v. State*, 902 So. 2d 211 (Fla. 5th DCA 2005). The brief of the Appellant expresses the foundation for the relief sought and specifically challenges the trial court's findings which the Appellee relies.

Without detaching from the argument presented, the Appellant expresses that the "Evidentiary" issues, coupled with the *Bruton* type issues, see *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), in addition to the antagonistic defenses presented by the Co-Defendants in violation of the 'legislature intent of jury instruction 3.6 (k)', plus the belief that convenience of trying the Defendants together outweighed the need for justice, and the unnecessary denial of severance to prove conspiracy permitted impermissibly stacked inferences of 'guilt by association' addressed in *United States v. Kelly*, 349 F.2d 720 (2nd. Cir. App. 1965).

These issues, including the admissible relevant evidence, admissible to one defendant but not others, absent limiting instructions and over objection (V.33, pp. 2410, 2413, 2450, 2469) (V.34, pp. 2548, 2591, 2595, 2613) supports the obvious prejudice the Appellant faced during the trial. The denial of severance is clearly fundamental error.

4. THE STATE'S REPSONSE TO THE PRIOR BAD ACTS CLAIM

On pages 64-73, the Appellee quotes the admission of the prior bad acts, as justified by the trial court. The Appellant concurs that absent the procedural time limit expressed at 90.404, all evidence of prior bad acts is relevant and admissible if used to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. However even relevant evidence will be

inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or if introduced to prove a Defendants bad character. *Zack V. State*, 753 So. 2d 9 (Fla. 2000).

Prior bad acts are inadmissible in a trial which the Defendant is not charged within the indictment. *Bundy v. State*, 455 So. 2d 330 (Fla. 1984). None of the allegations made by Brandon Graham were relevant to any matter in dispute, and neither proved motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. (V30, pp. 1981, 1982, 1983), What did occur was that the jurors were asked to focus on the bad character of the Appellant and his propensity to commit a crime, where the allegations submitted to the "Trier of Fact' were solely used to place the Appellant on trial for an event that he was not on trial.

Without detaching from this argument, voir dire began on April 10, 2006 and the admittance of the prior bad acts occurred well after the 10 day time limit established at 90.404. (V30 p. 1979). This supports the Appellant's claim to harmful, reversible error that was hidden behind the 'presumption of corrections' violating *Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005).

5. THE STATE'S RESPONSE TO THE CIRCUMSTANTIAL EVIDENCE STANDARD CLAIM

On pages 73-75, the Appellee relies on the matter of *State v. Law*, 559 So.2d

187 @ 188 (Fla. 1989), seeking to reverse this court's findings and expressions of law dictated at *Ballard v. State*, 923 So.2d 475 (Fla. 2006). First, the defense was proper in its request for judgment of acquittal at the close of the States case in chief. For the reasoning, that first, the defense was unable to cross-examine the testimony of Cannon (V30, pp. 1936-1965), yet, the Appellee cites it as direct evidence on page 94 of the answer brief. Secondly, the testimony of the boots belonging to Victorino were wholly circumstantial where evidence of another wearer D.N.A. was found therein and introduced at trial (V36, pp. 2789-2790). In addition the boots were not seized from the Appellant's person but at a home where numerous residents resided.

Lastly, the Appellant timely requested the Judgment of Acquittal at the close of the State's case. At the time, there existed no testimony from Salas or Hunter. (V35, pp. 2633-2733; V36, pp. 2743-2863).

Regarding the second request for Judgment of Acquittal, the Appellee seeks the court's allowance of the defense of duress or necessity. Wherefore, had they not been permitted to argue an illegal defense the fundamental error would not have occurred.

6. THE STATE'S RESPONSE TO THE HEINOUSNESS AGGRAVATOR

On pages 75-81 the Appellee rests his response on that of the trial court. The Appellant's contention on this matter is expressed in the Appellant's brief from pages 68-74 and the Appellant reiterates his previous argument in response to the answer

brief.

