IN THE SUPREME COURT OF FLORIDA

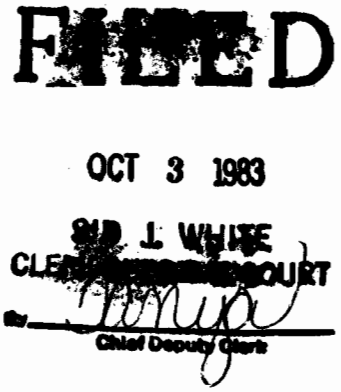
JOHN EARL BUSH,)

Appellant,)

v.) CASE NO. 62,947

STATE OF FLORIDA,)

Appellee.)



REPLY BRIEF OF APPELLANT

On Appeal From the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County [Criminal Division].

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POINTS ON APPEAL

POINT I

WHERE THE STATE OFFERS EVIDENCE FROM AN INVESTIGATING OFFICER TOTALLY CONTRADICTORY TO HIS TESTIMONY DURING PRE-TRIAL DISCOVERY AND THE DEFENDANT MOVES FOR A MISTRIAL BASED THEREON, THE COURT ERRED IN FAILING TO GRANT A MISTRIAL OR CONDUCT A RICHARDSON INQUIRY PRIOR TO ALLOWING THE EVIDENCE TO GO TO THE JURY.

The State predicates much of its argument on erroneous facts. The State maintains that the defense knew that Charlotte Grey had picked out Bush's photograph (State's Brief P. 10). However, that is not the case at all. The defense was totally surprised by Grey's identification of Bush's photograph (R 508).

Detective Forte's deposition was taken on July 22, 1982, at which time he said that Grey was unable to make any identification of any of the defendants (SR 10), and he also said he did not have any evidence which would indicate that the individuals in Grey's store were the four defendants in this case (SR 11). Furthermore, the description Forte testified that Grey gave of the men in her store did not match any of the defendants (SR 16). Thus, the logical conclusion from Forte's deposition was that there was no evidence to connect the defendant to any appearance in Charlotte Grey's store. Grey's deposition was then taken August 31, 1982. Grey said she identified one photograph (SR 13) but she wasn't completely

sure about it (SR 31). She had also seen pictures of the four denfendants in this case but none of them appeared to be familiar to her (SR 30). Thus, given the fact that Forte had previously testified that he had no evidence that the defendant was in Grey's store the night of the murder, it was completely reasonable to conclude that the one photograph that Grey picked out was not a picture of any of the defendants in this case. And that is exactly what Appellant's trial attorney had concluded (R 508).

Consequently, the information elicited at trial that Charlotte Grey had identified the Defendant as one of the individuals in her store was totally new and different than the defense had acquired during discovery. The defense had done their job by taking the depositions of State witnesses. They didn't expect to have a Sheriff's Detective testify one way at deposition and totally opposite at trial. Forte's explanation of his flip-flop on testimony is completely disingenuous. He may be able to "explain" his one answer that Grey did not "identify" Defendant's photograph but that she merely "picked it out", but that explanation does not shed light on why then he also testified that he had no evidence to indicate that Defendant was in Grey's store peering over her cash register. That statement was simply untrue.

Contrary to the State's position, this was a discovery violation similar to Niemeyer v. State, 378 So.2d 818 (Fla. 2d

DCA 1979). In that case, a State witness changed his testimony, and the Court held that the State's failure to timely notify the defense of this new information was a violation of the discovery rules. This case is also similar to Cumbie v. State, 345 So.2d 1061 (Fla. 1977). In that case two law enforcement officers testified at trial concerning statements made to them by the defendant. The defense, prior to trial, had been given the officers' names and had deposed them. The State argued that it had complied with the discovery rules and further that since the officers were only testifying to statements made by the defendant, there was no prejudice to the defendant. Nevertheless, this Court held that failure to supply the statements to the defendant pursuant to the discovery rules was a violation of those rules, and without a Richardson type of inquiry having been made, the Court was required to reverse.

