IN THE SUPREME COURT OF THE STATE OF FLORIDA

BYRON BRYANT,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 94,902
	)	
STATE OF FLORIDA,	)	
	)	
Appellee	)	
______________________________	)	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the lower tribunal. In this Brief, the parties will be referred to as they appeared before the lower tribunal.

The following symbols will be used:

(R) denotes the Record on Appeal.

(T) denotes Transcript of Testimony.

(SR) denotes Supplemental Record on Appeal.

(AB) denotes Appellee's Answer Brief.

In accord with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

FOREWORD

Appellant replies only to the arguments presented in Appellee's Answer Brief as to Point I.

Appellant does not abandon his arguments as to Points II - VII, but feels that it is unnecessary to reiterate herein the arguments expressed in Appellee's Initial Brief. The arguments raised in the Answer Brief as to those Points do not require reply, and Appellant stands on his arguments as previously presented.

ARGUMENT

POINT I

THE LOWER TRIBUNAL ERRED IN REQUIRING THE DEFENDANT TO BE SHACKLED BEFORE THE JURY.

In its Answer Brief, Appellee suggests that the basis for the Court's ruling that Defendant would be shackled in court was the fact that he had witnessed the Defendant throw a chair through the air at the prosecutor and toward the jury (AB at 10). That argument simply mischaracterizes the record below. In fact, the Court's decision that the Defendant would be restrained was announced during the week prior to trial (T 37). The Court made absolutely clear that the decision that the Defendant was to wear restraints and also the decision as to the type of restraints to be worn by the Defendant would be made by the Sheriff and the Correctional staff (T 39-40). When the Defendant objected to wearing the restraints prior to trial (T 15-16), the Court made clear that its decision that the Defendant would be restrained was made because

> THE COURT: . . . I defer to Corrections and Corrections had told me, and I will get the Sergeant to confirm that, they want either the belt or the chain restraints, and Sergeant, let's get your name. You're the supervising officer here, if

you would, Sergeant?

SERGEANT O'BRIEN: O'Brien. Yes, Your Honor, we wish for him either to be in the chain restraints or in the belt.

THE COURT: All right.

That's the way it will be then, Mr. Bryant, I'm sorry.

The reason that the Defendant was restrained, was that the Correctional staff and the Sheriff's Office believed that he should be restrained.

Appellee's argument that there was a standing Order that the Appellant would appear in shackles before Judge Mounts since the proceedings in his prior case is made without record citation and without support in the record. A review of the Appendix referenced in support of that argument makes clear that the only issue before this Court with regard to the prior proceedings was whether the Defendant should have had his Phase II hearing before a new jury when he had thrown a chair at the Prosecution at the end of that case. Appellee's attempt to claim that the limited Order in that case constituted a standing Order which either remained in effect through this case or was somehow elevated to law of the case status by virtue of the prior appellate proceedings misunderstands the state of the record and misapprehends the argument presented via

the appendix.[1]

Appellee's argument with regard to the request for hearing and requirement before allowing the Defendant to appear before the Court in shackles is similarly flawed. In Bello v. State, 547 So.2d 914 (Fla. 1989), this Court noted that there was no record evidence supporting the need for shackles and despite the Defendant's objection to the restraints and request for inquiry, the judge apparently deferred to the Sheriff's judgment. Bello, at 918. Here the situation is virtually identical. Appellee seeks to find support in the record for the wearing of restrains by referencing an incident which had occurred before the lower tribunal in 1993. Clearly it was not that incident nor the "book throwing incident" that led the Court to decide that restraints were necessary. Indeed, the lower tribunal advised defense counsel

> THE COURT: Now, on the other hand, if you can talk the Correctional staff into the view that they have sufficient people that he doesn't need the restraints and so forth and they agree that no restraints are necessary, it's their choice,

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[1] This Court's previous reversal of this cause in Bryant v. State, 656 So.2d 426 (Fla. 1995), made clear that the issue now claimed as law of the case was neither considered nor decided by this Court. The decision of this Court expressly indicated that it considered only one sentencing issue, that being the question of whether the sentencing Order complied with the requirements announced in Campbell v. State, 571 So.2d 415 (Fla. 1990).

that's fine with me (SR 40).

The Court further advised counsel:

> THE COURT: The security measures requested by the directions are within the province of the Sheriff. The Sheriff chooses, not the Court. (T 44-45)

The need for a hearing was underscored by the argument of counsel, where, when the Court was considering the continued use of the restraints, the following colloquy occurred:

> THE COURT: I assume Corrections
> still is under their direction from their superiors to keep him in restraints even though he testifies, is that correct?
>
> THE JAILER: That's correct.
>
> THE COURT: That's Correctional Officer?
>
> DEPUTY ROBBINS: R-O-B-B-I-N-S.
>
> THE COURT: All right, Mr. Robbins.
>
> MR. DUBINER: Judge, just to make it clear, I'm not quarreling with Court, but that is a determination that the Court needs to make. I'm suggesting to the Court that you need to make that determination by means of an evidentiary hearing as opposed to deferring to Corrections.

