IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

JOHN MILLS,
Appellant,

vs.

STATE OF FLORIDA
Appellee,

_____/

CASE NO. 63,092

ANSWER BRIEF OF APPELLEE

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_____/

PRELIMINARY STATEMENT

The State accepts Appellant's Preliminary Statement.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts.

POINT ONE

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE.

A

THE TRIAL COURT DID NOT ERR IN REFUSING TO AUTHORIZE THE EXPENDITURE OF FUNDS FOR A PUBLIC OPINION POLL IN ORDER FOR APPELLANT TO BOLSTER HIS MOTION FOR A CHANGE OF VENUE.

Appellant argues that, because he was indigent, he was entitled to the expenditure of funds in order to obtain a public opinion poll of the communities' sentiment to support his motion for change of venue.

The one case in Florida that deals with public opinion polls, Irvin v. State, 66 So.2d 288 (Fla. 1953) rejected the use of such polls for this purpose citing the polls' unreliablity. For various reasons, "scientific" public opinion polls are often suspect. See Michael Wheeler's Lies, Damn Lies, and Statistics, (New York: Del, 1976) and the examples therein of the opportunity for manipulation of public opinion survey polls.

The trial court was well aware of the problems associated with the polls and eloquently stated these problems as well or better than the state can:

> "This court would be completely wide open, as any other court, from the standpoint that it could not control when a numerous bunch of people from Florida State University runs into a small county and contaminates every possible juror down there, and even having the right to walk

> into that courthouse and get the jury list that would be used in this exact case, and start a voir dire on their own, instead of the Court being able to control it in any manner.
>
> This court denies the motion for a public opinion poll in this case.

(R-2370-2371).

As noted earlier by the court, various precautions were taken to insure that appellant received a fair trial. See the discussions of these precautions infra.

The trial court did not abuse its discretion in refusing to tax costs in order to enable appellant to obtain a public opinion poll on the sentiment in the community towards him.

B

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT MILLS' MOTION FOR A CHANGE OF VENUE BECAUSE THE PUBLICITY DID NOT INFECT THE JURY PANEL.

Appellant argues that the pretrial publicity so infected the jury panel that he should have been entitled to a change of venue.

There was some publicity subsequent to the commission of appellant's crime. In order to attenuate any effect that this publicity might have had on the jury panel, the court increased the number of peremptory challenges from ten to sixteen. (R-344). Additionally, an individual voir dire was undertaken in groups

of three. (R-344; 350).

During the course of this voir dire, appellant renewed his request for a change of venue. (R-1011-1012; 1035). In explaining why appellant would not receive any more additional peremptory challenges and in denying the renewed motions for a change of venue, the court summarized the selection process at that point. As noted by the court, the great majority of the twenty-one individuals challenged for cause were challenged because of their belief against the death penalty and not because of the effect of publicity. (R-1012). At this point, there were still potential jurors left after the individual voir dire. (R-1013). All of these potential jurors swore under oath that they could be fair and impartial and render their verdicts solely based on the evidence presented in the court. (R-1013).

Of those jurors who actually rendered the verdict, the responses of Ms. Pearce and Ms. Brown are typical. Ms. Pearce said that she had read some about the case in the paper and had heard some television reports about the case but did not know any details. She had no fixed opinion about the guilt or innocence of appellant and could render a fair and impartial verdict. (R-719). Likewise, Ms. Brown had read something about the case in the paper but had no opinion about the guilt or innocence of appellant. (R-692). Other actual jurors, such as Mr. Roberts, had heard "just a few things", but had no opinion about the guilt or innocence of appellant. (R-691). And so on, with these responses typical of each of the actual

jurors selected to try the case.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344, 362 (1977) the Supreme Court stated:

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere... utterly corrupted by press coverage," Murphy v. Florida, supra, at 798. One who is reasonably suspected of murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of circumstances," Murphy, supra, the Florida Supreme Court was wrong in finding no constitutional violation with respect to the pretrial publicity. The judgement of the Supreme Court of Florida is therefore affirmed. (Emphasis supplied)

See also Murphy v. Florida, 421 U.S. 794,95 S.Ct. 2031,44 L.Ed.2d 589 (1975); Dobbert v. State, 328 So.2d 433, 440 (Fla. 1976); Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981); Straight v. State, 397 So.2d. 903 (Fla. 1981).

As in Dobbert v. Florida, appellant's argument basically

rests on the mass of the pre-trial publicity, and not its prejudice. The only few particular portions in the record which appellant alleges show prejudice will be discussed separately.