It would serve no purpose to have rules concerning discovery and then allow the State to supply the Defendant with false and misleading information and contend that the rule has been satisfied. Such a result conflicts with this Court's philosophy on discovery as reflected by Cuciak v. State, 410 So.2d 916 (Fla. 1982). Furthermore, to claim that if a witness changes his testimony that is a matter for impeachment and thus for the jury to consider misses the mark. The defense here was at a substantial disadvantage cross-examining a law enforcement officer sworn to uphold the law and accusing him of lying on

his deposition. Taking a complete look at this episode of the trial, it is clear that the Defendant was prejudiced by the State's failure to disclose important information to the case.

Finally, this point is preserved on appeal by the defense's motion for mistrial immediately after Detective Forte's testimony. In Wilcox v. State, 367 So.2d 1020 (Fla. 1979), this Court held that failure to object until after the evidence is in does not preclude raising a discovery violation. Not only in this case did the defense counsel move for a mistrial, but he specifically pointed to the discovery depositions as the basis for the surprise. Lucas v. State, 376 So.2d 1149 (Fla. 1979), cited by the State, is not on point because in that case, the defense neither objected or moved for a mistrial. Furthermore, Grimmett v. State, 383 So.2d 698 (Fla. 4th DCA 1980), whose facts are similar to the facts of the instant case, relied on Clark v. State, 363 So.2d 331 (Fla. 1978) to hold that the defense failed to preserve a discovery rule violation for failure to object on that specific ground even though a motion for mistrial was made. However, in Clark, supra, which dealt with comments on defendant's right to remain silent, no objection or motion for mistrial was made, and the defendant was arguing for reversal as fundamental error. Therefore, Clark was incorrectly cited by the Fourth District as authority for its position. Wilcox v. State, supra, is the better reasoned opinion in that if an objection or motion for mistrial is made which apprises the court that the defendant

has been mislead in discovery or that the State has failed to fully disclose, then the Richardson objection is preserved for appeal. In this case, the defense attorney did that and this Court should reverse for failure to conduct a Richardson Inquiry.

POINT II

THE COURT ERRED IN ADMITTING THE CONFESSIONS OF THE DEFENDANT WHEN THEY WERE PROCURED THROUGH IMPROPER INFLUENCE AND ONE WAS PROCURED WITHOUT THE DEFENDANT BEING READ FULL MIRANDA WARNINGS.

Defendant presents no further argument on this point.

POINT III

THE TRIAL COURT ERRED IN ADMITTING GORY AND GRUESOME PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE WHICH WERE ADMITTED PRIMARILY TO INFLAME THE JURY AND HAD NO RELEVANCE TO ANY ISSUES IN THE CASE.

Appellee's argument goes to the introduction of State's Exhibit 21, the picture of the bullet wound, and not to Exhibit 15, the picture of the bloody face of Frances Slater. In fact, the cases cited by the State all go to the use of Exhibit 21 to explain the medical examiner's testimony. Those cases do not condone the use of photographs of the victim's body at a time and place away from the crime scene where the only claim for their admission is to establish identity.

Appellee is correct that this Court has ruled that a defense offer to stipulate to identity cannot thereby preclude admission of photographs, but in those cases in which the Court has so ruled, there was some other factor in the photographs which was also relevant to the issues. For instance, in Wilson v. State, (Case #61,365, decided July 21, 1983), this Court held it was not error to admit autopsy photographs because the pictures were relevant to depict not only identity but also the nature and extent of the victim's injuries and the force and violence used upon the victim. In other words, the photograph's sole relevance was not strictly identity.

In the case of Exhibit 15, this picture did not exhibit anything relevant except identity. It did not show the nature and extent of the injuries, nor anything about the nature of the violence used against Slater. Her blood-matted hair covered any wound inflicted. Furthermore, the picture was distorted by the presence of bags over the victim's hands. This may have suggested to the jury that the victim suffered other mutilations which were not shown. Such a suggestion would be highly prejudicial and outweigh the probative value of any picture.