7. THE STATE'S RESPONSE TO THE COLDNESS AGGRAVATOR

On pages 81-84, the Appellee rests his response on that of the trial court. The Appellant's contention on this matter is expressed in the Appellant's brief from pages 75-79, and the Appellant reiterates his previous argument in response to the answer brief.

8. THE STATE'S RESPONSE TO THE MITIGATION CLAIM

On pages 84-89, the Appellee adopts the trial court's findings. The Appellant's contention on this matter is expressed in the Appellant's brief from pages 80-83 and the Appellant reiterates his previous argument in response to the answer brief.

9. THE STATE'S RESPONSE TO THE DISPARATE SENTENCE CLAIM.

On pages 89-90, the Appellee has assumed the position of the "Trier of Fact', and dictated that pursuant to the jury's recommendation that Victorino was in conjunction with Hunter. The driving force behind the homicides. The law and facts as pertaining to this matter are established on pages 83-85 of the Appellant's brief and reiterates his argument as cited therein.

10. THE STATE'S RESPONSE TO THE 'AND/OR' JURY INSTRUCTION CLAIM.

On pages 90-96, the Appellee, submits that cases involving jury instructions with the terms 'and/or' in conjunction of Co-Defendants are not subject to fundamental error analysis or any error review. Foremost, *Reed v. State*, 837 So.2d 366 (Fla. 2002) dictates 'fundamental error is not subject to harmless error analysis because by its very nature fundamental error has to be considered harmful.

The Appellee request the court determine the Appellant to have been convicted based on his own actions, where the evidence did not so much support this; and did not because of the conjunction and/or which has clearly been considered to be improper. A jury cannot be expected to be versed in the sciences of law. The jury instructions are the proscribed Legislature intent, any deviation from such is error.

The cases hold that to include the 'and/or' conjunction between the names of the Co-Defendants in the jury instructions under facts like the instant case results in fundamental error, because it creates a situation in which the jury 'may have' convicted the Appellant solely upon the finding that the Co-Defendants conduct satisfied an element of the offense. *Harris v. State*, 31 Fla. L. Weekly D1691 (Fla. 3rd DCA 2006); *Davis v. State*, 895 So.2d 1195 (Fla. 2nd DCA 2005; *Concepcion v. State*, 857 So.2d 299 (Fla. 5th DCA 2003); *Williams v. State*, 744 So.2d 841 (Fla. 4th DCA 2000).

If not fundamental, this error at minimal reaches the standard of harmful reversible error, and the Appellee has a duty to concede such pursuant to Boca Burger, Inc., @ 571 and *Fusari v. Steinber*, 95 S. Ct. 533 @ 540 (1975)

11. THE STATE'S RESPONSE TO THE CHANGE OF VENUE CLAIM

On pages 96-97, the Appellant submits he has requested and been denied from exceeding the 100 page limitation. See Exhibit C. The Appellant request the court accept these grounds as timely filed and properly responded to. Here, the pretrial motion to move the venue outside of the Seventh Circuit was denied after being made at (V5, pp. 924-926).

12. THE STATE'S RESPONSE TO THE RING V. ARIZONA CLAIM

On pages 97-98, the Appellee adopts the position of the trial court. The Appellant presents his argument at pages 90-93, and reiterates this argument is addressed fully in the brief.

13. THE STATE'S RESPONSE TO THE DUE PROCESS CLAIM

On pages 98-99, the Appellee erroneously contests that a mistrial is effectively the same as a postponement pursuant to a change of venue. The denial of due process is prolific and the Appellee's failure to concede this error as dictated at *Boca Burger, Inc. V. Forum* @ 571 and *Fusari v. Steinber*, 95 S. Ct. 533 @ 540

(1975) is a blatant 'bad faith action'. This error is an affront to the very decorum of justice and constituted jeopardy one it attached. *Snipes v. State*, 733 So.2d 1000 (Fla. 1999) establishes the grounds for seeking relief on the violation of due process of law, citing from *Colorado v. Connelly*, 479 U.S. 157 @ 164 (1986). The 'state action' strikes a violation of the Appellant's guaranteed rights. *High School Activities v. Bradshaw*, 369 So.2d 398 (Fla. 2nd DCA 1979).

