IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

Appellant,

v.

CASE NO. 62,365

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

		PAGE
TABLE OF CONTENTS		i
TABLE OF CITATIONS		iii
I	STATEMENT OF THE CASE AND FACTS	1
II	ARGUMENT	1
	ISSUE I	
	THE TRIAL COURT ERRED IN DENYING BURR'S MOTION TO DISMISS THE INDICTMENT AFTER BURR HAD ESTABLISHED AN UNREBUTTED PRIMA FACIE CASE OF DISCRIMINATION AGAINST MEMBERS OF HIS RACE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WITH REGARD TO THE SELECTION OF GRAND JURY FOREMEN.	1
	ISSUE II	
	THE COURT SHOULD GRANT BURR A NEW TRIAL IN THE INTEREST OF JUSTICE AND BECAUSE HIS GUILT WAS BASED UPON INSUBSTANTIAL, INCOMPETENT EVIDENCE.	3
	ISSUE III	
	THE COURT ERRED IN ADMITTING THE TESTIMONY OF EMIL FERRELL, JAMES GRIFFIN, AND LLOYD LEE, CONCERNING THE ROBBERY/SHOOTINGS COMMITTED BY BURR IN BREVARD COUNTY AS THEIR ONLY RELEVANCY WAS TO SHOW BURR'S BAD CHARACTER.	7
	ISSUE IV	
	THE COURT ERRED IN FAILING TO CONTROL THE STATE'S INFLAMMATORY AND PREJUDICIAL CLOSING ARGUMENT.	9
	ISSUE V	
	THE COURT ERRED IN DENYING BURR'S MOTION TO EXCLUDE TAMMY FOOTMAN AS A REBUTTAL WITNESS AS SHE VIOLATED THE RULE OF SEQUESTRATION OF WITNESSES.	10
	ISSUE VI	
	THE COURT ERRED IN SENTENCING BURR TO DEATH, WHEN IT OVERRODE THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	10

TABLE OF CONTENTS
(cont'd)

PAGE

ISSUE VII

THE COURT ERRED IN FINDING THAT BURR COMMITTED THIS MURDER FOR THE PURPOSE OF AVOIDING LAWFUL ARREST. 12

ISSUE VIII

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID LAWFUL ARREST AND THAT IT WAS COMMITTED IN A COLD AND CALCULATED MANNER BECAUSE THESE FINDINGS FOCUS UPON THE SAME ASPECT OF THE MURDER: THE MANNER IN WHICH IT WAS COMMITTED. 13

III CONCLUSION 15

CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

CASES	PAGES
Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1980)	9
Alexander v. Louisiana, 405 U.S. 625, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972)	2
Armstrong v. State, 399 So.2d 953 (Fla. 1981)	5,6
Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963)	5
Bryant v. State, 386 So.2d 237 (Fla. 1980)	2
Buford v. State, 403 So.2d 943 (Fla. 1981)	10
Chandler v. State, Case No. 60,790 (Fla. opinion filed July 28, 1983)	8
Clark v. State, 379 So.2d 97 (Fla. 1980)	13
Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976)	6
Drake v. State, 400 So.2d 1217 (Fla. 1981)	7,8
Enmund v. State, 399 So.2d 1362 (Fla. 1981)	5,6
Henderson v. State, 135 Fla. 548, 185 So. 625 (1939)	5
Huff v. State, Case No. 59,989 (Fla. opinion filed September 1, 1983)	9,13
Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976)	6
Miller v. State, 389 So.2d 1210 (Fla. 1st DCA 1980)	6
Nazworth v. State, 352 So.2d 916 (Fla. 1st DCA 1978)	6
Oscar Mason v. State, Case No. 60,703 (Fla. opinion filed September 8, 1983)	13
People v. Haskett, 180 Cal.Rptr. 640 (1982)	11
People v. Terry, 37 Cal.Rptr. 605 (1964)	11
Provence v. State, 337 So.2d 783 (Fla. 1976)	13
Reese v. State, 382 So.2d 141 (Fla. 4th DCA 1980)	6
Riley v. State, 366 So.2d 19 (Fla. 1979)	12
Robert C. Richardson v. State, Case No. 61,924 (Fla. opinion filed September 1, 1983)	10,11

TABLE OF CITATIONS
(cont'd)

