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IN THE SUPREME COURT OF FLORIDA

JOHN KALISZ,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC12-580
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The original record on appeal comprises sixteen consecutively numbered volumes. The pages of the first seven volumes are numbered consecutively from 1 to 1,076. Volume eight begins renumbering the pages sequentially from page 1 to 214. Volume nine begins renumbering the pages sequentially from page 1 to 1325. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

SUMMARY OF ARGUMENTS

Point I: The trial court should have suppressed Kalisz's hospital bed statement to police. Kalisz's statement was inadmissible because the police interrogated him while he was incapacitated from the side effects of drugs taken

for injuries suffered during his arrest. Law enforcement questioned the appellant during a period where the appellant demonstrated obvious cognitive impairment. The appellant had disorientation, confusion, mental clouding, short attention span, sedation, altered speech and tangential thought. The appellant has had a lengthy history of prior arrests and stated he knew his ***Miranda***[1] rights. But when asked whether he was waiving his rights, the appellant did not answer. Given that the appellant gave no express waiver of ***Miranda***; given that the appellant was immobile in a hospital bed and was not free to leave; and given that the appellant was not advised of the charges against him before questioning began all create the totality of circumstances that the appellant's questioning was done without a knowing and voluntary waiver of his right to remain silent and have counsel present during questioning.

The erroneous admission of statements obtained in violation of ***Miranda*** rights is subject to harmless error analysis. There was overwhelming evidence of the appellant's guilt. The appellant concedes that based upon the entire appellate record, the admission of the statements by the appellant was harmless error and did not substantially contribute to the first-degree murder convictions. However, the statements that the appellant made on January 27 was essential to prove the

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[1]***Miranda v. Arizona***, 384 U.S. 436 (1966)

CCP aggravating factor. Under the circumstances of this case, the State is unable to sustain its heavy burden related to the penalty phase. Therefore, the appellant's death sentence should be reversed and a new penalty phase ordered with the exclusion of the appellant's admissions made at the hospital on January 27, 2010.

Point II: The trial court provided a short sentencing order concluding that the appellant knowingly created a great risk of death to many persons during the murder of Kathryn Donovan and Deborah Tillotson. Not counting the murder victim Kathryn Donovan, the appellant shot Deborah Tillotson, Manessa Donovan and Amy Wilson. This does not meet the threshold stated by this Court in ***Johnson v. State***, 696 So.2d 317 (Fla. 1997) on a numerical basis because this Court has defined "many persons" as four people in addition to the victim being put in great risk of death by the appellant. It also was individual shootings, and no other person was at risk of death while the appellant shot each victim in different places at Kathryn Donovan's home. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

Point III: The trial court claimed in the sentencing order that the avoiding arrest aggravating circumstance was proven but under the circumstances should be given moderate weight. In this case the victims in this case were not law

enforcement officers, the supporting evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." ***Preston v. State***, 607 So.2d 404 (Fla. 1992) The trial court found that the circumstances surrounding the crime clearly show it was the motive. This finding was error.

In the instant case there is direct evidence of the appellant's motive for the shootings. In fact, the trial court identified in his sentencing order the precise motive for the shootings. In the sentencing order the trial court stated: "He had one intention upon entering the residence and that was to kill all of its occupants." When interview by law enforcement the appellant stated that he bought a gun to conduct an operation against his sister Kitty. The appellant had been planing the operation for a while. The operation was to "erase the hell out (of) that Kitty and her blood line." Therefore the motive of the murder of Kathryn Donovan and Deborah Tillotson was not to avoid arrest, but rather a revenge killing of his sister, his sister's family and friends. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

Point IV: In imposing the death penalty, Judge Merritt found that the State

had proved six aggravating circumstances. The aggravating factors the that the appellant knowingly created a great risk of death to many persons and the murder was committed for the purpose of avoiding arrest should not have been before the jury and were improperly found. Moreover, that the finding that murder was committed in a cold, calculated and premeditated manner may not be proper in the event this Court was to accept the argument in Point I and exclude the statements by the appellant made during his recovery in the hospital. This Court should find that the trial court's actions in the penalty phase do not meet the test that this Court laid down in ***State v. Dixon***, 283 So. 2d 1 (Fla. 1973), and this Court should order a new penalty phase evidentiary hearing before a jury to give a new recommendation without the taint of the confession, and without the improper instruction on aggravating factors that do not apply.