Fundamental, mandatory protection against double jeopardy, as cited in *Moody v. State*, 931 So.2d 177 (Fla. App. 2 Dist. 2006) dictates the prohibition against double jeopardy standards. Notwithstanding, Rule 3.640 (A) Fla. R. Crim.P. allowing new trial when granted double jeopardy may not attach. The trial court lacked jurisdiction to begin voir dire or any pretrial proceeding absent formal arrest, notification and proceedings forthwith. Therefore submitting the Appellant to a fundamental and structural error. Additionally, fundamental error is not subject to harmless error analysis because by its very nature fundamental error has to be considered harmful. *Reed v. State*, 937 So.2d 366 (Fla. 2002), further warranting a reversal as a harmful error.

14. THE STATE'S RESPONSE TO ADDITIONAL PREMPTORIES CLAIM.

On pages 99-100, it is the contention of the Appellee that the Appellant has insufficiently briefed this claim. (FN-1).

First, the Appellant attempted to further brief this claim, but was denied by the clerk. Because of the denial to exceed the page limitation, the Appellant was hindered in his ability to further brief this claim.

Lastly, the State was precluded from raising any defenses or objections on this claim as a result of Appellee's duty to concede errors on appeal. See, *Boca Burger*, Inc., @ 571 and *Fusari*, @ 540. The trial court did not follow the rule of the court on peremptory challenges, *Jackson v. Crosby*, 375 F. 3d 1291 @ 1298 (11th Cir. 2004) (discussion on knew or should have known). Additionally, the State took advantage of the court's error despite the established law of *Busby and Trotter*, see *Busby v. State*, 894 So. 2d 88 @ 98 (Fla. 2004); *Trotter v. State*, 576 So.2d 691 (Fla. 1996), thus, the Appellee proceeded to seat a jury and effectively dominate the whole voir dire process.

15. THE STATE'S RESPONSE TO THE MISTRIAL CLAIM

This profound issue is clearly a fundamental denial of cross-examination of a State's witness, as the Appellee noted on page 100 of the answer brief. Cannon's so-called testimony provided direct evidence of Victorino's guilt see (pg. 100 FN. 61). However after his brief "speech to the victim's families" Cannon refused to testify, other than professing his innocence and the Appellant's guilt. (V30, pp. 1936-1965). Counsel for the Appellant attempted to and pleaded with the trial court

to order the witness to respond to cross-examination; however Cannon told the Court he was refusing to testify. (V30, p. 1957). Thereafter, the attempted cross-examination proved fruitless, counsel along with the other remaining co-defendants then moved the court for a mistrial. (V30, p. 1965).

A motion for mistrial was raised, and the exact motion counsel preserved the issue for review was diligent and timely (V30, pp. 1936-1965, 1961). This reversible error violated *Bruton* standards and this courts rulings in *McDuffie v. State*, 970 So.2d (Fla. 2007), and the application of *Crawford v. Washington*, 541 U.S. 36 (2004). "The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and due process right to confront ones' accusers, one accused of crime, therefore has an absolute right to full and fair cross-examination". *McDuffie*, @ 324; citing from *Steinhorst v. State*, 412 So.2d 332 @ 337 (Fla. 1982), see also *Giles v. California* 21 Fla. L. Weekly Fed. S439.

The failure of the Appellee to concede this issue exhibits 'Bad Faith' and is axiomatic of an accused to be free from an order procured by the misrepresenting of facts, *Boca Burger, Inc.*, @ 571, giving credence to the fundamentally harmful reversible error, as previously addressed by this court.

