

MAY 29, 1990

IN THE COURT OF  
CRIMINAL APPEALS OF THE  
STATE OF ALABAMA

RONALD PATRICK SWINEY,

APPELLANT,

VS.

CASE NO.: 89-95

STATE OF ALABAMA,

APPELLEE. /

APPEAL FROM THE CIRCUIT COURT OF  
SHELBY COUNTY, ALABAMA

REPLY BRIEF OF THE APPELLANT

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REPLY

I

The State has taken the position that the failure of the minute entry in the instant case to reflect the Defendant's waiver of his right to a jury trial on the issue of punishment is acceptable practice. (State's Brief page 20) Long after any transcript or appellate record is destroyed or lost in this case, time will not destroy the minute entry by the clerk reflecting the events of this case. In an abundance of caution, the appellant submits that the record of the punishment phase of the Defendant's trial should be memorialized in the minute entry.

II

This Court considered the facts in *Ex parte Mauricio*, 523 So.2d 87 (Ala.1987) which involves a "fact-intense" case of the charge of murder of the Defendant's new born child. The Supreme Court of Alabama cited their decision of *Ex parte Acree*, 63 Ala. 234 (1879) holding that a Defendant should not be convicted on circumstantial evidence unless it shows by full measure of proof that the Defendant is guilty.

In *Fuquay v. State*, 22 Ala.App. 243, 246, 114 So.2d 892, rev'd. on other grounds 217 Ala.4, 114 So.898 (1927) the Alabama Court of Appeals opined in a case involving the charge of bigamy that circumstantial evidence is always insufficient if some other hypothesis may exist as to the occurrence of that fact.

Certainly it is apparent that the State gives only of mere mention to the *Mauricio*, et. supra, decision. The hard and fast reality of *Mauricio* tends to show the extreme weakness of the case against the Defendant and the lack of proof of the elements of the charge of capital murder under §13A-5-40 (a) (10), *Code of Alabama* (1975). Another review of the State's lack of evidence in this case is helpful in light of the *Mauricio* decision.

First, it was not proven that Pate was shot by Swiney or with gun alleged to be use by Swiney to kill Betty Swiney. This is very important when considering the charge in the indictment that both Mrs. Swiney and Mr. Pate were killed by the Defendant as the result of one act or series of acts or one scheme. Certainly the facts in this particular case do not

indicate that any facts were proffered during the trial to prove this fact.

Second, there has been no proof of the times of death of either Mrs. Swiney or Mr. Pate offered during the trial of this case. Further, in support of the Defendant's position, the Supreme Court stated in *Mauricio*, supra, "circumstantial evidence must not only be consistent with guilt, but must also be inconsistent with any rational hypothesis of innocence." This statement of the test of circumstantial evidence lays heavily in favor of the Defendant in this case. This case is due to be reversed and rendered.

### III

The state cites the decisions of this Court in *Sides v. State*, 487 So.2d 1008 (Ala.Crim.App. 1986), *Uldric v. State*, 43 Ala.App.477, 192 So.2d 736 (1966), cert. denied 280 Ala. 718, 193 So.2d 739 (1966) in support of the trial courts' denial of the Defendant's Motion for Mistrial. (States Brief, page 38) *Sides*, supra, recites that the single outburst of the prosecutrix in a rape case is insufficient grounds for a

mistrial when coupled with curative instruction from the court. *Uldric, supra*, reveals facts of an outburst by the widow of a deceased during the closing argument. Again, the instructions of the trial court were deemed sufficient to alleviate the prejudicial condition created by the incident.

The Defendant agrees that the granting of a mistrial is the decision that must be used to avoid a miscarriage of justice created by a fundamental flaw in the trial procedure. *Floyd v. State*, 412 So.2d 826 (Ala.Crim.App. 1981). The primary function of the trial procedure is to provide a forum for the determination of guilt or innocence of the Defendant through due process of law. *Article I Section 6 Constitution of Alabama*, 1901. The function of the jury in this procedure can not be over stated in any manner. The attempt to implant illegal evidence into the minds of the jurors by prosecutors or witness should not be tolerated by either the trial court or by this court. *Collum v. State*, 21 Ala.App. 220, 170 So. 35 (1926) and *White v. State* 25 Ala.App. 323, 146 So. 85 (1933).

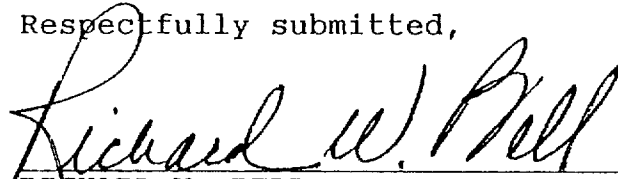
A critical aspect of Mrs. Snow's testimony is the duplicity of the statements made by her even after admonition and instruction by the trial judge. *Kendrick v. State*, 444

So.2d 905 (Ala.Crim.App.1984) involved two (2) witnesses who referred to "warrants" and "murder scene". The instant case presents a direct accusation of the ultimate issue in controversy to be determined by the jury. Again, Mrs. Snow corrupted the function of the jury in this case. The trial judge was required to admonish Mrs. Snow on three (3) different occasions for statements made in the presence of the jury. It was certainly highly prejudicially and inflammatory in light of the charges against the Defendant.

Where an individual is to be deprived of his life or liberty for the remainder of his life which is directly dependent upon a jury decision, toleration of this type of conduct is outrageous and unacceptable. *Collum and White, supra*. In addition, the State's characterization of the decisions of *Collum and White* as "old cases" infers their inapplicability to the instant case. The "old" *United States Constitution* and the "old" *Alabama Constitution* certainly provide a basis for the Defendant's argument and the decisions in *Collum and White, supra*. The Defendant submits that not only the provisions of the *United States Constitution* and the

*Constitution of Alabama* are alive and well, but the decisions in *Collum and White, supra*, are also directly applicable to the instant case. The trial judge was due to have declared a mistrial in the instant case.

Respectfully submitted,

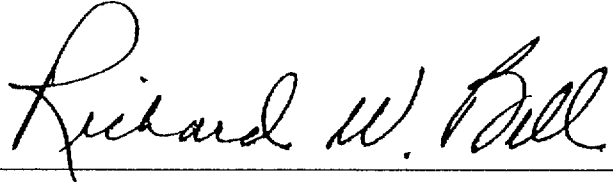
A handwritten signature in cursive script that reads "Richard W. Bell". The signature is written in dark ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Reply Brief by the Appellant upon the Attorney General, Don Siegelman, Office of the Attorney General; Alabama State House, 11 South Union Street, Montgomery, Alabama 36130 by placing same in the United States Mail, postage prepaid and properly addressed on this the 27<sup>th</sup> day of May, 1990.



RICHARD W. BELL