Point V: In the guilt phase trial, the appellant objected to the introduction of autopsy photograph of victim Tillotson and Donovan on the grounds that the gruesome picture was prejudicial and did not prove any fact in dispute. Great care should be taken prior to waving ghastly pictures in front of lay jurors who may never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt and as in appellant's case, penalty.

Point VI: The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. The appellant urged the trial court to have this evidence presented to the trial court after the jury made a sentencing recommendation. The trial court followed the law of this Court and ruled the evidence admissible.

Point VII: The present death penalty scheme is unconstitutional pursuant to the United States Supreme Court decision of ***Ring v. Arizona***, 536 U.S. 584 (2002). At this time, Appellant asks this Court to reconsider its position in ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied***, 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So. 2d 143 (Fla. 2002), ***cert. denied***, 537 U.S. 1069 (2002) because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS STATEMENT OBTAINED WHILE THE APPELLANT WAS INCAPACITATED FROM INJURIES SUFFERED DURING HIS ARREST.

The appellee argues in his Answer Brief that the state does not need to show that a waiver of ***Miranda*** rights was express. "A defendant may waive the right to remain silent by responding to questions by the interrogating officer." Answer Brief page 48. The appellee's statement is true but incomplete. If the State establishes that a ***Miranda*** warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate "a valid waiver" of ***Miranda*** rights. ***Miranda vs. Arizona***, 384 US 436, 475 (1966) The prosecution must make the additional showing that the accused understood these rights. See ***Colorado* v. *Spring***, 479 U.S. 564, 573-575 (1987); Cf. ***Tague v. Louisiana***, 444 U.S. 469, 469, 471 (1980) *(per curiam)* (no evidence that accused understood his ***Miranda*** rights). Where the prosecution shows that a ***Miranda*** warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.

The appellant argues that the state failed to demonstrate that the appellant

understood the waiver of ***Miranda*** rights due to his incapacity in the hospital while recovering from gunshot wounds. The appellant could not possibly waive his ***Miranda*** rights when he was not orientated to time and place, nor advised of the charges against him.

The appellee lists ***Escobar v. State***, 699 So.2d 988 (Fla. 1997) for the proposition that a statement provided while the defendant was hospitalized and been administered pain medicine may be admissible. Like the instant case, ***Escobar*** was recovering in a hospital from gunshot wounds when interrogated by law enforcement. However, ***Escobar*** is distinguishable from the instant case. In ***Escobar*** the State presented the testimony of a treating nurse who attended Escobar for three days prior to and including the day of the police interrogation. The nurse testified that appellant was awake and oriented as to time, place, and circumstances. The nurse also testified that appellant had a very high tolerance for morphine. The trial court in ***Escobar*** found that the nurse's testimony was very credible in finding that Escobar understood his ***Miranda*** rights. By contrast, in the instant case the hospital clinical social worker Michael Johnson's progress notes stated that the appellant was orientated to self ***but not correct to place or date***.

The ***Escobar*** case is further distinguishable from the instant case because in

Escobar, the defense presented testimony from the treating physician and a non-treating psychiatrist that based upon the morphine dosage given Escobar alone he could not have intelligently waived his ***Miranda*** rights. In Escobar the trial court dismissed both physician's testimony based upon the eyewitness testimony of Escobar's treating nurse. By contrast, the record of Kalisz's interrogation demonstrated on its face that law enforcement questioned the appellant during a period where the appellant demonstrated obvious cognitive impairment. The appellant had disorientation, confusion, mental clouding, short attention span, sedation, altered speech and tangential thought.

Therefore, given that social worker Michael Johnson's progress notes stated that the appellant was orientated to self but not correct to place or date; given that the appellant gave no express waiver of ***Miranda***; given that the appellant was immobile in a hospital bed and was not free to leave; and given that the appellant was not advised of the charges against him before questioning began all create the totality of circumstances that the appellant's questioning was done without a knowing and voluntary waiver of his right to remain silent and have counsel present during questioning.

POINT II

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The trial court found that the appellant put a great risk of harm to four people when he came to his sisters house and began shooting the house occupants. The trial court argued that since appellant shot indiscriminately at four people that qualifies as "many" for numerical requirement of this aggravating factor. Put another way the trial court argues that this aggravating factor should be applicable where the facts demonstrate that the victim plus three others are threatened with a great risk of death. This Court in ***Johnson v. State***, 696 So.2d 317 (Fla. 1997) has defined "many" differently and held that:

> We have stated that this aggravator cannot be supported in situations where death to many people is merely a possibility. Instead, there must be a likelihood or high probability of death to many people. (Citations omitted) Further, we have indicated that the word "many" must be read plainly. Therefore, we uphold the application of this aggravating circumstance in scenarios in which four or more persons other than the victim are threatened with a great risk of death. (Citations omitted)

Johnson at 327. Therefore, the aggravating factor is not applicable.