CASES	PAGES
Shriner v. State, 386 So.2d 525 (Fla. 1980)	12
State v. Anders, 388 So.2d 308 (Fla. 3d DCA 1980)	3
State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980)	3
State v. Dixon, 283 So.2d 1 (Fla. 1973)	11
White v. State, 403 So.2d 331 (Fla. 1981)	13
Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983)	1,2
Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976)	11
STATUTES	
Section 918.14, Florida Statutes (1982)	7
Section 921.141(5)(i), Florida Statutes	13
MISCELLANEOUS	
Florida Rule of Criminal Procedure 3.220	5
Model Penal Code, Section 201.6(1)(f) (proposed official draft, 1962)	11

IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,	:	
Appellant,	:	
v.	:	CASE NO. 62,365
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

REPLY BRIEF OF APPELLANT

I STATEMENT OF THE CASE AND FACTS

Burr relies upon his statement of the case and statement of the facts in his initial brief. One correction, however, needs to be made. On page 5 of the brief, he said:

> Burr took with him a box of .22 caliber guns which he sold in Melbourne (T-844).

Actually, the caliber of the guns was unknown.

II ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING BURR'S MOTION TO DISMISS THE INDICTMENT AFTER BURR HAD ESTABLISHED AN UNREBUTTED PRIMA FACIE CASE OF DISCRIMINATION AGAINST MEMBERS OF HIS RACE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WITH REGARD TO THE SELECTION OF GRAND JURY FOREMEN.

The state in its brief relies upon the First District Court of Appeal's ruling in Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983) to support its argument that Burr has not presented a prima facie case of racial discrimination

in the selection of Leon County grand jury foremen. The First District Court of Appeal, using the figures relied upon in this case, cited this Court's opinion in Bryant v. State, 386 So.2d 237 (Fla. 1980) as directly supporting its holding that Wiley had not established a prima facie case of racial discrimination. Bryant does not, however, support the court's holding and it served only to short circuit any analysis of the problems presented by the Leon County statistics.

Specifically, the figures used in Bryant showed the black population in Dade County from 1974-1978 to be 13.4 per cent to 14.3 per cent of the total population, whereas, blacks represented 6.6 per cent of the total number of people called to serve on grand juries during that period. This Court held that based on those figures, Bryant had not presented a prima facie case of racial discrimination.

But the figures used in this case and in Wiley were for a far longer period (25 years) and showed that Leon County had a much larger black population (19 per cent to 39.5 per cent) than Dade County. Thus, Bryant is not controlling in this case and should not have controlled in Wiley. Burr, consequently, has presented the prima facie case of racial discrimination required by Rose v. Mitchell, 443 U.S. 545, 61 L.Ed.2d 739, 99 S.Ct. 2293 (1979).

The state, therefore, is wrong when it says on page 14 of its brief:

> What appellant has demonstrated is an arguably disproportionate effect; not that racial discrimination caused it. (emphasis in original).

What Burr has demonstrated is a prima facie case of racial discrimination, all that Rose requires for the burden of proof to shift to the state to show a lack of discriminatory intent. Alexander v. Louisiana, 405 U.S. 625, 631, 632, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972).

Moreover, even though what the prosecutor said below may not bind this Court (appellee's brief at 13), it does bind the state. That is, the prosecutor admitted a prima facie case had been established (2 SR-22). For the state to now argue that such was not the case is a "gotcha" tactic lower appellate courts in this state have condemned. State v. Anders, 388 So.2d 308 (Fla. 3d DCA 1980); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980). After all, if defense counsel can waive, concede, or overlook issues at the trial level, why cannot the prosecution? Fairness dictates that those same rules which are so maddening to defense counsel on appeal apply equally to the state.

Consequently, when the state complains about the lack of statistics on the number of registered black voters in Leon County (appellee's brief at 14), this Court should ignore that complaint because counsel below did not object to its absence.

More importantly, however, such figures are unnecessary as the Supreme Court in Rose said:

> Next, the degree of unrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foremen.] Rose at 443 (emphasis supplied).

Finally the state cites the factors Judges Cooksey and Miner used in selecting grand jury foremen (appellee's brief at 16). Neither of these judges, however, have selected grand jurors for Leon County (1 SR-22,43), and their testimony is irrelevant to this case.