16. THE STATE'S RESPONSE TO A DENIAL OF A MISTRIAL.

On pages 101-102 the Appellee beseeches the court to deny this claim as insufficiently briefed. Again Appellant attempted to further brief this claim, but was

denied by the clerk. (FN-1). See Exhibit D. On this attempt the Appellee was informed of its ethical duty to concede errors on appeal and the State's response did not refute this duty.

On (V32, p.2233, V38, p. 3102) a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Perez v. State,* 919 So. 2d 347 (Fla. 2005); *Goodwin v. State*, 751 So. 2d 537 @ 546 (Fla. 1999). Upon a showing that judicial action is arbitrary, fanciful or unreasonable discretion is abused only where no reasonable person would take the view adopted by the trial court. See *Trease v. State*, 768 So.2d 1050 @ 1053 (Fla. 2000) quoting *Huff v. State*, 564 So.2d 1247 @ 1247 (Fla. 1990). As a matter of law and ethical decorum, the illegal defenses put forth by the defendants could have been cured by severance or mistrial and undoubtedly contributed to the verdict. The denial of full cross-examination of Cannon was violative of the Sixth Amendment and due process and could only have been cured by declaring a mistrial. At minimum, these errors all constitute reversal and profound abuse of discretion subject to review by this court.

17. THE STATE'S RESPONSE TO THE IRRELEVANT EVIDENCE CLAIM

On page 102, the Appellee seeks to persuade the court to allow it the ability to hide behind the 'presumption of correctness' condemned at *Boca Burger, Inc*., 571 and not concede his error as evidenced by their response. See Exhibit E. This court has previously determined that broad discretion rests with the trial court to determine

whether probative values of evidence sought to be admitted is substantially outweighed by unfair prejudice and the trial court's decision to admit into evidence items will not be disturbed absent a showing of an abuse of discretion. *Zack V. State*, 911 So. 2d 1190 (Fla. 2005) quoting from *Heath v. State*, 648 So.2d 660 @ 664 (Fla. 1994).

Relevancy is not the only test for admissibility of evidence rule requiring the weighing of relevancy against unfair prejudice. *Sexton v. State*, 697 So.2d 833 (Fla. 1997). The trial court's function is to weigh the danger of unfair prejudice in admitting relevant evidence against the probative value of the evidence; and in doing so the trial court should consider the need for the evidence; the tendency of the evidence to suggest an improper basis for the jury to resolve the matter, such as on emotional basis, the chain of inference necessary to establish the material fact and the effectiveness of a limiting instruction. *State v. Sawyer*, 561 So.2d 278 (Fla. 2nd DCA 1990). The record at (V33, pp. 2410, 2413, 2450, 2463, 2469, 2473, V34, pp. 2521, 2537, 2548, 2591, 2595, 2613) cites incidents where counsel timely objected to evidence submitted that bore no relevance to him but a Co-Defendant and without a limiting instruction, thus constituting a flagrant reversible error clearly evident on the record and preserved for review.

18. THE STATE'S RESPONSE TO THE CUMULATIVE ERROR CLAIM

On pages 102-103, the Appellee unsuccessfully denies this claim, whereas, the record here on appeal speaks contrary to such. Primarily, this court has deemed it appropriate to evaluate claims of error cumulative to determine if the errors collectively warrant a new trial. *Rodgers v. State*, 32 Fla, L. Weekly S41 @ S46 and *Suggs v. State*, 923 So.2d 419 441-42 (Fla. 2005). This court also rendered that an Appellee cannot hide behind the presumption of correctness of an order that the Appellee itself procured.

CONCLUSION

Based on the foregoing arguments the Appellant respectfully submits his judgment and sentence be reversed and he be granted a new trial.

CERTIFICATE OF FONT

That Appellant certifies that this brief is typed in New Times Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand/courier delivery/U.S. mail/e-mail to the Florida Supreme Court, 500 South Duval Street, Tallassee, Florida 32399-1927, Office of the State Attorney,

251 North Ridgewood Ave. Daytona Beach Florida 32114; by U. S. Mail delivery to the Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118; and to the Defendant/Appellant this _____ day of October 2008.

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