THE COURT: All right, I don't need an evidentiary hearing. I was present and saw the throwing of a huge heavy chair and witnessed it along with everybody else that's in the courtroom. I have never seen a more violent act in a Court of law in all of my years, which is, I guess, 38, 39, somewhere in there, and also it's not part of this record yet, but this, the Appellate Court, your client is charged, not convicted, but charged, I believe, with an aggravated battery that occurred when he was confined and it is my understanding that that charge is going to go forward to trial, is that correct?

MR. GALO: State's intentions, yes, sir, Your Honor.[2]

THE COURT: It's not one of those where the victim or -- has indicated that he or she wishes to withdraw, so I mean that's all the evidentiary hearing I need.

MR. DUBINER: Judge, I would point out, again, I don't mean to quarrel but you're making a record and I need to as

[2]Prosecution was abandoned in that case.

well, but the throwing of the chair was approximately five or six years ago, as we stated before, and the Court would need to determine whether or not that is something that is a present risk as opposed to past conduct.

THE COURT: Well, I don't know what the date of the alleged aggravated battery while confined was but that occurred after the throwing of the chair and the throwing of the chair, of course, occurred after the book was thrown at Judge Colbath, not in the direction of Judge Colbath, but at Judge Colbath, according to the accounts I have heard.

MR. DUBINER: Yes, sir, and I was not present. I assume the Court was not present during the Judge Colbath incident.

THE COURT: No, I wasn't.

MR. DUBINER: Obviously, we would suggest that the Court needs to have any evidentiary hearing to determine the facts of that in order to determine the restraints appropriately but I will stop here.

MR. GALO: Could I briefly put on the record in the Court file the Defendant was convicted of three counts of

contempt in the same case numbers? One of the cases already's in Evidence in a previous matter regarding that chair throwing, Judge Colbath's record should reflect.

THE COURT: Not the chair throwing.

MR. GALO: Excuse me, the book throwing.

THE COURT: The chair throwing, I didn't cite him for contempt. It seems to me that the conviction was -- that was enough.

MR. GALO: I misstated. I apologize. But it was the book throwing that the Defendant was convicted of three counts of contempt and the State has certified copies of the convictions. I believe they're already in, in the previous sentencing hearing, the same case number as the sexual battery and the grand theft charge that was imposed on the Defendant, so the record should reflect at least there was a finding by the Court of such contempt.

MR. DUBINER: Judge, I'm not certain of this but I believe that the contempt citations were withdrawn but I'm not certain. I have not researched the contempt.

> THE COURT: They were either withdrawn or he gave him time served or no -- there was no punishment exacted is my recollection. But I don't remember. Whatever the record shows it shows, okay? (P 743-747).

It requires an incredible leap in logic to find the State of that record to reflect that "it is clear the parties agreed Appellant had committed two violent acts in court (throwing a chair and a book) and had been charged with aggravated battery while in jail after the chair throwing incident." (AB at 13).

For Appellee now to suggest that Defendant did not make an argument before this Court which factually challenged whether Defendant should have been tried in the lower tribunal while in restraints mischaracterizes the role of this Court. Appellant made every attempt to address those arguments in an evidentiary hearing before the lower tribunal. The lower tribunal refused to allow such a hearing, and refused to allow Appellant to present evidence going to the issue of the length of time between the incident and the retrial, the nature of the situation, and whether the incidents not observed by the lower tribunal even took place as the lower tribunal recalled them. It would not be proper to make those arguments outside of the record before this Court. It was the responsibility of the lower tribunal to consider its decisions based on record evidence, and not rank speculation. The lower tribunal refused to allow Appellant to

make a record that could be argued before this Court. The record in this case does not present "extensive, unrefuted evidence of Appellant's violent courtroom behavior." (AB at 16). In fact, no such evidence was ever developed before the lower tribunal. The error presented by virtue of the actions of the lower tribunal cannot possibly be deemed harmless, especially in light of the statements of the jurors as set forth in greater detail in Appellant's Initial Brief.

CONCLUSION

For the reasons stated herein, Defendant respectfully requests this Honorable Court vacate the judgment of conviction as to Points I and V and or remand this cause for a new sentencing phase, with regard to Points II, III, IV, VI, and VII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Leslie Campbell, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 5th day of July, 2000.

MICHAEL DUBINER, ESQ.

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MARK WILENSKY, ESQ.