ISSUE II

THE COURT SHOULD GRANT BURR A NEW TRIAL IN THE INTEREST OF JUSTICE AND BECAUSE HIS GUILT WAS BASED UPON INSUBSTANTIAL, INCOMPETENT EVIDENCE.

Domita Williams' schizoid testimony permeates this trial. Consequently, the "difference of opinion" of what the evidence showed presents an issue more

subtle than the state's brief suggests (appellee's brief at 38). Specifically, the problem is whether this Court should adhere to the same standards and scope of review when the state's key witness is the sole source of the "difference of opinion."

This issue becomes more difficult in light of the testimony of the three disinterested customers of the Suwannee Swiftee who said they saw Steve Harty alive shortly before 7:00 a.m. and several minutes after 7:00 a.m. Trying to discredit this testimony, the state claims two of these witnesses were unsure of the exact time they saw Harty alive (appellee's brief at 40). One of these witnesses who was "unsure" was Mr. Pritchard (T-1089). But the critical point of Pritchard's testimony is not the exact time he got to the Suwannee Swiftee. After leaving the store, he drove past it two or three minutes later and saw Kim Miller, the man who discovered Harty's body, pull into the parking lot (T-1089). That directly contradicted Domita Williams' claim that she spent five to ten minutes at the store with Burr (T-850).

Moreover, Thompson was very certain that he was at the store at 7:06 a.m. (T-1114). Significantly, the prosecutor asked him if his clock was wrong (T-1115). Thompson candidly admitted it could have been (T-1115). But, a sheriff's investigator took the stand and said that she checked Thompson's clock, and it was within one minute of the "118" time (T-1118).

Similar confirmations, however, were not a characteristic of the state's case. For example, the state's claim that what Williams told Katherine Haygood corroborated her prosecution story (appellee's brief at 39) does not (T-1136-1138).

Moreover, Williams was not the only state witness to recant her initial trial testimony. Katrina Jackson did so also. Originally she testified

that Burr did not show up at her apartment the morning of the murder and Williams mentioned nothing of the murder (T-922-924). Apparently, she had said the same thing in deposition (T-931). Eventually she changed her story (T-957-958). Nevertheless, if recanted testimony is "exceedingly unreliable" as the state claims (appellee's brief at 41) this Court said in Henderson v. State, 135 Fla. 548, 185 So. 625, 630 (1939)[1] Jackson's testimony inculpating Burr is unreliable.

The state tries to downplay the prosecutor's and state attorney's roles in coercing Domita Williams to change her testimony. On page 43 of its brief, it said:

> What the prosecutor did do was to fully reveal the circumstances leading up to her original testimony to opposing counsel, the court, and the jury. (R-932-933, 1295-1305).

The prosecutor, however, did not do this, Burr's counsel did. Moreover, when the prosecutor questioned Williams about what happened, he did it when she was called as a defense witness. He certainly did not present this evidence when she was his witness. Nor did he tell defense counsel that Williams had changed her story, a possible discovery violation under Rule 3.220, Florida Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Moreover, the state in its brief almost totally ignores State Attorney Modesitt's threats to throw Williams in jail (T-1284). The state attorney was not advising her to tell the truth, Armstrong v. State, 399 So.2d 953 (Fla. 1981), Enmund v. State, 399 So.2d 1362 (Fla. 1981) when he called her a "lying bitch" who made him "sick to his stomach." He was "injecting"

---

[1] Actually, the concurring opinion said that.

testimony into this trial by telling her to testify consistently with her earlier testimony. Armstrong, Enmund, supra.

In Burr's initial brief, he cited Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976) as support for this argument. The state deprecates the court's ruling in Davis by saying that the court declined to "note the factual difference" in Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976) when it granted Davis a new trial. So what? Had it noticed the differences, the results would have been the same because the prosecutors in Lee and Davis had "injected" testimony into the trial by threats of prosecution. Moreover, saying that Davis has been more often distinguished than followed (appellee's brief at 46), is somewhat misleading. Davis has been cited in five other cases and distinguished in three of those five. Miller v. State, 389 So.2d 1210 (Fla. 1st DCA 1980); Armstrong, supra; Enmund, supra; Reese v. State, 382 So.2d 141 (Fla. 4th DCA 1980); Nazworth v. State, 352 So.2d 916 (Fla. 1st DCA 1978). But Armstrong and Enmund were co-defendants and consequently what the court said about the prosecutor's advice to the state's key witness regarding telling the truth applied to both cases. Moreover, while this Court distinguished Davis in Armstrong and Enmund, it did not disapprove it. Consequently we can "assume" it is still good law (see appellee's brief at 47).