Therefore, even if the State's argument supports the admission of Exhibit 21, there is still error in the admission of Exhibit 15. That photograph is gruesome, not relevant, and prejudicial to the Defendant. Therefore, Defendant's con-

viction should be reversed and remanded for a new trial with directions to exclude those photographs.

POINT IV

THE COURT ERRED IN EXCLUDING JUROR REID ON A CHALLENGE FOR CAUSE, IN VIOLATION OF WITHERSPOON v. ILLINOIS.

Defendant presents no further argument on this point.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE STATE TO DISCLOSE WHETHER OR NOT THEY WERE PROCEEDING UNDER FELONY MURDER OR PREMEDITATED MURDER, WHERE PREMEDITATED MURDER WAS THE ONLY CHARGE IN THE INICTMENT.

Defendant stands on his argument in the main brief. However, in arguing this point, the State did not respond to the distinction drawn in Defendant's brief between Knight v. State, 338 So.2d 201 (Fla. 1976) and its progeny and the instant case; namely, that in Knight and cases following, the defendant actually committed the murder, whereas here the Defendant did not commit the murder and thus would be liable for felony murder.

POINT VI

THE COURT ERRED IN FAILING TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTION ON THIRD DEGREE MURDER TO THE JURY.

Defendant presents no further argument on this point.

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Defendant presents no further argument on this point.

POINT VIII

THE COURT COMMITTED FUNDAMENTAL ERROR IN THE PENALTY PHASE IN INSTRUCTING THE JURY THAT A MAJORITY OF THE JURY WAS REQUIRED TO AGREE ON THE SENTENCE BEFORE A VERDICT SHOULD BE RETURNED.

In Harich v. State, Case #62,366, decided August 25, 1983, this Court agreed that the jury instruction given during the penalty phase was indeed incorrect and unclear just as was argued in Defendant's main brief. In that case, as here, no objection was made to the standard instruction, but the jury vote in favor of the death penalty was 9-3. Thus, this Court concluded that despite the erroneous unclear instruction, in view of the vote, this Court would not reverse the sentence.

In the instant case, the jury vote in favor of death was only 7-5. Therefore, the Court cannot say in this case that the erroneous instruction was harmless. In fact, it could have been very harmful in persuading only one juror to change his

vote so that a majority decision, called for by the instruction, is reached.

The erroneous instruction should be considered fundamental error because it goes to the very essence of the jury deliberations. Secondly, since this Court has now held in Harich, supra, that the contested instruction is erroneous, this case should be remanded to retry the penalty portion of this trial in light of this Court's most recent rulings.

POINT IX

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR WHEN HE FAILED TO INSTRUCT THE JURY ON THE SENTENCING PHASE THAT THE JURY COULD NOT SENTENCE THE DEFENDANT TO DEATH UNLESS IT FOUND THAT THE DEFENDANT KILLED OR ATTEMPTED TO KILL THE VICTIM OR INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

Appellant misconstrues the U. S. Supreme Court's holding in Enmund v. Florida, _____U. S._____, 73 L.Ed. 2d 1140 (1982). The majority decision in that case is not grounded on the degree of participation of the defendant in the underlying crime or crimes. In fact, the Court specifically noted in footnote 4 of the majority opinion that they were not reaching the question of whether or not the degree of Enmund's participation in the crime was given proper consideration under the Eighth and Fourteenth Amendments.

The question of whether there was proof of intent to kill or contemplation that life would be taken in the planning and

execution of the underlying crime is one that properly should be submitted to the jury. Therefore, failure to instruct the jury in accordance with the dictates of Enmund precludes their full consideration of a necessary constitutional element in prescribing the death penalty. Consequently, the sentence of death imposed on this Defendant should be reversed and remanded for a new trial with an Enmund instruction given to the jury.

POINT X

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW.