Appellant's first complaint is that the court was forced to use security precautions in order to insure that violence did not erupt in the courtroom. (R-1402-1403). The court, apparently acting in the best interest of everyone, reserved the two rows immediately preceeding counsel for security purposes. While this might reflect upon the demeanor of some people present in the courtroom as spectators, it says nothing about the actual jurors selected, who swore under oath that they could be fair and impartial. Clearly this isolated incident does not relate in any way to the wisdom of the trial court in refusing to deny the motion for a change of venue.

The second incidence of alleged particular prejudice in the record occurs at page 1646 where Mr. Randolph complained that Glen Lawhon made some type of gesture directed towards his counsel table. The nature of this gesture is not clear in the record but at any rate the court moved quickly and promptly (with the concurrance of the prosecution) to eliminate the possibility of this occurring again. (R-1646). Again, the relevance of this incident to the selected jurors who actually tried the case is non-existant.

The court increased the number of peremptory challenges

in order to insure a selection of a fair and impartial jury. Jurors, in groups of three, were individually voir dired. The selected jurors who tried the case indicated that the publicity would not be a factor in their decision and that their decision would be based only on the evidence presented in the courtroom. The incidents of prejudice articulated by appellant were irrelevant. The trial court did not err in denying appellant's motion for change of venue.

POINT TWO

THE COURT DID NOT ERR IN REFUSING TO EXCUSE JUROR JOHN C. BYRNE FOR CAUSE.

Appellant argues that the court erred in refusing to excuse juror John C. Byrne for cause because Byrne was not impartial, appellant, with the removal of Byrne had exhausted his peremptory challenges, and the court refused to grant the defense any additional peremptory challenges.

Prior to the excusal of Byrne by appellant's final peremptory challenge, Byrne stated, under oath, that he did not have an opinion about the guilt or innocence of appellant, that even if appellant were convicted Byrne could give a recomendation of life if the circumstances warranted it, that he believed in "justice" and could fairly determine the issues in the case, and that even though he was distantly related to the victim's family, he did not regularly come in contact with them. (R-691; 693-694;699;1006). Byrne was also acquainted with appellant and appellant's family but there was nothing in this relationship which prevented him from rendering a fair and impartial verdict. (1007). Byrne indicated that he was fully capable of abiding by the instructions given to him by the court. (R-1008-1009).

There was no basis in the record for the trial court to excuse Byrne for cause. Appellant's attorney was given an opportunity to develop information contradictory to the sworn testimony of Byrne but apparently was unable to do so. (R-700-701). Moreover, the trial court had initially increased appellant's peremptory challenges from ten to sixteen, presumably to cover such a situation. (R-344).

Appellant's reliance upon Singer v. State, 109 So.2d 22 (Fla. 1959) is misplaced. In Singer, there is no indication that the trial court had increased the peremptory challenges from those allowed by the Rules of Criminal Proceedure. Additionally, there was a legitimate question (as reflected by the voir dire examination) as to whether the potential juror in Singer could render a fair and impartial verdict. Id. at 19-21.

Here, Mr. Byrne indicated that he could arrive at a fair and impartial verdict based on the evidence, appellant was afforded additional peremptory challenges, and appellant failed to produce any substantial, competent evidence which rebutted Byrne's statements under oath of his impartiality.

The trial court did not err in denying appellant's motion to remove juror Byrne for cause.

POINT THREE

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTION'S PROPER CROSS-EXAMINATION CONCERNING APPELLANT'S PRIOR CONVICTIONS.

Appellant argues that because his counsel brought out the number of his previous convictions on direct the state had no right to do the same on cross-examination and as such, the trial court erred in denying his motion for mistrial.

What is good for the goose is certainly good for the gander. On the direct examination of Michael Fredrick the state elicited the number of times Fredrick had been convicted of felonies. (R-1172-1173). Thereafter, on cross-examination, defense counsel employed a similar tactic, asking Fredrick whether he had been convicted of crimes involving "falsity or dishonesty". (R-1308-1311). The distinction between felony convictions and convictions involving dishonesty or false statements is irrelevant to this issue as both questions may be asked. See, §90.610 (1) Fla. Stat. (1981). At any rate, appellant should be estopped from complaining about a tactic that he employed as well.

Aside from the fact that appellant used this very tactic, the procedure is approved by the case law. If defense counsel brings out on direct-examination a defendent's prior record of felony convictions, the state is still allowed to do the same on cross-examination just so long as the state goes no further

than the permissible proceedure of questioning when the answers elicited from the defendant are truthful. Sneed v. State, 397 So.2d 931, 933 (Fla. 5th DCA 1981) and Leonard v. State, 386 So.2d 51,52 (Fla. 2nd DCA 1980). See also Professor Ehrhardt's discussion of this matter in 5 Florida Practice, 1982 supplement for use during 1983 at 97.

The trial court properly denied appellant's motion for mistrial 1) because appellant employed the very same tactic that the prosecution used and 2) the proceedure is approved by the case law.

POINT FOUR

THE COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE TESTIMONY OF GLENN LAWHON CONCERNING IDENTIFICATION OF THE VICTIM'S PROPERTY.

Appellant argues that the trial court abused its discretion in allowing Glenn Lawhon to testify in regard to the identification of the victim's property. Essentially, appellant's argument is that the he "stipulated" to the identification of this property and as such the prosecution had no right to admit the testimony of Glenn Lawhon because its only purpose was to envoke sympathy from the jury.

Initially, it should be noted that although appellant objected to the testimony of Lawhon he did not ask for a mistrial nor did he ask for an instruction to the jury on how to evaluate the testimony of Lawhon. (R-1463-1464). At trial, appellant's objections were based on 1) relevancy (R-1461) and 2) sympathy (R-1464).

The identification of the property by Lawhon (particularly the stereo equipment and the rifle) was relevant because although the victim's wife generally described the property (R-1129-1131) she did not particularly identify it. Moreover, as noted by the prosecutor below, Fredrick's identification of the property was (perhaps) subject to questions by the defense. (R-1465). The identification of the victim's rifle was crucial because

it was found at the Mills' residence and had no serial number on it. (R-1465).

Lawhon's testimony was further useful in establishing the credibility of Fredrick's testimony about how the murder occurred. For instance, Lawhon testified that the victim had never been shot prior to the murder. (R-1462). Lawhon's testimony also helped establish the value of the stereo equipment. (R-1470).

In light of the foregoing, the testimony was clearly relevant. This is particularly so because Fredrick admitted upon cross-examination that he had given at least ten different versions of where the property had been obtained. (R-1292).

Appellant's reliance upon Neering v. Johnson, 390 So.2d 742 (4th DCA 1980) for the proposition that it is reversible error to allow testimony on a stipulated matter is misplaced. Neering involved a civil matter, not a criminal matter. The criminal rule is different:

> A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt.

Foster v. State, 369 So.2d 928, 930 (Fla. 1979).

Likewise, appellant's reliance upon Welty v. State, 402 So.2d 1159 (Fla. 1981) for the proposition that family members should not identify the victim of a homicide, is misplaced as well. First, the case relates only to the identity of the victim, and not to the identity of property and second, appellant has not suggested to this court any

more competent individual to identify the property other than the family members who testified.

The trial court did not err in allowing Glenn Lawhon to testify regarding the identification of the property.

POINT FIVE

THE TRIAL COURT DID NOT ERR IN ADMITTING PHOTOGRAPH B OF STATE'S COMPOSITE EXHIBIT #9 INTO EVIDENCE.

Appellant, recognizing that Adams v. State, 412 So.2d 850 (Fla. 1982) permits the introduction of relevant photographs even if gruesome, argues none the less that 1) the photograph was not relevant and 2) even if it were relevant, its probative value was outweighed by its prejudicial impact.

The photograph was relevant. One of the contentions at trial was whether the victim had received a traumatic blow to the skull prior to his death. This was important because, as the prosecutor argued to the jury, if the victim had received such a blow it corroborated Michael Fredrick's version of how the victim died. (R-1888-1889). Moreover, Mr. Randolph put this issue into contention at the very outset of the trial when he argued in his opening statement to the jury that the doctor would subsequently testify that there was no evidence of trauma on the back of the victim's skull. (R-1113).

Additionally, the photograph of the skull was a "scene" photograph necessary to establish the amount of time that had passed from the time of the victim's death and the time that his remains were discovered. (R-1317). Scene photographs "should be admitted if they properly depict the factual conditions relevant in that they aid the court and jury in finding the truth." Swan v. State, 322 So.2d 485, 487 (Fla.

1975).

Here, the probative value of the photograph in question outweighed any prejudicial impact that it might have had upon the jury because 1) it refuted or at least helped to explain the absence of medical evidence indicating trauma to the skull and 2) it was a scene photograph, properly admissible to show the passage of time between the death of the victim and the finding of his remains.

The trial court did not err in refusing to prohibit the admission of this photograph.

POINT SIX

THE TRIAL COURT DID NOT ERR IN RETAINING JURISDICTION OVER ONE-HALF OF APPELLANT'S SENTENCE.

Appellant argues that the trial court erred in retaining jurisdiction over one-half of his sentence pursuant to §947.16 (3) Fla. Stat. (1981), as amended by Chapters 82-179 §9 and 82-401, §2, Laws of Florida. See §947.16, Fla. Statute (Supp. 1982). Appellant's argument is that the legislature attempted to get around the prohibition of passing an ex post facto law by providing that the provision of the statute increasing the court's retention of jurisdiction from one-third to one-half of a defendant's sentence would be effective if the defendant was convicted prior to the effective date of this legislation even though his crime might have been committed before the statute became law.

Appellant objected to the retention of jurisdiction by the court on the burglary charge and cited to the court Williams v. State, 414 So.2d 509 (Fla. 1982), Prince v. State, 398 So.2d 976 (Fla. 1981), and State v. Williams, 397 So.2d 663 (Fla. 1981). (R-2388).

As recognized by appellant, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) controls this case. (Appellant's brief at 43). Mere procedural changes (as opposed to substantive changes) are changes which do not affect the quantum of punishment. Id.

The State is well aware of the two-pronged test stated by this Court in State v. Williams, supra. The circumstances of this case, however, distinguish it from the Williams case. Here, Mills, by virtue of his death sentence, is not entitled to gain time in the first place. If this Court affirms Mills' death sentence, there is no need to even reach this issue. Moreover, because this statute merely increases the length of time over which the Court may impose its jurisdiction, the legal consequence of the trial court's parole veto is irrelevant because it would attach regardless of whether the trial court retained jurisdiction over one-third or one-half of appellant's sentence. True, if the death sentence were struck down by this Court it is conceivable that the application of the retention of jurisdiction by the court would operate in a disadvantageous fashion towards Mills but that in and of itself is not enough to satisfy the Williams test. The legal consequences had already attached by virtue of the existence of the prior statute, which allowed the court to retain jurisdiction over one-third of Mills' sentence if its other requirements were met. This is no different than Dobbert v. Florida, which rejected the notion that the passage of Florida's "new" death penalty law after Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) struck down the older death penalty law left a void in which defendants could commit a capitol crime and not be punished by death. The United States Supreme Court refused to state that the application of

"new" death penalty statute was an ex post facto application of the law. Likewise, this Court should refuse to find that the application of the amendment to §947.16 (3), Fla. Stat. has been applied to appellant in an ex post facto manner.

The trial court did not err in increasing jurisdiction over appellant's sentence from one-third to one-half of its term on the burglary charge.

POINT SEVEN

THE TRIAL COURT'S FINDING THAT APPELLANT'S MURDER OF THE VICTIM WAS HEINOUS, ATROCIOUS, AND CRUEL. WAS PROPER.

Appellant argues that the trial court erred in finding that appellant's murder of the victim was heinous, atrocious, and cruel particularly because the circumstances upon which this finding are based came mainly from the testimony of appellant's accomplice.

Initially, after gaining entrance to the victim's dwelling, appellant held a knife to the victim's throat; the victim begged not to be hurt. (R-1209-1210). In response to this begging, Mills told the victim: "Shut up, Cracker." (R-1210).

Subsequently, as the victim was led out of the trailer, he asked appellant if he could get his shoes; he was told by appellant that he would not need his shoes where he was going. (R-1211-1212). It was raining hard outside. (R-1212). The victim was led out by Mills with a shotgun to the victim's head and was transported by truck to his death. (R-1212-1213). During the course of this ride, the victim was scared and trembling. (R-1214).

When the truck in which they were riding turned down a remote dirt road, the victim asked: "what are y'all going to do to me?" Appellant replied: "I'm going to do to you what your forefathers did to my forefathers." (R-1216). At this,

the victim began to shake even more than he was already shaking. (R-1216). The victim then asked appellant's accomplice to watch over him but appellant's accomplice refused. (R-1217).

The victim was led out of the truck by shotgun in a remote area, made to kneel and had his hands buckled behind his back with a belt by appellant. (R-1218-1219).

Appellant then hit the victim a hard blow behind the head with a tire iron. (R-1219-1220). The victim fell forward in a praying position, with blood oozing from his head. Appellant watched him for a while and then said "Let's go." The victim, with his hands still buckled behind his back, jumped up and attempted to hide in some nearby bushes. (R-1221).

Appellant grabbed a shotgun, and went after him, caught him in a water canal and was headbutted by the victim as the victim attempted to escape. Appellant hit the victim in the side with the butt of the gun; the victim made a further attempt to escape, ran into an area covered by palmettos and was shot to death by appellant with two blasts from the shotgun. (R-1222).

Prior to his death, the victim was a disabled epileptic. (R-1127).

The fear and emotional strain preceeding the victim's death establishes this circumstance beyond a reasonable doubt. Adams v. State, 412 So.2d 850 (Fla. 1982), Knight v. State, 338 So.2d 201 (Fla. 1976), and Francois v. State, 407 So.2d 885 (Fla. 1981). Additionally, the fact that the victim cried, screamed,

and pleaded prior to his death establishes this circumstance. Lucas v. State, 376 So.2d 1149,1153 (Fla. 1979).

On the facts presented here, the court properly found that appellant's murder of the victim was heinous, atrocious, and cruel.

POINT EIGHT

THE TRIAL COURT DID NOT IMPROPERLY DOUBLE THE AGGRAVATING CIRCUMSTANCES OF HEINOUS, ATROCIOUS, AND CRUEL AND COLD, CALCULATED, AND PREMEDITATED.

Appellant, relying upon Hill v. State, 422 So.2d 816 (Fla. 1982), argues that the trial court incorrectly doubled the circumstance of heinous, atrocious, and cruel with the circumstance of cold, calculated, and premeditated murder because the trial court relied upon the same facts to establish both.

Just as in Hill v. State, although the trial court considered these two findings together, there was distinct proof as to each factor. There was no moral or legal justification whatsoever (as the trial court observed) for appellant to murder a disabled, epileptic victim. (R-270). Moreover, when the victim plead for his life, appellant demonstrated his cold, premeditated, and calculated design by telling the victim to "Shut up, Cracker." This cold and calculated design was further demonstrated by appellant's indifference to the victim's suffering because he prohibited the victim from wearing shoes as he led him out into the rain to his death and for telling the victim that he was going "to do to you what your forefathers did to my forefathers."

Remember, that this circumstance applies to the intent of the killer; the circumstance in the previous issue applies

to the state of mind of the victim. The fear that the victim felt as a result of the statements made by appellant relate to the victim's state of mind (i.e., whether the crime was heinous, atrocious, and cruel) but the actual statements made by appellant relate to appellant's state of mind (i.e., whether the appellant committed the murder in a cold, calculated, and premeditated manner.)

Thus, separate and distinct proof for each circumstance exists. The trial court did not err in finding both circumstances.

POINT NINE

THE TRIAL COURT DID NOT ERR IN FINDING THAT CERTAIN ALLEGED MITIGATING CIRCUMSTANCES WERE INAPPLICABLE.

Appellant argues that the trial court erred in a) the failure of the court to find that he had an insignificant prior criminal history, b) the refusal of the court to find that his age of twenty-six at the time of the homicide was a mitigating factor and c) its failure to accept the testimony of Dr. Akbar regarding appellant's mental ability and prognosis for rehabilitation as a mitigating factor. Each will be dealt with separately.

A

Appellant's prior significant criminal history.

Appellant argues that his criminal history is insignificant because he had committed only four burglaries, all at once. Put another way, appellant seeks to be rewarded for the commission of four simultaneous burglaries.

In Songer v. State, 322 So.2d 481 (Fla. 1975) this court found that three prior felony convictions were "not insignificant." Moreover, a series of burglaries (even though a defendant is not convicted of these crimes) is considered "significant" enough to eliminate this circumstance as a mitigating factor. Washington v. State, 362 So.2d 658 (Fla. 1978) cert. denied 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666.

B

Appellant's age of twenty-six at the time of the homicide was not a mitigating factor.

Appellant argues that his age of twenty-six at the time of the homicide entitled him to a finding of this circumstance.

In Washington v. State, supra. the defendant was twenty-six years old at the time he committed his homicides. This Court rejected the age of twenty-six as a mitigating factor in that case and should do likewise in this case.

C

The testimony of Dr. Akbar did not entitle appellant to a mitigating circumstance.

Appellant argues that the testimony of Dr. Akbar relating to appellant's intelligence level and to his prognosis for rehabilitation entitled him to a non-statutory mitigating circumstance.

Like the defendant in Ruffin v. State, 397 So.2d 277 (Fla. 1981), cert. denied 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194, appellant's low intelligence level does not entitle him to this circumstance. Moreover, as recognized by appellant, it is up to the trial court to determine whether these non-statutory mitigating circumstances should be given weight and apparently the trial court was unimpressed with Dr. Akbar's testimony concerning appellant's "rehabilitation."

Smith v. State, 407 So.2d 894 (Fla. 1981).

CONCLUSION

Based on the foregoing arguments and authorities, the convictions and sentences of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Asnwer Brief of Appellee has been forwarded to Mr. Roosevelt Randolph, 528 E. Park Avenue, Tallahassee, Florida 32301, by U.S. Mail, this 3rd day of January, 1984.

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