IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
AUG 20 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JERRY HALIBURTON,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Case No. 64,510

ANSWER BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS

(CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS - Continued

TABLE OF CITATIONS - Continued

TABLE OF CITATIONS - Continued

TABLE OF CITATIONS - Continued

TABLE OF CITATIONS - Continued

TABLE OF CONTENTS - Continued

OTHER AUTHORITY

PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The parties will be referred to as they appear before this court.

The symbol "R" will denote the record on appeal. All emphasis in this brief is supplied by appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case. To it appellee will only add that the murder case at one point had been misconsolidated with another case, but that mistake was corrected by an oral order of the trial judge before trial so that the murder and burglary cases were properly consolidated (R 570-571).

Appellee also accepts appellant's statement of the facts to the extent that it presents an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and/or clarifications:

Teresa Cast testified that her shirt which was found in the apartment was among some dirty clothing which she had not taken with her when she moved out (R 1123-1125). Sergeant James Wilburn, the crime scene investigator (R 1181), testfied that other than the victim's fingerprints found on a pack of cigarettes in his bedroom and the fingerprints found on the jalousies which were later identified as appellant's no other latent prints were

found at the scene (R 1262-1263, 1281-1282). The only sign of a struggle in the apartment was around the victim's bed (R 1292). The murder weapon was never recovered (R 1307). Wilburn testified that the blood splatters on the walls indicated repeated, full-arch swings of the knife (R 1378-1383). Wilburn found some female clothing in the closet in the southwest bedroom, which was not the bedroom where the victim was found (R 1403), and observed other female clothing which was dirty in a hamper-type object next to the room in which the victim was found (R 1405-1406, 1446-1447). Terry Cast's shirt was found on the living room table (R 1303) which Wilburn retrieved because the stains on it indicated it might have been used to clean up after the crime (R 1361). Teresa Cast later readily identified that shirt as hers (R 1541).

Appellant's taped statement was played for the jury (R 1628-1752). He began by claiming that he and the victim had smoked reefer on Saturday night, after which appellant went to a party at his sister's home (R 1631-1633). However, the police told him that the appellant had a party at his home that evening, and that none of the people at the party had seen appellant there (R 1675-1676). After being confronted with other inconsistencies in his story, appellant admitted that he had burglarized a number of homes in the area, but denied breaking into the victim's home in the early morning hours of Sunday, August 9, 1981 (R 1687-1690). He denied ever carrying a knife (R 1690). When appellant was told that the victim did not socialize with blacks, appellant still insisted that he had smoked four joints with him (R 1695-1697). Appellant eventually admitted breaking into a lot of

houses (R 1706), but said that he would never kill anyone because that would result in life imprisonment or the electric chair (R 1707-1708). While appellant claimed that he had smoked the marijuana inside of the victim's apartment while sitting on his bed (R 1717), the police asked him if he was not just saying that to cover up the fact that his fingerprints had been found at the scene (R 1720). Eventually, appellant admitted that he broke into the victim's apartment during the early morning hours of Sunday, but when he saw the victim "laying there bleeding" he ran home; appellant still denied committing the murder at the end of the statement (R 1730-1752).

However, Freddie Haliburton, appellant's younger brother, testified that in December of 1981 while at a family barbecue appellant confessed that he killed "the cracker," describing how he entered the apartment, and how after he stabbed the victim the first time the victim raised his arms in defense and appellant continued to stab him. Appellant wanted to cut the victim's penis off and put it in the victim's mouth. Appellant advised Freddie that if he ever wanted to kill someone he should use a knife because it is hard to trace, and told Freddie that "there's a couple more people that I want to get." When Freddie asked him why he did it, appellant responded that it was "to see if I have the nerve to kill someone like this and that's when he stated about the people, couple people he had to get later on." No one else was present during this conversation, and the next time appellant mentioned the murder to Freddie was almost one and one half months later during a minor confrontation with another

man on Tamarind Avenue after which appellant said, "that nigger must don't know who I am. I kill him just like I kill that cracker." At first Freddie did not go to the police with the information because of the reaction he expected from his family, but he eventually did go to the police and gave a statement after his girlfriend called him and told him that she had been attacked by appellant. Freddie testified that at the time he went to the police there were no criminal charges pending against him, and he was not looking for any sort of deal. However, he acknowledged that he had been convicted of crimes twice, and that he had reached an agreement with the prosecutor's office about a burglary charge in return for his testimony at trial. He also acknowledged that he shot his brother, and had been given use immunity with respect to that acknowledgment at this trial (R 1775-1801).

Sharon Williams, Freddie's girlfriend, testified about the attack on her by appellant on March 8, 1982 at 3:00 a.m. in her apartment, during which he also confessed the murder. At first she did not report the incident because she was frightened, but eventually she told Freddie about the attack, about what appellant had said, and she and Freddie went to the police station and gave statements separately (R 1264-1279).

At first the prosecution did not want to give Freddie Haliburton use immunity for the shooting incident, and filed a pretrial motion to determine the admissibilty of his testimony in the absence of immunity (R 2434-2440). After a hearing on that motion (R 830-853), in a written order the trial judge ruled that Freddie Haliburton's testimony would not be admissible if

he asserted his privilege against self-incrimination (R 2448-2451), and immunity was granted thereafter.

The jury's deliberation after arguments of counsel at the sentencing phase lasted for two hours, not ten minutes (R 2131-2132).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A SPEEDY TRIAL DISCHARGE?

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING SUPPRESSION OF APPELLANT'S STATEMENTS?

POINT III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE JURY VENIRE?

POINT IV

WHETHER APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED EITHER BY THE STATE WITNESS' RESPONSE TO DEFENSE COUNSEL'S QUESTION OR BY THE PROSECUTOR'S ARGUMENT?

POINT V

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL ON THE BASIS OF ALLEGED CUMULATIVE ERROR?

POINT VI

WHETHER THE TRIAL COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS EXAMINATION?

POINT VII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF THE PHOTOGRAPH?

POINT VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE?

POINT IX

WHETHER THE TRIAL COURT ERRED IN STRIKING PROSPECTIVE JURORS FOR CAUSE FOR SCRUPLES AGAINST THE DEATH PENALTY?

POINT X

WHETHER FLORIDA'S CAPITAL PUNISHMENT LAW IS CONSTITUTIONAL?

POINT XI

WHETHER THE TRIAL COURT CORRECTLY SENTENCED APPELLANT TO DEATH?

POINT XII

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT FOR BOTH THE BURGLARY AND THE MURDER?

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A SPEEDY TRIAL DISCHARGE.

Appellant was originally arrested for both murder and burglary (R 2215-2217). The grand jury did not indict appellant for the murder at that time, and on November 3, 1981 appellant was charged by information with the burglary (R 2237-2238). Later, appellant's brother, Freddie Haliburton, and Freddie's girlfriend, Sharon Williams, came forward with confessions to the murder which appellant had made to them (R 467-468). Thereafter, on March 24, 1982, the grand jury indicted appellant for the murder as well (R 2542-2543). However, on December 17, 1981, while only the burglary charge was pending, appellant himself signed a waiver of speedy trial (R 2251). Appellant filed a motion to discharge under Fla.R.Crim.P. 3.191, the speedy trial rule (R 2638-2639, 2651-2653), to which the state filed its response (R 2640-2650).

Appellant argued in the trial court and argues here that his motion to discharge should have been granted because the waiver of speedy trial which was filed during the pendancy of the burglary charge did not apply to the murder charge. As the state argued in its written response and at the hearing on the motion (R 143-172), appellant was not entitled to a speedy trial discharge because the waiver which was filed applied to all crimes arising out of the criminal episode. Thus, the waiver on the burglary was a waiver on the subsequently-returned indictment as well.

Under Fla.R.Crim.P. 3.191(a)(4), the speedy trial period

begins to run when a person is arrested "as a result of the conduct or criminal episode which gave rise to the charge." Thus, the key is conduct or criminal episode, not the crime charged. Just as the same speedy trial period attaches to whatever charges are brought as the result of a given episode, so also a waiver of the speedy trial period applies to any and all such charges. Several cases have so held.

For example, in Gallego v. Purdy, 415 So.2d 166 (Fla. 4th DCA 1982), the defendant was arrested on February 26, 1981 and on April 22, 1981 was charged by information with trafficking in cocaine in an amount less than 200 grams. Various defense continuances were filed thereafter, and on February 23, 1982 the information was amended to charge trafficking in cocaine in an amount in excess of 400 grams. Two separate amounts of cocaine had been involved in the same criminal episode. After the defendant's motion for discharge was denied, the fourth district denied prohibition, and in its discussion of the merits stated:

> Addressing, first, the merits, we find no violation of the speedy trial rule. A defense continuance constitutes a specific waiver of the speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode. State v. DeSimone, 386 So.2d 283 (Fla. 4th DCA 1980; State v. Corlew, 382 So.2d 787 (Fla. 2nd DCA 1980).

415 So.2d at 157.

It should be noted that in Gallego the amended information charging a more serious crime was filed ten months after the original information, and well beyond the original 180 day

speedy trial period. The same rule was applied by the fourth district in Clark v. State, 318 So.2d 513 (Fla. 4th DCA 1975), where the defendant was originally indicted on two counts of petit larceny and one count of grand larceny, and subsequently was granted a continuance and filed a waiver of his speedy trial rights under the rule. Almost two months after he filed his waiver, a nolle prosequi was entered on the charges brought in the indictment, and a new information with a new case number was filed charging the defendant with embezzlement. The fourth district held that because the new charge arose out of the same conduct or criminal episode as the original charges, the speedy trial waiver applied to the new information. Similarly, in State v. DeSimone, 386 So.2d 283 (Fla. 4th DCA 1980), the court held that a waiver by continuance in one case applied in a separate case filed after the waiver charging a different crime arising out of the same criminal episode. More recently, the third district came to the same conclusion in State v. Cocalis, 443 So.2d 138 (Fla. 3rd DCA 1983). In that case, the original information charged the defendant with one count of kidnapping. Unexcused defense continuances followed, a second information was filed charging an additional kidnapping count, more defense continuances were filed, and finally on February 7, 1983 (well over a year after the original arrest), a third information was filed adding a count of extortion. The speedy trial discharge on the extortion count was reversed by the third district, which held:

> It is clear that Count III [the extortion charge] arose from the same criminal conduct or episode as gave rise to Count I

> [the original kidnapping charge]; therefore, the fact that this charge was filed more than 180 days after defendant's arrest does not exclude it from the effect of the speedy trial waiver.

Id. at 139.

In the instant case, the burglary and murder charges obviously arose from the same conduct or criminal episode; indeed, appellant does not argue otherwise. Thus, the written waiver executed by appellant applies to both. The above authorities rebut appellant's argument that the waiver cannot be held to apply to any charge arising from the same criminal episode.

Furthermore, appellant cites the case of Haddock v. State, 379 So.2d 194 (Fla. 5th DCA 1980), for the proposition that a waiver on one crime does not carry over to a subsequently-filed charge because it is a separate crime. While at first blush the Haddock case might seem inconsistent with the authorities cited above, close analysis will show that it is not. Before addressing the speedy trial issue, the fifth district discussed the alleged inconsistency in the verdicts, and held that verdicts finding the defendant innocent of manslaughter but guilty of aggravated battery were not inconsistent. The defendant had been struck by an intruder in an apartment and fought back, stabbing the intruder while still in the apartment. The intruder then retreated and ran outside, and the appellant followed. After running approximately 340 feet, the intruder turned to fight, the appellant stabbed him again, and the intruder died. Expert testimony showed that the intruder could

have died from the first stabbing, even though he ran 340 feet away. The fifth district explained that the jury could have concluded that the intruder died from the first wounds, but that this was a lawful homicide, and then concluded that the second stabbing outside was a separate crime of aggravated battery. Thus, the conduct was separable, and the fifth district then decided the speedy trial issue consistent with that conclusion. The court distinguished the rule that a waiver on one information applies to a second information based on the same criminal conduct by pointing out that in Haddock the jury must have decided that the manslaughter and the aggravated battery were separate. Thus, the court held that while the waiver on the manslaughter charge could have applied to a second manslaughter information, it did not apply to a subsequently filed aggravated battery charge, which involved separate conduct. This interpretation of Haddock is consistent with the result reached in Walker v. State, 390 So.2d 411 (Fla. 4th DCA 1980), where the court concluded that the vehicular accident out of which a charge of vehicular manslaughter arose was a separate criminal episode separable from the defendant's flight from the scene which was an independent criminal episode and gave rise to a charge of leaving the scene of an accident.

Moreover, even if the Haddock case cannot be harmonized with the cases cited by appellee, appellee respectfully submits

that the Haddock case is simply wrong.[1/] There is a certain logic and symmetry to the rule that identity of conduct or criminal episode, and not identity of charge, governs the application of the speedy trial rule. While appellant cites the case of State v. Gravlee, 276 So.2d 480 (Fla. 1973), for the proposition that a speedy trial demand is a nulity when no charges have been filed, nevertheless the speedy trial period has been applied to bar, in the absence of any waivers, charges filed after an original charge. For example, in Carter v. State, 432 So.2d 979 (Fla. 2nd DCA 1983), the defendant was originally charged with the criminal offense of driving while his license was suspended or revoked. More than 180 days after custody on that charge had elapsed, he was charged with causing a death by the operation of a motor vehicle while intoxicated, which charge arose out of the same collision as did the first charge. The appellate court held that because the state failed to charge him within 180 days of the original date of custody, denial of his motion for discharge was error. Id. at 798. See also Robinson v. Lasher, 368 So.2d 83 (Fla. 4th DCA 1970); Deloach v. State, 338 So.2d 1141 (Fla. 1st DCA 1976). Thus, the speedy trial rule is a two-edged sword. It provides extraordinary rights (beyond that mandated by constitutional speedy trial) to a defendant who does not waive its protection. Conversely, if he does waive, it allows the state to bring other charges, so long as they are

1/ In fact, in State v. Corlew, 382 So.2d 787, 788 (Fla. 2nd DCA 1980), the second district clarified the basis for its opinion in State v. Boyd, 368 So.2d 54 (Fla. 2nd DCA 1979), which was the case upon which the fifth district based its holding in Haddock. In Corlew the court explained that the decision in Boyd was based on the fact that both informations arose out of the same criminal conduct, not that they involved the same charge or crime.

within the limits of constitutional speedy trial. Just as the state cannot avoid the effect of the speedy trial rule by entering a nolle prosse to a criminal charge and then filing a new information based on the same conduct, State v. Rheinsmith, 362 So.2d 698 (Fla. 2nd DCA 1978), so also a defendant should not be entitled to reap the windfall of discharge when he has filed a waiver.

Two final comments are in order. The case of Johnson v. Zerbst, 304 U.S. 458 (1938), cited by appellant, governs waivers of constitutional rights and mandates that such waivers be knowing and intelligent. However, waiver under the speedy trial rule is not the waiver of a constitutional right because speedy trial under the rule is not the same as constitutional speedy trial. See State ex rel Butler v. Cullen, 253 So.2d 861, 863 (Fla. 1971). In fact, it has been held that an attorney can waive speedy trial without his client's knowledge or consent, McArthur v. State, 303 So.2d 359, 360 (Fla. 3rd DCA 1974), or even against his wishes, State v. Abrams, 350 So.2d 1104, 1105 (Fla. 4th DCA 1977). See also State ex rel Gutierrez v. Baker, 276 So.2d 470, 472 (Fla. 1973). Finally, appellant's argument that he was forced to choose between his right to a speedy trial and his right to counsel is utterly without basis in the record. Thus, in conclusion, appellee maintains that the trial judge correctly denied the motion for speedy trial discharge.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING SUPPRESSION OF APPELLANT'S STATEMENTS.

Appellee maintains that the central question posed by this point is whether an interrogation of a defendant must be interrupted at the request of an attorney who has been retained by someone else to represent the defendant, when the defendant himself (especially an experienced one such as appellant) has repeatedly and unequivocally waived his right to counsel and has voluntarily entertained interrogation. Appellee contends that the answer to that question must be no.

It is by now axiomatic that a trial court's ruling on a motion to suppress is closed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). In the instant case, it was affirmatively established during the hearing on the motion to suppress that appellant had been repeatedly advised of his Miranda rights, had repeatedly waived those rights, never indicated that he wanted an attorney and never indicated that he was unwilling to talk to the police (R 230-235, 238-239, 247, 256, 260-262, 267-268, 334-336, 343-344). [The sequence of appellant's execution of rights waivers and consent forms to undertake the polygraph examination are also summarized in the state's memorandum presented to the trial judge (R 2343-2345).] Appellant's taped statement which was played for the jury (R 1629-1752) corroborated the waivers

which the testimony at the suppression hearing established. The testimony of the attorney who had been retained by appellant's sister indicated that his first telephoned request that the interrogation stop occurred at approximately 3:30 p.m., just before he came to the police station and was refused access to appellant during the interrogation at 3:58 p.m. (R 296-297). The police chief's order that the interrogation cease due to the telephone call from the judge occurred at approximately 4:20 p.m. (R 285-286, 344), and the attorney saw appellant from 5 to 15 minutes after his phone conversation with the judge (R 302-207).

In considering the issue presented here, it must be remembered that Miranda v. Arizona, 384 U.S. 436 (1966), was an effort to eliminate coercion from confessions, but not confessions themselves. Appellant's argument shifts the focus from an effort to honestly determine whether a defendant wants to talk to an attempt to guarantee someone else's right to tell him to keep silent.

Further, it is important to remember what this case does not involve. Had the attorney appeared on the scene before the interrogation had begun, he certainly could not have been denied access to appellant. However, in this case interrogation had already begun. It would not have begun if appellant had decided not to talk. It would not have begun if appellant had asked for an attorney. This appellant was given ample, repeated opportunities to do either. Where, as here, Miranda's mandates have been followed, it cannot be credibly claimed that a defendant (especially an experienced one) is a captive during interrogation, unless we are willing to assume that the Miranda warnings have no meaning at all.

If they do have meaning, then a defendant truly has the right to either enter or end an interrogation, and it is his right which is at issue, not that of someone else. Thus, appellee maintains that even though an identifiable attorney is out in the hall, if Miranda's mandates have been followed, the defendant's waiver of his rights is still free and voluntary.

Appellee submits that the most dispositive case on this issue is State v. Craig, 327 So.2d 737 (Fla. 1970). In Craig, the district court of appeal had reversed the conviction, deciding that the defendant had not waived his right to counsel because during the interrogation he had stated that "in a way" he would like to have an attorney but concluded that he did not "see how it can help me." Id. at 739. This court quashed that decision, noting that on the day the defendant surrendered to the police he had been orally warned of his rights to have an attorney and to remain silent, and that the rights had been put in writing and explained to him, after which he signed the written warnings. While this was happening, the defendant's family had secured an attorney for him and notified a deputy that the defendant had an attorney. All of this occurred on a Saturday. The next day, Sunday morning, the defendant was again advised of his rights by an assistant state attorney at which time his statement was taken.

This court decided that Craig's statement without counsel did not vitiate the voluntariness of his waiver. Furthermore, as the dissenting justice pointed out, id. at 742, Craig's attorney was at the jail on Sunday morning asking to see him. Nevertheless, this court held as follows:

> A verbal acknowledgment of understanding and willingness to talk, followed by conduct which is consistent only with the waiver of his right to have a lawyer present, by one who has been advised of his rights, constitutes an effective waiver of his right to counsel at that stage of the proceeding.

Id. at 741. Two years later, the Second District Court of Appeal followed the Craig case in the case of State v. Brown, 261 So.2d 186 (Fla. 2nd DCA 1972), wherein that court stated the following:

> The trial judge suppressed the statement taken from Brown in the Hillsborough County Jail, on the ground that Brown was at the time represented by the Public Defender, who was not notified of the interrogation. Full Miranda warnings were given. Williams v. State, Fla. app.2d 1966, 188 So.2d 320, would support the trial judge's ruling, but since that decision the Supreme Court has allowed a confession taken from a defendant represented by counsel who was in fact waiting in the lobby of the jail to see his client at the conclusion of the interrogation. State v. Craig, Fla. 1970, 237 So.2d 737. We must therefore reverse and remand for reconsideration in light of Craig.

Id. at 187. See also Kimble v. State, 372 So.2d 1014, 1015 (Fla. 2nd DCA 1979 ("appellant argues further that his appointed counsel must be notified of his interrogation, despite appellant's waiver of counsel's attendance after full Miranda warnings were given. We find that contention without merit.")

Thus, Florida law establishes that where, as here, an accused has been fully advised of his rights, the simple fact that an attorney has been retained for him does not vitiate the voluntariness of an anotherwise valid waiver of those rights. Appellant's argument articulates what has become known as the "New York Rule." That rule is based upon the provisions of the New York State

constitution, and its basic proposition is that once the police know or have been apprised of the fact that a defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing him, the defendant's right to counsel attaches and may not be waived in the absence of counsel. As the New York courts have acknowledged, their rule extends protection to a defendant beyond that which is afforded by the federal constitution. See People v. Donovan, 243 N.Y.S. 2nd 841, 193 N.E. 2nd 628 (1963); People v. Hobson, 384 N.Y.S. 2nd 419, 348 N.E. 2nd 894, 897-898 (1976). Even in the case of Edwards v. Arizona, 451 U.S. 477 (1981), where the United States Supreme Court held that whenever a defendantexpresses in any way a desire for an attorney all interrogation must cease until and unless it is initiated by the defendant himself, the Court never required, as does New York, that a later initiation of interrogation by the defendant can be effected only in the presence of his attorney.

The cases cited by appellant are distinguishable. In Escobedo v. Illinois, 378 U.S. 478 (1964), not only was the defendant's attorney attempting to see him, but the defendant's request to see his attorney was denied. The holding of that case takes it out of the reach of the instant case:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police

> have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the "Assistance of Counsel" in violation of the Sixth Amendment to the Constitution ....

Id. at 490-491. Where, as here, the suspect did not request consultation with counsel and the police did not fail to advise him of his right to remain silent, appellee maintains that Escobedo does not apply.

Nor does State v. Alford, 225 So.2d 582 (Fla. 2nd DCA 1969), where the defendant was never given Miranda warnings. Id. at 585. Davis v. State, 287 So.2d 399 (Fla. 2nd DCA 1973), is likewise distinguishable, for there the attorney arrived and requested to see the defendant at least 30 minutes before the interrogation had begun, unlike in the instant case where the interrogation was well underway before the attorney either called or arrived at the police station. In DelDuca v. State, 422 So.2d 40 (Fla. 2nd DCA 1982), the defendant's attorney had visited him in the jail before the interrogation began, and thereafter requested that there be no questioning outside of his presence. Appellee in the instant case has never maintained that an attorney cannot visit his client before interrogation, advise him to remain silent, and then tell the police that his client has decided to follow his advice. DelDuca stands for nothing more than that unremarkable proposition.

In sum, appellee maintains that a rule which would allow an attorney to interrupt an interrogation after the defendant has been advised of his rights, has waived them, and has willingly submitted to questioning would effectively move the focus of the

Miranda rule from eliminating coercion to eliminating confessions. Realistically, under those circumstances, what attorney is going to advise the defendant to continue? If the criminal justice system is intended to be a search for the truth, confessions (with proper safeguards) should be encouraged, not eliminated. Appellant was accorded those safeguards, and the trial judge correctly denied the motion to suppress. See Stone v. State, 378 So.2d 765, 768-769 (Fla. 1979); Sanders v. State, 378 So.2d 880, 881-882 (Fla. 1st DCA 1979).

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE THE JURY VENIRE.

Appellant argues that the trial judge should have granted the motion to strike the jury venire when, during jury selection, the prosecutor referred to the fact of appellate review of the sentence. Appellant argues that the prosecutor committed the same type of error as that which occurred in Pait v. State, 112 So.2d 380 (Fla. 1959), and that reversal is mandated. Appellee disagrees.

First, the trial judge denied appellant's motion because, as he stated, there had been no misstatement of the law (R 706-707), and for that reason he felt that no corrective instruction was necessary. Of course, the trial judge was correct since this court explained in State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973), the steps involved in the Florida capital sentencing procedure, the final step being review of the sentence by this court "to provide the convicted defendant with one final hearing before death is imposed." This court examines the record in capital cases to determine whether there are clear and convincing facts which warrant the imposition of the death penalty. See Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980).

Thus, there was no misstatement of the law by the prosecutor. Moreover, what occurred here did not parallel what occurred in Pait, supra, at 383-384. In Pait, the prosecutor pointed out the defendant's right of appeal in contrast to his statement that the "people of the State have no right to appeal."

He contended that while the defendant "may have another day," the trial was "the last time the People of this State will try this case in this court." Thus, in Pait, the prosecutor painted the state as the procedural underdog in contrast to the rights accorded the defendant. The prejudicial intent in those comments was manifest. In the instant case, the prosecutor merely explained in a neutral way the procedural scheme of capital sentencing. Of course, in Pait there were other comments of a different character which also led to the reversal of that case. In short, appellee maintains that the trial judge properly denied the motion to strike the panel, and that the Pait case does not establish otherwise.

POINT IV

APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS NOT VIOLATED EITHER BY THE STATE WITNESS' RESPONSE TO DEFENSE COUNSEL'S QUESTION OR BY THE PROSECUTOR'S ARGUMENT.

Appellant alleges two instances of violation of his privilege against self-incrimination, arguing that either one is sufficient to require a new trial. Appellee disagrees.

The first instance came during cross examination of Teresa Cast, the victim's former girlfriend. On direct examination, she recounted an occasion on which she had met appellant while on a ride with a friend, Danny Lee. During the ride, they stopped by a building downtown which Lee entered while Cast remained in the car; when Lee returned, appellant was with him. The prosecutor asked where it was that she and Lee met appellant, but Cast could only recall that it was a building downtown close to her apartment, and could not recall

the nature of the building (R 1059-1064). On cross examination, defense counsel inquired further regarding the building where the witness had met appellant, as follows:

> [By defense counsel]
> Q. When was it that you met Jerry Haliburton, now? Is that the Saturday before?
>
> A. Friday.
>
> Q. The Friday before, What time of the day?
>
> A. I'm not sure.
>
> Q. What was this building that Danny Lee went into and came out with Jerry?
>
> A. I'm not sure.
>
> Q. Was it a place of business or what?
>
> A. I'm not sure of that, either. I assume it was a place of business. He was working there. Maybe it was a schoolroom.
>
> Q. You don't recall seeing any signs that would indicate it was connected with school or plumbing or a grocery store?
>
> A. I was reading the newspaper.
>
> Q. You-all went to another location in town for somebody to buy some marijuana?
>
> A. Yes. * * * *
>
> Q. Okay. Where was this place that the marijuana was purchased, in West Palm Beach?
>
> A. Yes, downtown.
>
> Q. How far from where you picked Jerry up was it? Do you have any idea?
>
> A. It didn't take us very long to get there, so I would -- I would -- I couldn't -- less than a mile, I would say.
>
> Q. Do you have any idea of where?
>
> A. No.

Q. Can you give us some indication of where downtown?

A. No. (R 1103, 1105).

Later during cross examination defense counsel again returned to this same area of inquiry, and the following occurred:

[By defense counsel]
Q. Okay. Did you take Jerry Haliburton somewhere else or is that where he left?

MR. BARKIN: Objection, asked and answered.

MR. BAILEY: I don't recall the answer.

THE COURT: Overruled.

THE WITNESS: I, took him back to where we picked him up from.

BY MR. BAILEY:

Q. Okay. That was somewhere downtown West Palm Beach?

A. Yes, I'm sure.

Q. Hmmm?

A. I'm sure. He could tell you where it's at.

MR. BARKIN: Judge, if I can bring up something, and I hate to do this, but I would ask the jury to go in the back.

THE COURT: All right. You can step into the jury room for just a moment, ladies and gentlemen.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

MR. BARKIN: I would just want to ask Your Honor if the witness can just answer the questions and not stray into what Mr. Haliburton can say to Mr. Bailey. I don't think we reached that point but I'm afraid of any questions going further.

THE WITNESS: Why does he keep asking me questions I don't know the answers to? (R 1112-1113)

The trial judge then explained to the witness that she should limit her responses to the questions asked, and not volunteer information, after which defense counsel made his motion for mistrial based on an alleged comment on appellant's right to remain silent (R 1113-1114).

Appellee maintains that there was no basis for a mistrial here on the same grounds which the state argued when the matter was taken up later before the trial judge (R 1238-1243). First, the witness' statement was not a comment on appellant's failure to testify, either under the standard applied in David v. State, 369 So.2d 943 (Fla. 1979), or under the standard applied by the second district in State v. Bolton, 383 So.2d 924, 928 (Fla. 2nd DCA 1980), and by the first district in Gains v. State, 417 So.2d 719, 724. [Whether the Bolton-Gains standard should apply rather than the David standard is currently at issue before this court in State v. Kinchen, Case No. 64,043.]

Here, a lay witness was asked repeatedly by defense counsel about the nature of the building where appellant was picked up and where he was later dropped off, and just before the contested comment, defense counsel pressed her on it again. She was obviously confused as to what counsel wanted on a point that seemed minor, and made the comment only after she had been pushed to the point of exasperation. As she asked the trial judge: "Why does he keep asking me questions I don't know the answers to?" (R 113). Comments such as that contested here must be taken in context, Nelson v. State, 416 So.2d 899, 900 (Fla. 2nd DCA 1982), and when so taken, to a lay jury

this statement is susceptible only to its plain meaning, that is, in effect: "I don't know. Talk to you're client if you want to know. He could tell you where it's at." It must be remembered that unlike many other cases, the witness here was not a police officer stating that a defendant had remained silent, nor was the statement made by a prosecutor referring to a defendant's failure to take the stand, which distinguishes it from the comment in Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978), cited by appellant.

Further, assuming for the sake of argument that the comment can somehow be deemed to be a reference to appellant's failure to testify, it was clearly invited. This court stated in Clark v. State, 363 So.2d 331, 334-335 (Fla. 1978) that "[n]o error occurs when defense counsel comments upon or elicits testimony concerning the defendant's exercise of his right to remain silent....A defendant may not make or invite an improper comment and later seek reversal based on that comment." What transpired in this trial was very similar to what occurred in Castle v. State, 305 So.2d 794, 797 (Fla. 4th DCA 1974). The pertinent part of that opinion is the following:

> During the trial, in defense counsel's cross-examination of the arresting police officer, the following occurred:
>
> "Q. And you did not arrest him until October 13, 1970?
>
> "A. That's correct, sir.
>
> "Q. Could you not have served an arrest on September 8, 1970 on him and noted that they detain him at the hospital for your custodial duty?
>
> "A. I notified (sic) the hospital, Mr. Starr, that when he was ready to be re-

leased we would like to be notified.

"Q. I know that. Couldn't you have gone down on the 8th?

"A. I went down on the 9th.

"Q. You did?

"A. Yes.

"Q. For what purpose?

"A. To try to get a statement from your client, and after reading him his rights, he refused to give us one."

Appellant's counsel immediately had the jury excused, and moved for a mistrial on grounds the answer was unresponsive and prejudicial comment on the accused's having exercised his Fifth Amendment rights. The Trial Judge denied a mistrial, but did give a corrective jury instruction.

The answer given by the arresting police officer was clearly responsive to the line of questions being asked. It was not volunteered, but rather was solicited by the questions posed by Appellant's own counsel. Appellant's lawyer attempted to find out from this witness why the accused had been arrested by this witness on one date and not another, and the witness gave his reason. Consequently, there is no error to complain about in the first place. A criminal defendant may not take advantage on appeal of an error which he himself induced at trial, cf., Anderson v. State, 230 So.2d 704 (2d D.C.A.Fla.1970).

Here, as in Castle, the witness' comment was clearly responsive to repeated questioning on the same point by defense counsel. Unlike Castle, however, where the witness was a police officer, here the witness was a lay person and her comment cannot by any construction be deemed to be as direct a comment on silence as

was the comment in Castle. The district court's conclusion in Castle was later specifically approved by this court. Castle v. State, 330 So.2d 10, 11 (Fla. 1976). In the instant case, the trial judge agreed that the comment at issue was not a comment on appellant's failure to testify, but rather a comment "upon the fact that the defense counsel, who was at that time questioning the witness, could ask his own client if he desired to know that particular information." (R 1250). Relying on the Castle and Clark cases, he agreed that the comment was not of the same character as that involved in the Castle case, and that it was in response to questions which had previously been asked in cross examination (R 1251).

In short, appellee maintains that the contested comment did not refer to appellant's failure to testify, and even if it did, the state had absolutely nothing to do with it. In fact, it was the prosecutor who interrupted the trial so that the witness could be cautioned in order to insure that what he felt had not yet occurred did not occur in response to further questions (R 1112-1113). Had he not intervened, it is not clear that a mistrial motion would even have been made, but once the issue had been brought up defense counsel picked up the ball and attempted to run with it. Even when he did, he acknowledged that "the prosecutor was not directly involved in it," and the fact that the witness was not a police officer had some bearing on the interpretation of her comment (R 1114). No curative instruction was requested. Unlike in White v. State, 365 So.2d 199, 200 (Fla. 2nd DCA 1978), cited by appellant, here defense

counsel clearly did solicit the remark.

Finally, depending upon the resolution by this court of the question certified by the fifth district in Rowell v. State, ___ So.2d ___, Case No. 83-452 (Fla. 5th DCA opinion filed May 24, 1984) [9 FLW 1177], appellee maintains that the comment at issue here did not infect this trial and that any error was harmless.

Appellant's next argument is that the prosecutor's use of the term "stonewalling" in closing argument was a reference to appellant's right to remain silent. Here again, the statement must be taken in context. Nelson v. State, supra. At that portion of his argument (R 1941-1943), the prosecutor was discussing the statement which appellant gave to the police, showing how the progression of information changed as appellant realized he was tripping himself up. As the state argued in its written response (R 2506) and at the hearing on the motion for new trial (R 2176), and as the trial judge ruled (R 2180), the prosecutor's terminology could not be deemed a comment on silence since appellant did not remain silent and the prosecutor was discussing appellant's lengthy statement which had been played for the jury. See Lofton v. Wainwright, 620 F.2d 74, 77 (5th Cir. 1980). The term "stonewalling" was used in the same sense as it had been during the Watergate investigation and as is defined in Webster's Dictionary as "to engage in obstructive parliamentary debate or delaying tactic." Webster's New Collegiate Dictionary (1973 ed.) at 1146. That is, during his statement appellant was continuously attempting to evade the

truth; at no time during that statement did he assert a right to remain silent, and there was no reference to that right during the prosecutor's argument.

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL ON THE BASIS OF ALLEGED CUMULATIVE ERROR.

Appellant lists numerous incidents during the trial which he maintains should have triggered a mistrial. Appellee maintains that none of them, either individually or collectively, were cause to stop this trial.

The first incident was when Freddie Haliburton referred to the fact that appellant had "got out of jail, somewhat in December." (R 1778). As the state argued at trial (R 1779, 1868-1869), the inadvertent reference by the witness was clearly non-prejudicial because the jury had already heard appellant himself in his taped statement discuss the fact that he was a habitual burglar and always got caught (R 1074-1078). Thus, the witness' statement told the jury nothing they had not already heard, and the defense strategy in closing argument was to argue away the presence of appellant's fingerprints by arguing that he was the neighborhood burglar who happened onto the scene after the murder had been committed by someone else (R 1911-1912, 1929).[1/] The trial judge correctly denied a mistrial on this basis (R 1870). See People v. McQueen, 85 Mich. App. 348 (1978); State v. Rebideau, 321 A.2nd 58 (Vt. 1974). Further, no curative instruction was given at the time of the comment since none was requested.

Freddie's testimony that appellant told him that "there's a couple more people that I want to get (R 1786)" and his testimony concerning appellant's bragging threat that he would kill the man he encountered on Tamarind Avenue "just like I killed

1/ In fact, the defense had the limine order amended to allow references to prior burglaries (R 867).

that cracker" (R 1790-1792) was directly relevant to the issue of premeditation. Both statements served to illustrate appellant's state of mind at the time the crime was committed, that is, that the stabbing was a calculated test of his own capacity for murder. Freddie's expression of concern for his own safety (R 1792) was relevant because that, coupled with the attack upon his girlfriend by appellant, caused him to report appellant's confession to the police despite his concern about how the rest of the family would feel about it (R 1792-1796). This testimony was also necessary to rebut the defense argument that Freddie's motive for going to the police and for testifying at trial was because he wanted to kill appellant (R 1923-1924). Thus, unlike the comment at issue in Jackson v. State, ___ So.2d ___, Case No. 62,723 (Florida opinion filed May 10, 1984) [9 FLW 175, 176], upon which appellant relies, here the statements were clearly relevant to material facts in issue. While they were prejudicial to appellant, all evidence of crime is prejudicial. Ruffin v. State, 397 So.2d 277, 280 (Fla. 1981). However, the test of admissibility is relevancy, Johnson v. State, 130 So.2d 599, 600 (Fla. 1961),and this testimony met that test.

Sharon Williams' testimony was properly admitted on the same basis. The first comments of which appellant complains (R 1844-1847) were unobjected to, and were within the bounds of the trial judge's ruling on the motion in limine (R 2457), which allowed all circumstances of the attack upon the witness to be admitted except that portion of her statement which dealt with an accomplished sexual battery. The attack upon her was integral to appellant's confession of the murder, and was the reason why

she told Freddie about it. The fact that appellant used a knife during his attack on her was not admitted to show propensity to use a knife, but because he told her that he killed the victim with a knife and that it was better to use a knife than a gun in order to avoid detection (R 1846-1848). The admissibility of all of these statements has been determined pretrial at the hearing on the motion in limine (R 462-490), which hearing was prompted by the state in order to avoid evidentiary issues during the trial (R 477).

Regarding the testimony about appellant's tennis shoes, it was the prosecution that brought out the fact that the FBI expert could not determine that the two stains were human blood because they were too small to test adequately (R 1465). Testimony concerning the articles taken from appellant's room, including the shoes, was absolutely necessary since a challenge to the thoroughness of the police investigation was a prominent component of the defense case from the very outset of the trial, as was clearly demonstrated by defense counsel's opening statement and his later intense cross-examination of the police crime scene expert (R 1322-1431).

Appellant's argument about the admission of the standard fingerprints taken on March 22, 1979 is clearly without merit. There was no objection to Detective Calvin Bryant's testimony that appellant was arrested after the fingerprints found at the scene were identified as his (R 1611-1612). Obviously, a set of prints was on file before the murder took place. Here again the jury learned nothing they could not have inferred from appellant's admission during his taped statement that he was the neighborhood

and always got caught
burglar/. Finally, the fact that a search warrant was obtained to search appellant's room was not elicited to imply a judicial determination of guilt, but to establish, as the prosecutor argued (R 1543), that the police did not "just go gangbusting in there," since he anticipated due to allegations by defense witnesses in depositions that there might be defense testimony that the police "were brutal when they went to the house and they did not follow procedures (R 1544)."

In conclusion, none of the issues raised under this point have merit because all of the contested testimony met the test of relevancy; in each instance appellant was prejudiced only because the evidence validly demonstrated his guilt.

POINT VI

THE TRIAL COURT DID NOT ERR IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS EXAMINATION.

Appellant's argument that defense counsel was forced to conduct cross examination of Freddie Haliburton when he was too exhausted to do it effectively is completely without merit. On the afternoon of the fourth day of the trial, at 3:31 p.m. (R 1753), the administrative meeting which the trial judge had been scheduled to attend was cancelled, allowing the trial to continue. Therefore, as governor of the trial, the trial judge decided to begin hearing as much of the testimony of Freddie Haliburton as could be heard that day, and decided that the trial would continue "a little bit past" 5:00 p.m. (R 1753). Defense counsel's only reservation at that time was that he did not want to be required to complete his cross examination that day, and the judge said that they would get as far as they could (R 1754). Just before direct

examination began, claiming exhaustion, defense counsel asked that he be allowed to cross examine the witness in the morning. The judge responded that they would not be required to go past 6:00 p.m., and that if direct examination was completed before that time he would ask defense counsel "to begin, at least begin your cross this evening and possibly go up to 6:00" (R 1771).

Appellee maintains that it was clearly within the court's discretion to extend the trial one more hour in order to move the case along, and setting the time for adjournment at 6:00 p.m. was hardly inordinate or unreasonable. This incident occurred at the conclusion of only the fourth day of trial. As the trial judge noted during the hearing on the motion for new trial, the parties had been given several days off between the end of jury selection and the beginning of trial as an accommodation to both counsel, he had not forced trial to continue until 10:00 p.m. or midnight, and he did not observe the "that either counsel were particularly exhausted." (R 2170).

It should be noted that defense counsel completed cross examination before 5:50 p.m. (R 1828), and that examination brought to the jury's attention several bases for impeachment based on bias and motive, including Freddie Haliburton's feelings about his brother, the fact that he had shot his brother after believing that appellant had attacked his girlfriend, the fact of Freddie's plea agreement and the use immunity agreement which had been given him in exchange for his testimony at trial (R 1801-1928). The trial judge said nothing to indicate that he would not have allowed the witness to be recalled for further cross examini-

tion the next morning, quite the contrary. However, no such request was made by defense counsel. As the state submitted in its written response to the new trial motion (R 2508), "in reality this issue was raised in an attempt to create the grounds for a 'no-fault' Rule 3.850 motion, since as an experienced defense and appellate attorney defense counsel knows that ineffective assistance of counsel issues are always raised in post-trial proceedings in capital cases." There was no undue haste in the progress of this trial, and no basis for the claim made here.

POINT VII

THE TRIAL COURT DID NOT ERR IN ALLOWING THE ADMISSION OF THE PHOTOGRAPH.

Appellant argues that the trial judge prejudicially erred in the admission of State Exhibit 1, a photograph of the victim's body at the scene of the crime. Appellee maintains that there was absolutely no error here; to the contrary, the record demonstrates a moderate use of photographs compared to that which is found in other murder cases.

First, it must be noted that only four black and white photographs were proposed for admission into evidence by the state; three of those photographs were in fact admitted and published to the jury (R 940-944, 1215-1225). Throughout the trial, defense counsel attempted to create an issue regarding the photographs, where there really was none, by repeatedly parrotting for the appellate record (R 1243) the term "gory photographs." When he made an issue of the photographs at various points in the trial, the prosecutor noted that no color photographs had been proposed at trial (R 1051, 1087, 1244), even though they were available. During the hearing on the motion for new trial, the prosecutor further elaborated on the availability of color photographs of the crime scene and of color autopsy photographs. Those photographs were admitted as State Composite Exhibits 1 and 2 at the new trial motion hearing in order to show the trial judge exactly what photographs were available to the state, which it chose not to even attempt to introduce at trial (R 2173-2175). Those photographs have been forwarded to this court, as were the three photographs which

were admitted at trial. Appellee invites this court to compare the photographs which were available with the photographs which were admitted. That comparison will put to rest any complaint that the state did not exercise moderation in its use of photographic evidence in this case.

As the trial judge stated, the photograph which is contested here, Exhibit 1, is "not too grisly" (R 1251), and that the "problem with the goriness of the photograph....is that it's a gory case and there isn't any way you can present the case without those type of photographs." (R 1292-1293) Further, appellee is confident that this court's examination of the three photographs which were admitted at trial will demonstrate that they do not even approach those whose admission was upheld in Booker v. State, 397 So.2d 910, 914 (Fla. 1981), where one photograph of the victim as she was found at the scene of the crime showed a knife protruding from her throat, nor did they come near the photographs admitted in Straight v. State, 397 So.2d 903, 906 (Fla. 1981), several of which depicted the victim's bloated body which had been recovered from a river after 20 days. Those photographs showed the wounds inflicted and were gruesome because of decomposition. Still, this court held that they were "relevant either independently or as corroborative of other evidence, specifically, the testimony of witnesses." Id. at 907. See also McCray v. State, 369 So.2d 111 (Fla. 1st DCA 1979) (six photographs of the badly decomposed body of the victim, while unquestionably gruesome, were relevant, either independently or as corroborative of other evidence and were admissible.) The

test for admissibility of photographs in Florida is relevancy, not necessity. Foster v. State, 369 So.2d 928, 930 (Fla. 1979).

Regarding appellant's specific complaints about Exhibit 1, appellee submits that that photograph was no more graphic than Exhibits 17 and 18, about which appellant does not complain here. Those latter exhibits showed blood splattered on the walls of the victim's bedroom, and were relevant to show the crime scene. In fact, they were used extensively by defense counsel in lengthy questioning of the state's witnesses regarding their conclusions derived from the blood splatters as to how the crime was committed (R 1365-1385,1513-1514). Exhibit 1 was no less relevant than were Exhibits 17 and 18. Defense counsel's objection to the crime scene investigator's use of Exhibit 1 in describing the wounds was based on the best evidence rule, and not the nature of the photograph (R 1226). Further, the medical examiner used Exhibit 1 in describing the wounds, testifying that the photograph portrayed the victim as he first saw him at the scene; defense counsel's objection at that point was based on improper refreshing of recollection, and not the allegedly inflammatory nature of the photograph (R 1494-1496).

While appellant argues that identity was not in dispute, nevertheless defense counsel refused to stipulate to it (R 1049). Of course, this court has held that a defendant cannot, by stipulating to the identity of the victim and the cause of death, relieve the state of its burden to prove those elements beyond a reasonable doubt, and challenges to the admission of photographs on the basis of an alleged stipulation have failed.

See, e.g., Foster v. State, supra, at 930. Appellant argues that a crime scene photograph such as Exhibit 1 should not have been used for identification testimony, and mentions that at one point the trial judge opined that the state could produce an ordinary photograph of the victim for identification (R 1085). However, in Meeks v. State, 339 So.2d 186, 188 (Fla. 1976), this court listed among the acceptable means of proof of identity either a picture of the victim when alive or a photograph of the autopsied cadaver, either of which could be identified by any person who knew the victim in life.

Here, four witnesses were shown Exhibit 1 for identification purposes. Two of the witnesses did not react emotionally at all (R 959, 1032). One of the witnesses did react to it slightly (R 924), which the judge later stated was no problem (R 941). The only strong reaction was by Teresa Cast, the victim's girlfriend. However, she had refused the prosecutor's request that she look at the photograph before the trial (R 1089). Further, she was asked to identify the photograph not only for identification but because she had been the first person to discover the victim, and the photograph showed the position of the body and the crime scene as they appeared at the time of discovery (R 1050-1052, 1087). It was established later during the trial that the crime scene investigator had pulled the sheet which the victim had been clutching down away from his face in order to examine the wounds before he took that photograph (R 1225), a fact which the prosecutor discovered for the first time during the trial (R 1216-1217), and which he brought

to the jury's attention thereafter through the crime scene investigator's testimony. Nevertheless, the position of the sheet was only slightly different, and was the only difference. The prosecutor's honest mistake was in no way calculated to stir the emotion of the witness, and any argument that appellant was prejudiced by Ms. Cast's reaction was conclusively rebutted when the court polled the jury (R 1089-1091). Thus, appellee maintains that there was no error in the admission of the photographs at trial.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE.

Even before the recent elimination of the circumstantial evidence instruction from the standard jury instructions, the law in Florida was that the instruction on circumstantial evidence had to be given only when the prosecution relied solely upon circumstantial evidence. State v. Anderson, 270 So.2d 353, 357 (Fla. 1972); Miller v. State, 403 So.2d 1015, 1016-1017 (Fla. 5th DCA 1981). In the instant case, the state relied not only upon circumstantial evidence but also upon the testimony of witnesses that appellant had confessed the murder to them. Thus, even before the elimination of the instruction, a refusal to deliver it in this case would not have been a palpable abuse of discretion, which is what appellant must demonstrate in order to prevail under this point. See Williams v. State, 437 So.2d 133, 136 (Fla. 1983); McGill v. State, 443 So.2d 433 (Fla. 5th DCA 1984). There was no abuse of discretion in this case, much less a palpable abuse. [Moreover, in case at some time in the future an assistant attorney general is reading this brief with bloodshot eyes in preparation for a federal habeas corpus hearing, the circumstantial evidence instruction was eliminated in reliance upon federal law, specifically a United States Supreme Court case. See In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 595 (Fla.1981).]

POINT IX

THE TRIAL COURT DID NOT ERR IN STRIKING PROSPECTIVE JURORS FOR CAUSE FOR SCRUPLES AGAINST THE DEATH PENALTY.

Appellant does not contend that any of the jurors who

were excused for cause under the test of Witherspoon v. Illinois, 391 U.S. 510 (1968), did not come within the ambit of that rule. Indeed, no such contention could be made since those five prospective jurors were about as death-scrupled as they come, a point which was established with special clarity during defense counsel's questioning of them. Rather, appellant challenges the validity of the Witherspoon standard itself.

Appellant relies heavily upon the case of Grigsby v. Mabry, 569 F.Supp.1273 (E.D.Ark.1983), modified, 637 F.2d 525 (8th Cir.1980). However, appellant's motion to preclude Witherspoon challenges (R 2563-2564) and his motion for a bifurcated jury (R 2567), and the arguments thereon and the brief argument presented during jury selection (R 804-806) certainly did not present the judge in this case with the volumes of information provided in the Grigsby case, which itself was remanded for an evidentiary hearing. Thus, appellee maintains that the issue was not preserved for appeal here, because the trial judge had no opportunity to make a ruling on the information which gave rise to the Grigsby case and its progeny.

Regardless, appellant's argument has been rejected repeatedly, and appellee will rely upon the cases which have rejected it. See Downs v. State, 386 So.2d 788, 790-791 (Fla. 1980). See also Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978); Steinhorst v. State, 412 So.2d 332, 335 (Fla. 1982); Maggard v. State, 399 So.2d 973, 975 (Fla. 1981); Gafford v. State, 387 So.2d 333, 335-336 (Fla. 1980); Jackson v. State, 366 So.2d 752, 754-755 (Fla. 1978); Riley v. State, 366 So.2d 19, 21 (Fla. 1978); Hicks v. State, 414 So.2d 1137, 1138 (Fla. 3rd DCA 1982);

Nettles v. State, 409 So.2d 85, 86-87 (Fla. 1st DCA 1982); Herman v. State, 396 So.2d 222, 228 (Fla. 4th DCA 1981). Further, a Grigsby claim was rejected in Hutchins v. Woodard, 730 F.2d 953, 957-958 (4th Cir.), stay denied; Woodard v. Hutchins, ___ U.S. ___, 78 L.Ed.2d 541 (1984).

POINT X

FLORIDA'S CAPITAL PUNISHMENT LAW IS CONSTITUTIONAL.

Appellant presents the usual laundry list of challenges to the constitutionality of the death penality, all of which have been rejected in many cases. See, e.g. Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. ___, Case No. 83-5596 (Decided July 2, 1984) [35 Crim.L.Rep. 3199]; Barclay v. Florida, ___ U.S. ___, 77 L.Ed. 2nd 1134 (1983); Proffitt v. Florida, 428 U.S. 242 (1976); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983); Spinkellink v. Wainwright, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973).

POINT XI

THE TRIAL COURT CORRECTLY SENTENCED APPELLANT TO DEATH

By a vote of 10 to 2, the jury recommended the death sentence in this case (R 2687). Contrary to appellant's mistake in his statement of the facts, the advisory verdict was reached after two hours of deliberation, not 10 minutes (R 2131). Just over two weeks later, after the parties had been given the opportunity to submit memoranda on sentencing (R 2462-2471, 2472-2485), and after being given an opportunity for further argument (R 2151), the trial judge announced his findings and sentenced appellant to death (R 2152-2153). His written findings and sentence were filed that same day (R 2688-2689). The judge found that five aggravating circumstances existed. He further found that the evidence failed to support the existence of any mitigating circumstances, and that no mitigating circumstances outweigh the aggravating circumstances which he found to exist. Appellant, of course, challenges each of the judge's findings, but appellee maintains that those findings were correct.

Appellant first challenges the judge's finding that the aggravating circumstance delineated in § 921.141(5)(a), Fla.Stat. (1981), that the capital felony was committed by a person under sentence of imprisonment, applied. It is uncontested that appellant was on mandatory conditional release at the time the murder was committed. The statute in effect at the time of appellant's release, § 944.291(1), Fla.Stat. (1979), stated that "[a] prisoner who has served his term or terms less allowable statutory gain-time deductions and extra-good time allowances as

provided by law, shall, upon release, be under the supervision and control of the department [of Corrections] and shall be subject to all statutes relating to parole...." In Williams v. State, 370 So.2d 1164-1165 (Fla. 4th DCA 1979), the court stated that the defendant in that case, who was on mandatory conditional release, was "serving only one sentence, a portion of which is in prison and the remainder of which is in freedom, subject to his being under the supervision of the state as if on parole." Appellee maintains that this definition fits within the ambit of the rule explained in White v. State, 403 So.2d 331, 337 (Fla. 1981), where a defendant on parole was held subject to this aggravating circumstance. Thus, appellee maintains that the aggravating circumstance was properly found in the instant case.

Appellant challenges the application of the aggravating circumstance specified in § 921.141(5)(b), Fla.Stat. (1981), that he had been previously convicted of a felony involving the use or threat of violence to the person. During the sentencing phase, documentation was admitted (charging documents and judgments) proving that appellant had previously been convicted of robbery with a firearm and attempted sexual battery (R 2025-2032). Such documentation is sufficient evidence to support the existence of prior convictions under this aggravating circumstance. See Morgan v. State, 415 So.2d 6, 12 (Fla. 1982; Jones v. State, 411 So.2d 165, 168 (Fla. 1982). Appellant himself later took the stand and testified that while he pled no contest to the charge of robbery with a firearm, the other people involved in the robbery actually committed it, and that he did not carry the gun (R 2089-2090). As it did in its memorandum to the court (R 2478), ap-

pellee maintains here that appellant's own, self-serving version of the facts was totally irrelevant. Even giving appellant's testimony undeserved credence, an aider or abettor is as responsible for the crime as the primary perpetrator. Potts v. State, 430 So.2d 900, 903 (Fla. 1982). Appellant also denied on the stand that he carried the weapon during the attempted sexual battery on another inmate at the Desoto Correctional Institute (R 2091). As appellee argued in its memorandum (R 2478), the documentation which it presented was sufficient evidence, and had it attempted to present proof of the circumstances of appellant's prior crimes, the defense would no doubt have objected that the state was attempting to unduly prejudice the jury against appellant. In fact, the documentation presented to the judge with the memorandum (R 2484-2485), which the state chose not to produce before the jury for the reason stated above, included appellant's own version of the attempted sexual battery wherein he stated that he in fact wielded a knife during the commission of that crime. It is apparent that appellant committed perjury on the stand at the penalty phase.

Appellant next alleges that the aggravating circumstance set forth in § 921.141(5)(d), Fla.Stat. (1981), that the capital felony was committed while he was engaged in the commission of a burglary, did not apply. He generously concedes that there "is some evidence to support this finding," which might qualify as the understatement of the year in light of the record in this case. Further, appellant is not entitled to challenge this finding here, since defense counsel obviously and wisely

attempted to preserve his credibility before the jury by not challenging it in his argument to them (R 2118-2119), and as the state noted in its memorandum (R 2479), did not contest its application in his own memorandum to the judge (R 2462-2468). There is no preservation of an argument on appeal which was never presented in the trial court. Further, the jury's question to the court during its deliberation on guilt (R 1989-1990) was obviously a question regarding the verdict form, and not an indication that they had not found that a burglary had occurred. Finally, as appellee argues under Point XII, judgment and sentence were properly entered on both the murder and burglary counts. In Menendez v. State, 419 So.2d 312, 314-315 (Fla. 1982), this court rejected the argument that this aggravating circumstance creates a presumption that death is the appropriate penalty for persons convicted of first-degree murder based on the theory of felony murder.

Appellant argues that the trial judge did not properly find the aggravating circumstance set forth in § 921.141(5)(h) Fla.Stat. (1981), that the capital felony was especially heinous, atrocious, or cruel. In State v. Dixon, supra, at 9, this court interpreted "that heinous means extremely wicked or shockingly evil...." Thus, the trial judge's use of the term "especially wicked and evil" was sufficently precise.

The victim in this case was stabbed 31 times (R 1500-1501). At the sentencing phase, Dr. Frederick Hobin, the medical examiner, testified that the victim was surprised in his bed, and that the evidence demonstrated either that he was awakened because he was startled by the presence of someone or was awakened by the

attack itself. The doctor was "confident" that the victim was conscious and aware of the fact that he was being repeatedly stabbed, since the defensive wounds on his arms indicated a futile attempt to defend himself. While the evidence did not suggest that the victim had been tormented before the attack, it indicated to the doctor that the victim survived for minutes after the wounds were inflicted (R 2065-2069). At trial, Dr. Hobin testified that during the attack the victim was conscious and pulled up his limbs in protection, and that he was awakened before or after the stabbing began (R 1531-1532).

Most people consider their bedroom to be a safe sanctum for privacy and repose. It does not tax the imagination to picture the shock and terror which the victim in this case must have suffered during the last minutes of his life, when he was awakened to see a knife-wielding assailant over him, and when that knife was plunged repeatedly into his chest. The evidence portrayed a classic tale of horror, and the posture of the victim in his bed as shown in the photographs depicted a helpless victim, powerless to prevent his own slaughter. His death was not instantaneous, and the application of this aggravating circumstance to the facts of this case is clear beyond any reasonable doubt. See Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982) ("the trial court properly found the murder to be heinous, atrocious and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay

asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place "); Morgan v. State, supra, at 12 ("under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance [heinous, atrocious, or cruel] is also supported. The evidence showed that death was caused by one or more of 10 stab wounds inflicted upon the victim by appellant "); Washington v. State, 362 So.2d 658, 665 (Fla. 1978) ("the victim Pridgen was stabbed repeatedly while appellant's accomplice held him helpless and unable to defend himself. Pridgen received seven potentially fatal wounds, none of which would have caused instantaneous death. Dr. Fernandez testified that it would have taken minutes for the victim to die....") See also Moody v. State, 418 So.2d 989 (Fla. 1982); King v. State, 390 So.2d 315 (Fla. 1980); Rutledge v. State, 374 So.2d 975 (Fla. 1979).

Appellant's reliance on Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983), is misplaced. While the medical examiner testified that blood and urine samples indicated that the victim was intoxicated (R 2065), the last two persons to leave the party at approximately 11:30 p.m. Saturday night indicated that the victim was in good spirits as they saw him go back upstairs to bed (R 1003-1004, 1036-1037); his brother specifically testified that while the victim was intoxicated, he was not "staggering drunk or falling down drunk or anything (R 1019.)" The victim in Herzog was "under heavy influence of methaqualone previous to her death,", was unconscious during part of the episode, and "was semi-conscious during the whole incident as there [was] evidence that the victim

offered no resistence...." Id. at 1380. The victim in the instant case had not ingested any hard drugs (R 948, 971-972), and was awakened either immediately before or during the attack. The trial judge's finding that appellant "attacked a neighbor while the victim was intoxicated in his bedroom asleep and totally defenseless (R 2689)" was fully supported by the evidence and established this aggravating circumstance.

Appellant also challenges the last aggravating circumstance in this case enumerated in § 921.141(5)(i), Fla.Stat.(1981), that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. After having argued that there is doubt that the jury found that the murder was committed during a burglary, appellant now somehow argues that "the jury was not even unanimous as to whether this was a premeditated murder...." Appellant's argument not only ignores the evidence at trial, but apparently assumes that the jury filled out the verdict form for no reason at all. The nature of the weapon used, the absence of provication, and the nature and manner of the wounds inflicted clearly establish premeditation. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). Further, the heightened level of premeditation necessary to support this aggravating circumstance was also proven. Freddie Haliburton's testimony portraying appellant's own description of how and why he committed the crime established beyond any doubt that appellant's action was a cold, calculated, premeditated and perverted rite of passage intended to test his own nerve and to prove to himself that he was capable of murder. Appellant's statement that

there were "a couple more people that I want to get," his bragging about the murder to his brother after an encounter with another man on Tamarind Avenue, his bragging threat during his attack on Sharon Williams that he would "do you just like that man, (R 1846)" and his explanation to both his brother and Williams of the advantages of using a knife to kill (R 1786, 1848) all served to illustrate further his state of mind at the time the crime was committed, that is, that it was a calculated test of his own murderous capability. Further, once he had broken into the apartment appellant found the victim asleep in his bed, obviously not awakened by appellant's removal of the jalousies and screen at the point of entry. Equally obviously, appellant had ample time to ponder his sleeping victim before deciding to use him as his test case, utterly without any pretense of moral or legal justification. While the medical examiner testified that the murder appeared to have been committed during a "frenzy," that testimony was not inconsistent with the state's position in closing argument (R 1962-1963). That is, after the first thrust of the knife appellant clearly "got into" what he was doing, and any frenzy which followed does not detract from the character of the crime as having begun with cold calculation.

In McCray v. State, 416 So.2d 804, 807 (Fla. 1982), this court explained that while this aggravating circumstance ordinarily applies in execution or contract murders, "that description is not intended to be all inclusive." In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), this court explained the level of premeditation which is necessary, and further explained that

the focus must also be on the other elements of the aggravating factor, that the murder was "cold, calculated...and without any pretense of moral or legal justification." This aggravating circumstance was found to apply in Combs v. State, 403 So.2d 418 (Fla. 1981, which was neither a contract nor an execution case. It is important to note that the Combs case lacked any evidence of prior planning, and appellee contends that here, as in Combs, appellant's own words demonstrated a cold and calculated decision to prove a point to himself by committing this murder.

Appellant's argument regarding mitigating circumstances is insufficient to rebut the trial judge's finding that there were none. There is no indication that the judge believed appellant's bogus story that he had been drinking and smoking marijuana with the victim. The judge's findings indicate that appellant knew only that his victim was sleeping and helpless, not that he was intoxicated. Other evidence showed that, and what appellant knew was enough. Appellant's argument on appeal of diminished mental capacity was never presented to the jury or to the trial judge (R 2122-2124, 2469-2471) for the very good reason that there was absolutedly no evidence to support it.

In conclusion, appellee asserts that the trial judge properly followed the advisory determination of the jury in sentencing appellant to death. Five aggravating circumstances were found, and no mitigating circumstances. Furthermore, even if an aggravating circumstance was improperly applied, the sentence should still stand. See Brown v. State, 381 So.2d 690, 696 (Fla. 1980). See also Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d

1134 (1983); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

POINT XII

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT FOR BOTH THE BURGLARY AND THE MURDER.

Repeating some of the arguments regarding the jury's deliberation which he made under Point XI, appellant contends that the trial judge erred in sentencing him for both the burglary and the murder. However, this argument presupposes that that the sole basis for conviction was felony murder. Appellee maintains that sufficient evidence existed to support conviction under either the theory of felony murder or premeditation, and therefore the separate sentence for burglary was not error. See White v. State, 446 So.2d 1031, 1037 (Fla. 1984).

CONCLUSION

Based on the foregoing argument appellee respectfully submits that no error was committed by the trial court and respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 17th day of August, 1984 by United States Mail to CHARLES W. MUSGROVE, ESQUIRE, Congress Park, Suite 1-D, 2328 South Congress Avenue, West Palm Beach, Florida 33406.

OF COUNSEL