The state intimates that perhaps Domita Williams is lying about what happened at the pretrial review because only she "ever referred to such a meeting and it is not clear under what circumstances the witnesses were questioned (R-1282)" (appellee's brief at 48). But nowhere does the prosecutor deny that the meeting as Williams described it occurred. Moreover, when he called Tammy Footman, one of the witnesses who Williams claimed was at the review (T-1249), he did not ask her any questions that

may have clarified what Williams said. Likewise, he did not recall Katrina Jackson (T-1249) or call the police officer (T-1249) Williams said was also present to in any way rebut Williams' allegations.

Moreover, contrary to what the state claims (appellee's brief at 48), the record at page 1282 clearly shows "under what circumstances the witnesses were questioned."

Finally, the state says:

> Rules of fair play do not transform themselves depending on which attorney is involved. (appellee's brief at 48).

Very true. Had Burr's counsel done what the prosecutor and state attorney did here, he would have been guilty of tampering with a witness. Section 918.14, Florida Statutes (1982). Rules of fair play dictate a new trial for Charles Burr.

ISSUE III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF EMIL FERRELL, JAMES GRIFFIN, AND LLOYD LEE, CONCERNING THE ROBBERY/SHOOTINGS COMMITTED BY BURR IN BREVARD COUNTY AS THEIR ONLY RELEVANCY WAS TO SHOW BURR'S BAD CHARACTER.

In some situations the Williams Rule testimony presented here may have been relevant. For example, if Domita Williams had not known Burr and had she caught only a glimpse of him as he fled from the store, the Brevard County robberies would have been relevant to the issue of identity, assuming significant similarities. Drake v. State, 400 So.2d 1217 (Fla. 1981). In such a case, they would have tended to prove that Burr was the robber because he acted in this case in accordance with a similar modus operandi as in the Williams Rule cases.

Here, of course, we don't have that situation. Domita Williams knew Burr very well (T-832,856), and she knew exactly what he had done (T-837).

Identity simply was not an issue. Even on cross-examination, Burr's counsel never challenged or questioned Williams regarding her identity of Burr (T-846-861). Consequently it was "unnecessary" because its sole relevance was to exhibit Burr's criminal propensity.

Moreover, the similarities between the Tallahassee Suwanee Swiftee murder and the Brevard County robberies, whether considered separately or together, are not "sufficiently unique," Drake, supra, or "so unusual" as to point to Burr as the perpetrator of all the crimes. Chandler v. State, Case No. 60,790 (Fla. opinion filed July 28, 1983). Also, some of the "similarities" found by the state in its brief (appellee's brief at 21-22) were clearly speculative or irrelevant as to the Tallahassee crime. For example, we simply do not know whether or not Harty provoked the shooting even though the victims in the Brevard County cases may not have done so. Likewise, the state can only guess that Burr's motive was to eliminate witnesses in this case despite what Burr did in Brevard County. Finally, while all the victims in the Brevard County cases may have identified Burr from "hundreds of photographs" (appellee's brief at 22) that certainly was not a similarity with this case.

Moreover, the significant dissimilarities, see Chandler, supra, further weaken the relevance of this evidence. The Suwannee Swiftee murder occurred in Tallahassee; the Williams Rule robberies took place in the Melbourne area. The method of the killing in this case was by a single shot to the back of the head, an execution style killing (T-913). In the Melbourne robberies, Burr shot each victim twice in the abdomen (T-1063, 1071). Moreover, the Suwannee Swiftee robbery took place at 7:00 a.m. on a Thursday morning (T-1078), hardly a quiet time of the day.

Consequently, the Brevard County robberies were irrelevant and because of the "shocking" exhibition of Burr's character, they became a feature of

this trial. C.f. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1980).

ISSUE IV

THE COURT ERRED IN FAILING TO CONTROL THE STATE'S INFLAMMATORY AND PREJUDICIAL CLOSING ARGUMENT.

Why Domita Williams changed her story was one of the major questions the prosecution had to answer during its closing arguments. It did so by implying that Burr threatened Williams (T-1492). Such an implication, however, amounted to a comment on matters which were not supported by the record.

Conceededly, Williams was afraid of Burr and had been afraid of him since August 20th (T-856). But that fear did not somehow translate into threats. Nor could the state legitimately infer that because she was afraid of Burr, he would somehow come after her if she did not change her story. To the contrary, despite her fears of Burr (which, based upon what she did and how she acted after the killing, are questionable) he had never threatened her (T-1248-1285). The state's comments, therefore, were not based upon evidence, and because it explained why Domita Williams changed her testimony, it is reversible error. Huff v. State, Case No. 59,989 (Fla. opinion filed September 1, 1983).

Moreover, on appeal, the state has fallen into the same trap it dug for itself at trial by referring to Burr as the "Master of Disaster":

> Appellant wore that shirt and advertised to all that he considered himself the "Master of Disaster." (appellee's brief at 33).

> Appellant wore a shirt announcing to the world that he was the "Master of Disaster." (appellee's brief at 34).

The problem is that a shirt is, after all, a piece of clothing. It is not a resume, and the state unfairly dwelt upon Burr's character by continually referring to him as the "Master of Disaster."

ISSUE V

THE COURT ERRED IN DENYING BURR'S MOTION TO EXCLUDE TAMMY FOOTMAN AS A REBUTTAL WITNESS AS SHE VIOLATED THE RULE OF SEQUESTRATION OF WITNESSES.

Tammy Footman, contrary to the state's claim, was listed as a potential witness for the state (T-493).

Without question, Footman should have been placed under the rule. That she was not was the state's fault. Consequently, the burden of showing that she had violated the rule without the state's connivance or consent should have been upon the state, not the defense. (Contra, appellee's brief at 27). Further, contrary to the state's assertion (appellee's brief at 28), the court made no inquiry into the state's knowledge, connivance, or consent in allowing Footman to be present in the courtroom.

ISSUE VI

THE COURT ERRED IN SENTENCING BURR TO DEATH, WHEN IT OVERRODE THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state's argument here is that because this Court has rejected a similar argument as that raised by Burr in Buford v. State, 403 So.2d 943 (Fla. 1981) it should do so here. While Buford was a factually much weaker case than presented here, and hence perhaps distinguishable, Burr nevertheless asks this Court to re-examine its language in Buford cited by the state in its brief (appellee's brief at 56). Good reasons exist for it to do so.

A primary reason is that this Court apparently has adopted Burr's "weakness of the evidence" argument in Robert C. Richardson v. State, Case No. 61,924 (Fla. opinion filed September 1, 1983). In that case, as here, the court sentenced the defendant to death over a jury life recommendation. The only basis for that life recommendation and the only mitigating factor argued by Richardson's attorney at the sentencing phase of his trial was the

weakness of the evidence used to convict him. On appeal, Richardson argued, as here, that the weakness of the evidence of his guilt was a reasonable basis for the jury's life recommendation (see Issue II of appellant's initial brief in Robert C. Richardson v. State, Case No. 61,924). This Court, without explanation, reversed the trial court's imposition of death and remanded for imposition of a life sentence. This Court did so despite the presence of four aggravating factors and no mitigating factors. The only way it could have done so was if it accepted Richardson's weakness of the evidence argument. Burr, therefore, argues that this Court should likewise reverse his death sentence and impose a life sentence.

Moreover, other authorities believe that a jury can find a man guilty beyond a reasonable doubt yet have some residual doubt of his guilt and thus recommend a life sentence. See Model Penal Code, Section 201.6(1)(f) (proposed official draft, 1962), People v. Terry, 37 Cal.Rptr. 605 (1964), People v. Haskett, 180 Cal.Rptr. 640 (1982).

Moreover, from a historical perspective this position has some merit. Woodson v. North Carolina, 428 U.S. 280, 292-293, 49 L.Ed.2d 944, 954, 96 S.Ct. 2978 (1976). Of course, Woodson focused upon the harshness of the death penalty in mandatory death situations, but the underlying principles recognized there apply here as well. That is, in light of the strongly conflicting evidence and the unrebutted exculpatory evidence, the jury could have legitimately believed that the death sentence was too harsh. Moreover, from a slightly different position, the jury could simply have felt that notwithstanding the presence of at least two aggravating factors the facts as presented by the prosecution in this case simply did not justify a death sentence. In other words, the jury said that this was not one of the few cases that differs from the norm of capital felonies. See, State v. Dixon,

283 So.2d 1 (Fla. 1973).

ISSUE VII

THE COURT ERRED IN FINDING THAT BURR COMMITTED THIS MURDER FOR THE PURPOSE OF AVOIDING LAWFUL ARREST.

The state's argument on this point appears to be that if it presents only "substantial, competent" evidence that Burr had committed the murder in this case to avoid lawful arrest, this Court should uphold the trial court's finding of this aggravating factor (appellee's brief at 53). The point, however, that Burr argues is that, conceeding the possibility that the evidence shows that he committed the murder to avoid lawful arrest, it is nevertheless not the "strong evidence" required by this Court to prove that such a motive was the dominant motive for the killing. Riley v. State, 366 So.2d 19 (Fla. 1979). As an example of a somewhat similar case in which this factor was not applied, Burr cited Shriner v. State, 386 So.2d 525 (Fla. 1980). That is, because the trial court in Shriner did not find that Shriner committed the murder to prevent or avoid a lawful arrest, the trial court in this case likewise should not have found this aggravating factor.

The state, on the other hand, bolsters its arguments with speculation and evidence not supported by the record. For example, the state claims that if Domita Williams could refer to Harty as "Steve" then she knew him, and if she knew him, Burr knew him also (appellee's brief at 52-53). The state, however, never asked Williams if she knew Harty, and this Court can only speculate that Burr knew him.

Further, while Williams did say that Burr disposed of a number of guns following the murder (T-844), she never said many of them were .22 caliber. Finally, only the trial court said Burr had a "very distinctive

face." (R-317). For the trial court to make such a finding when there is no evidence in the record to support it amounts to unsworn testimony, and if comment upon such evidence is prohibited in closing argument, it should be prohibited in a sentencing order. See Huff v. State, Case No. 59,989 (Fla. opinion filed September 1, 1983). In short, the "strong evidence" this Court has required in order to establish that the dominant motive for committing a murder was to prevent or avoid lawful arrest was missing in this case.

ISSUE VIII

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID LAWFUL ARREST AND THAT IT WAS COMMITTED IN A COLD AND CALCULATED MANNER BECAUSE THESE FINDINGS FOCUS UPON THE SAME ASPECT OF THE MURDER: THE MANNER IN WHICH IT WAS COMMITTED.

The state says that this Court has limited the doubling of aggravating factors to those situations typified by Provence v. State, 337 So.2d 783 (Fla. 1976). In Clark v. State, 379 So.2d 97, 104 (Fla. 1980) this Court found that the trial court had impermissibly doubled the aggravating factors to prevent or avoid lawful arrest and to hinder enforcement of the robbery laws of Florida. Accord White v. State, 403 So.2d 331 (Fla. 1981); Francois v. State, 402 So.2d 885 (Fla. 1981). Consequently, a doubling can occur in the instant case if the trial court focused upon the same aspect of the crime.

In Oscar Mason v. State, Case No. 60,703 (Fla. opinion filed September 8, 1983) this Court said, regarding the application of Section 921.141(5)(i), that it:

> relates more to the killer's state of mind, intent, and motivation. (slip opinion at page 7).

Yet, that is precisely the same focus that the trial court here gave to the aggravating factor "to prevent or avoid lawful arrest." That is, Burr's

motive or intent in executing Harty was to prevent or avoid lawful arrest.

Consequently, the court focused upon the same aspect of the murder in this case, and this Court should remand for a new sentencing hearing.

III CONCLUSION

Based upon the arguments presented here, Burr asks this Honorable Court to: (1) reverse the trial court's judgment and sentence and remand for a new trial; (2) reverse the trial court's sentence and remand for an imposition of a life sentence; or, (3) reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

DAVID A. DAVIS
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand to Mr. Andrew Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and, a copy has been mailed to appellant, Mr. Charles Lewis Burr, c/o Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 21st day of September, 1983.

DAVID A. DAVIS