A. THE PENALTY OF DEATH WAS ASSESSED AGAINST JOHN EARL BUSH WHERE THE TRIAL COURT IMPROPERLY APPLIED THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER; FURTHER, THAT THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME OCCURRED AS A RESULT OF A ROBBERY APPLIES AN AUTOMATIC AGGRAVATING CIRCUMSTANCE IN THE SENTENCING PHASE RENDERING THE FLORIDA STATUTE ARBITRARY AND CAPRICIOUS AS APPLIED.

The argument of the State overlooks the fact that this Court in Jent v. State, 408 So.2d 1024 (Fla. 1981) requires the State to prove beyond a reasonable doubt that the murder was cold, calculated and without any pretense of moral or legal justification. Defendant's main argument is that in individualizing the consideration of factors imposing death, as required by Lockett v. Ohio, 438 U.S. 586 (1978), the State in

this case had not proved beyond a reasonable doubt that this Defendant coldly and calculatedly murdered Frances Slater.

B. THE EXTREME PENALTY WAS ASSESSED AGAINST JOHN EARL BUSH WHERE THE PROSECUTOR CROSS-EXAMINED THE APPELLANT BEYOND THE SCOPE OF EVIDENCE PRESENTED IN MITIGATION, IN ATTEMPTING TO INTRODUCE OTHER AGGRAVATING FACTORS INTO EVIDENCE AND FURTHER MADE PREJUDICIAL AND INFLAMMATORY ARGUMENTS OUTSIDE THE EVIDENCE PRESENTED AT THE SENTENCING HEARING.

Appellee is wrong that the defense did not properly object to the State's cross-examination on the substance of the prior crime. The defense twice objected that the prosecution was going into the prior conviction (R 1213-14). Twice the court overruled the objection. The third question which the prosecution asked about the prior crime was finally sustained by the court (R 1215) and the prosecution ceased questioning about it. Thus, the defense properly objected to introduction of the facts behind the prior conviction each time a question of that nature was asked. The only time he interposed only an objection that the question was "asked and answered" was when the prosecution simply repeated a question upon which the court had previoulsy overruled his objection (R 1214). The prosecution improperly delved into this inquiry. Not only was it entirely outside the scope of direct examination, the prosecution itself never attempted to introduce more facts about the prior conviction than the judgment and sentence (R 6-42).

The State now contends that this cross-examination was proper to get at the truth of a mitigating factor. However, by any view of the questions asked, they were propounded to prove additional aggravating factors and to prejudice the jury against the Defendant. That the State did not request an instruction that the murder was committed to avoid arrest does not thereby vitiate the prejudicial effect of the questions.

While the State acknowledged that the prosecutor's closing argument contained improper argument, it argues that the comments were not as prejudicial as the Defendant's own testimony and therefore should not be grounds for reversal. However, the State concedes that such arguments are usually held to be error, Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972), but that each case must be judged on its own facts and circumstances. None of the cases cited by the State dealt with improper argument in the penalty phase of a capital case. More on point is Pait v. State, 112 So.2d 380 (Fla. 1959) where this Court held that a prosecutor's improper argument in a capital case must constitute grounds for reversal (even without objection) unless the Court can determine from the record that the remarks did not prejudice the accused. The holding of Pait was recently reaffirmed in Teffeteller v. State, Case #60,337, decided August 25, 1983.

Despite the fact that the jury decision is advisory, it cannot be said that the improper prosecutorial questions and remarks were harmless. The jury decided in favor of the death

penalty by a 7-5 margin. Can it be said that the prosecutor did not influence with his remarks any single juror? The change of a single vote would have changed a death recommendation to that of life imprisonment, and considering the weight the trial judge gave and must give to the jury's recommendation, it cannot be said that the result would have necessarily been the imposition of the death penalty.

This Court should reverse the sentencing phase of Defendant's trial and remand for a new sentencing determination.

CONCLUSION

Based on the foregoing arguments, Defendant's conviction and sentence should be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was sent by U.S. Mail this 29th day of September, 1983, to Russell S. Bohn, Assistant Attorney General, 111 Georgia Avenue - Suite 204, West Palm Beach, Florida 33401.

By: Martha C. Warner
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