The appellee wishes to reach the numerical requirement of ***Johnson*** by arguing that a separate crime committed in Dixie County after Kalisz fled his sister's home in Hernando County should be considered as one episode. There is no authority for this expansion of the aggravating factor. Moreover, the murder in Dixie County is already being considered as a prior violent felony for the Prior Violent Felony Aggravator circumstance. To also consider the murder in Dixie County for the Great Risk of Harm to Many People aggravating circumstance as well as Prior Violent Felony would be improper doubling of aggravating circumstances and therefore should be rejected.

POINT III

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED IN FINDING THAT THE SOLE OR DOMINANT MOTIVE OF THE CAPITAL FELONIES WAS THE ELIMINATION OF THE WITNESSES.

The elements of the Avoiding Arrest aggravator are:

1. The defendant committed a capital felony, and,

2. the dominant motive for the commission of the capital felony was:

    a. to avoid a lawful arrest, or

    b. to prevent a lawful arrest, or

    c. to effect an escape from custody.

In the instant case there is direct evidence of the appellant's motive for the shootings. The trial court identified in his sentencing order the precise motive for the shootings. In the sentencing order the trial court stated: "He had one intention upon entering the residence and that was to kill all of its occupants." This was a revenge killing during an emotional disturbance.

Despite the trial court sentencing order, the appellee argues that the circumstantial evidence of the appellant's motive trumps the direct evidence of the appellant's motive detailed by the trial court. Consistent with this Court's ruling in ***Swafford v. State***, 533 So. 2d 270 (Fla. 1988) the appellee listed the following

circumstantial factors to support this aggravating circumstance:

1) Kalisz admitted that he had a plan to "take care" of his sister and that he did not care who stood in his way.

2) Kalisz admitted that he meant to shoot anyone he saw during the slaughter at the Donovan home.

3) Kalisz made no attempts to conceal his identity.

4) Some victim's knew Kalisz and the others got a good look at him.

5) None of the victim's offered resistance.

Items 3 through 5 above under this Court's decisions is circumstantial evidence that the appellant's dominant motive to murder his victims was to eliminate them as witnesses. However, when the totality of circumstances of this horrific crime is understood this aggravating circumstance does not apply.

The appellant went to his sister's house to kill everyone. He actions leading up to the crime clearly demonstrate that he was emotionally disturbed and Kalisz did not attempt to conceal his actions evidenced by his call to Todd Linville after the murders. The appellant told Linville that his sister ruined his life, so he ruined her life. The appellant blamed his sister for his problems including losing his job in Colorado and losing his inheritance. The appellant further told Linville that he was thinking of heading to the Keys and if anyone tried to stop him the

that he was thinking of heading to the Keys and if anyone tried to stop him the appellant would put his gun to his head.

The actions of appellant throughout his criminal episode clearly distinguish it from the case of ***Correll v. State***, 523 So.2d 562 (Fla. 1988) listed by the appellee. In ***Correll*** the appellant committed a sexual battery on his ex-wife and then killed his ex-wife. As a consequence, anyone else that came to the house that could implicate him in his crimes was murdered. The appellant by contrast did not conceal his crimes and was motivated by revenge to go to his sister's house and kill her and her family and friends. The appellee's arguments concerning this aggravating circumstance should be rejected by this Court.

POINT IV

IN REPLY AND IN SUPPORT APPELLANT'S DEATH SENTENCE MUST BE REVERSED AND A NEW PENALTY PHASE TRIAL ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER STATUTORY AGGRAVATION THEREBY TAINTING THE JURY RECOMMENDATION.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY AND IN SUPPORT THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE OVERLY GRUESOME AND NOT RELEVANT TO ANY CONTESTED ISSUE.

The appellant relies upon the initial brief in reply to the appellee.

POINT VI

IN REPLY AND IN SUPPORT THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The appellant relies upon the initial brief in reply to the appellee.

POINT VII

IN REPLY AND IN SUPPORT FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the sentences of death and order an new penalty phase trial with a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, Daytona Beach, Florida, and mailed to John Kalisz, DOC #U38267, Florida State Prison 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 25th day of March, 2013.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER