IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 59,140
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE THERE EXISTED A CONFLICT OF INTEREST SINCE THE DEFENDANT'S COUNSEL HAD REPRESENTED THE STATE'S KEY WITNESS AND HAD ACCESS TO PRIOR, IMPEACHING STATEMENTS.

In its answer brief the state has attempted to distinguish the case of Foster v. State, 387 So.2d 344 (Fla. 1980), by pointing out that the joint representation was not allowed to continue until trial in the instant cause. However, the attorney general makes a distinction without a difference. The conflict exists just as strongly in a case where counsel has previously represented a person who is now testifying against a current client, where impeaching

information is known to the attorney by the prior representation. The legal representation of the current client is impaired by the existence of conflicting interests to a prior client.

The state argues that if this Court were to accept the appellant's contention it "would require the public defender to withdraw from representation of the Appellant." (Appellee's Answer Brief, pp. 7-8) This is exactly the appellant's contention. This is precisely the situation envisioned by the Olds court in its statement that this conflict could not be countenanced. Olds v. State, 302 So.2d 787,792 (Fla. 4th DCA 1974), cert. denied 312 So.2d 743 (Fla. 1975). (See Appellant's Initial Brief, pp. 11-12)

Because of the obvious conflict of interests, Gregory Mills was denied his right to the effective assistance of counsel. A new trial with a specially appointed private attorney is required.

POINT III

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AND EVIDENCE OF GUNSHOT RESIDUE TESTS WHICH TESTS WERE NOT SHOWN TO BE RELIABLE, WERE USED TO IMPROPERLY BOLSTER THE TESTIMONY OF A STATE'S WITNESS, AND WERE NOT CONCLUSIVE.

The appellee argues in response to this contention that the defendant's objection at trial was insufficient and failed to alert the trial court to the challenge now before this Court. (Appellee's Answer Brief, p. 18) The objection interposed by defense counsel was not vague. The defense told the court that the state had failed to lay a sufficient predicate to show that these unreliable, inconclusive tests should be admissible in a court of law. (R304) This is precisely the ground sought to be reviewed by this point in the appeal.

The attorney general next quotes in length from defense counsel's cross-examination in order to argue that the tests were reliable. (Appellee's Answer Brief, pp. 19-20) However, the appellee omits that portion of the cross-examination dealing with the potential unreliability and actual inconclusiveness of the tests. See R 305-306 (where the state's witness admitted that numerous factors could effect the accuracy of the results); R 388-392 (where the witness stated that most people walking the streets have

traces of antimony without ever having fired a gun); and R 392-393,395-396 (where he admitted that contact with certain metals, e.g., lead, could produce results similar to that from gunshot residue). (See Appellant's Initial Brief, pp. 20-22.)

The state must prove a defendant's guilt beyond a reasonable doubt. The prosecution must not just prove probabilities or possibilities. But, in admitting the inconclusive antimony residue test results, this is precisely what the trial court allowed the state to do. Evidence which only renders probable or possible the existence of a fact in issue should be excluded where it is misleading, confusing, or inconclusive. See cases cited in Appellant's Initial Brief, pp. 24-25. The test results in the instant case clearly fall under the "inconclusive," "confusing," and "misleading" labels, a fact which the state chooses to ignore. Testimony by a state witness shows that the results obtained from the defendant's hands, although slightly higher than normal, were far below the amount necessary to be conclusive. (R384,386-392) The appellant does not have to prove the test results to be unreliable or inconclusive where the state's witness has conceded this fact and the state has not demonstrated otherwise beyond a reasonable doubt. The evidence of the residue test results presented to the jury prejudiced the defendant since, although admittedly inconclusive, it invited speculation into probabilities by the jury. The results of these tests on Ashley and the defendant were erroneously admitted. A new trial is required.

POINT IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE COURT ERRED IN DENYING THE MOTION TO DISMISS THE INDICTMENT AND IN ADJUDICATING THE DEFENDANT GUILTY OF THE OFFENSES WHERE THE INDICTMENT FAILED TO PROPERLY AND ADEQUATELY CHARGE THE OFFENSES OF BURGLARY AND FELONY MURDER.

In answering this claim, the state admits the appellant's entire argument:

> If fault exists in the charging instrument, it is that the indictment is overly broad.... (Appellee's Answer Brief, p. 25.)

In Lee v. State, 385 So.2d 1149 (Fla. 4th DCA 1980), the court held that the charging document must not be overly broad as to the specific crime allegedly intended to have been committed therein. The indictment here, as conceded by the attorney general, is overbroad in alleging many specific intents when it stated as to Counts 1 and 2 that the defendant burglarized the named structure (and killing during the burglary):

> with the intent to commit an offense therein, to wit: theft, assault, battery or any other offense prohibited by Florida Law...(R483-484) (emphasis added).

This language clearly fails to allege an entry with the intent to commit a specific offense and is no better than the charging document denounced in Lee v. State, supra. How can a defendant prepare a defense against a charge without

knowing with specificity the crime with which he is being charged?

Appellee notes that the defendant filed two motions for statements of particulars (addressed to entirely different problems) without mention of the problems addressed in the motion to dismiss. Appellee then argues since the defendant failed to raise the grounds in the motions for statement of particulars which he had already raised in the motion to dismiss, he has somehow waived the issue. Surely, the appellee is not suggesting that a defendant must renew every previous issue in all successive motions. Moreover, a defendant should not have to help the state write the charges against him. The indictment against the defendant should have been dismissed by the court following the defendant's request via the motion to dismiss.

POINT V

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR NEW TRIAL ON THE GROUND THAT THE VERDICTS WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE SINCE THE SOLE EVIDENCE AGAINST THE DEFENDANT WAS TOTALLY UNRELIABLE AND UNWORTHY OF BELIEF AND CONTRADICTED OTHER EYEWITNESS EVIDENCE.

The appellant claimed and continues to claim that especially in light of other evidence adduced at trial, the testimony of Ashley and Davis are totally unworthy of belief. In its answer, the state claims that it does not know "to which 'other evidence' Appellant refers." (Appellee's Answer Brief, p. 28) The appellant in his initial brief clearly set forth at pages 34-35 to which "other evidence" the appellant was referring. Ashley testified that he and Greg Mills ran to their bicycles together. (R250-253,266) However, Mrs. Wright, the victim's wife, saw only one man running from the house to one bicycle moments after the shooting. (R6-7,10,11-12,15) The description which she gave to the police (that of a tall, thin black male wearing a light colored hat) did not match that of the defendant. (R6-7,10,11-12,15,39) Rather, it perfectly described Vince Ashley, chief prosecution witness, who had been apprehended a short distance from the burglary scene, and who police described as a tall, thin black male who was wearing a light

colored hat and riding a bicycle. (R29-30,33,39-40) This is the "other evidence" which totally flies in the face of Ashley's testimony, rendering Ashley's testimony completely unworthy of belief, especially when coupled with the benefits Ashley received in exchange for his testimony. See Lee v. State, 115 Fla. 30, 155 So. 123 (1934); Dupree v. State, 195 So.2d 1 (Fla. 2d DCA 1967). (See Appellant's Initial Brief, pp. 33-35.)

As argued above and in the initial brief, the testimony of Ashley and Davis is highly suspect and unworthy of belief. Additionally, contrary to the inference raised by the state, Vivian Mills (the defendant's sister) testified for the state that she was only in the area where the rifle was found because she was on her way shopping; she denied having been told by her brother (or anyone else) to retrieve the gun. (R177-178,181,183-185,188) The only other evidence "against" the defendant is the inconclusive antimony residue test, which, as argued in Point III, supra, is unreliable. Hence, the defendant's conviction was based entirely on unreliable evidence totally unworthy of belief which should, as a matter of law, be rejected by this Court. The appellant's convictions cannot stand.

POINT VIII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

The appellee, attempting to justify the trial court's overruling of the jury's life recommendation, argues that "[t]he trial court was privy to certain relevant aggravating circumstances...which were not before the jury. However, this argument is fatally defective. This Court has held repeatedly that the state must prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980); Alford v. State, 307 So.2d 433 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court's decision in Williams v. State, supra, holds that the state must carry its burden of proof by introducing evidence in aggravation either at the guilt or penalty phase of the trial. See also Chambers v. State, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring); and Appellant's Initial Brief, pp. 46-48.

In arguing in support of the aggravating finding that the defendant was under sentence of imprisonment during the commission of the murder, the state maintains that the defendant was on parole rather than probation. The state knows this because Mr. Rousch (the parole and probation officer) tells them so. (Appellee's Answer Brief, pp. 37-38; A54-55) The appellee, however, totally ignores the

calculations of time set forth in the initial brief at p. 52, clearly showing that the appellant had completed the imprisonment condition of a probation as of March 4, 1979, notwithstanding Mr. Rousch's testimony.

The appellee chastises the appellant for "ignoring" the decision of Peek v. State, ____ So.2d ____, 1980 FLW 545 (Fla. Sup. Ct. Case No. 54,226, 10/30/80), which, the state claims, supports its position that a probationer is under sentence of imprisonment if the probation included a period of incarceration as a condition thereof. Aside from Peek being decided after the Appellant's Initial Brief (therefore, the undersigned was not ignoring it when the initial brief was written), the appellant would gladly cite Peek as authority in support of his claim. Peek v. State, supra, holds that probation is not a sentence of imprisonment. See also Villery v. The Florida Parole and Probation Commission, ____ So.2d ____, 1980 FLW 534 (Fla. Sup. Ct. Case No. 57,935, 10/30/80). The exception mentioned in Peek applies only when the capital felony was committed while the defendant is or should have been incarcerated. As shown by the calculations in Appellant's Initial Brief and discussed above, the defendant had completed the entire term of incarceration. Indeed, as Villery makes clear, persons incarcerated pursuant to a probation order are not entitled to release on parole; this

was the sole cause of Villery's petition for writ of mandamus. The aggravating factor of "under sentence of imprisonment" must fall.

Regarding the duplicative factors of during a burglary and for pecuniary gain, the state argues that Brown v. State, 381 So.2d 690 (Fla. 1980), condones the doubling. However, this is not the case when the only evidence that the crime was committed for pecuniary gain was the same evidence of the burglary underlying the capital crime. Perry v. State, ____ So.2d ____, 1981 FLW 18 (Fla. Sup. Ct. Case No. 53,003, 12/18/80); Gibson v. State, 351 So.2d 948 (Fla. 1977); Provence v. State, 337 So.2d 783 (Fla. 1976).

In discussing the aggravating circumstance of especially heinous, atrocious, or cruel, the state espouses the medical language of Dr. Garay. This language translated into layman's terms means that the victim died of bleeding from a single shot from a shotgun. One such shot and the resulting bleeding does not make this aggravating factor applicable. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). See also cases cited in Appellant's Initial Brief, pp. 57-58. Additionally, the attorney general notes that "it is evident that the court was influenced by the unnecessary nature of this death." (Appellee's Answer Brief, p. 46.) However, this Court rejected this factor from consideration in Cooper v. State, 336 So.2d 1133, 1140-1141 (Fla. 1976). See also Williams v. State, 386 So.2d 538 (Fla. 1980); Lewis v. State, 377 So.2d 640 (Fla. 1979); Tedder v. State, supra.

Finally, regarding non-statutory mitigation, the appellant submitted that the trial court erroneously failed to consider any non-statutory mitigating circumstances of which there was ample proof. (See Appellant's Initial Brief, pp. 46,48,50-52.) The state counters that just because "no mitigating circumstances are found does not mean that the factors presented in mitigation were not considered." (Appellee's Answer Brief, p. 47) The appellee has apparently overlooked the trial court's comments at the sentencing hearing indicating that the court only considered and rejected the statutory mitigating circumstances:

> THE COURT: Gregory Mills, the Court has gone through the aggravating and mitigating provisions as set forth in section 921.141.... (R936) (emphasis added)

Moreover, the evidence of non-statutory mitigating factors was not refuted by the state. As such, especially in light of the jury's recommendation of life, it must be given some weight.

There is no compelling reason for rejecting the jurors' life recommendation. Greg Mills' death sentence was based on improper and unsupported aggravating factors. Additionally, the trial judge ignored the strong and material mitigating factors. The sentence is erroneous and should be vacated and remanded for entry of a life sentence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief, the appellant requests that this Honorable Court reverse the judgments and sentences, and remand for the appropriate relief requested in each point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal and mailed on this 31st day of December, 1980, to: Mr. Gregory Mills, Inmate No. 053673, Florida State Prison, P. O. Box 747, Starke, Florida 32091.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER