IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY HALIBURTON,

Appellant,

CASE No. 64,510

v.

STATE OF FLORIDA,

Appellee.
_____/

BRIEF OF APPELLANT

An Appeal from the Fifteenth Judicial
Circuit Court for Palm Beach County

CHARLES W. MUSGROVE
Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
305-968-8799
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS, Continued

TABLE OF CITATIONS, Continued

PRELIMINARY STATEMENT

Appellant was the Defendant in the Circuit Court in and for Palm Beach County, Florida. Appellee was the prosecution. The parties will be referred to as they appear before this Court. Jurisdiction lies in this Court pursuant to Article V, Section 3(b)(1) Fla. Const. and Rule 9.030(a)(1)(A)(i), Fla. R. App. P., because Appellant was sentenced to death (R2690).

The symbol R followed by a number will refer to the record on appeal. The symbol SR refers to the additional record ordered by this Court on April 13, 1984. Exhibits will be referred to by number, and, for those which were not introduced at trial, the date of the hearing will follow.

STATEMENT OF THE CASE

By information filed November 3 (R2237-2238), Appellant was charged with committing a burglary on August 9. On March 24, 1982, Appellant was indicted for murder in the first degree, also allegedly committed August 9 (R2542-2543). The cases were consolidated for trial (R207, 2513).

On June 24, 1982, Appellant moved for discharge from the murder charge (R2638-2639). The State argued (R152-162, 2640-2641) successfully that the waiver filed December 17, 1981 on the burglary charge (R2251) applied to the then unfiled murder charge as well. The motion was denied (R2513, SR1).

The Court refused to order Phase Two discovery (R2552-2553, 2637). It also denied motions to dismiss on Constitutional grounds (R116, 2555-2560), to quash the grand jury indictment (R117, 2571-2572), to allow individual voir dire (R117, 2565-2566), to provide criminal records on state witnesses (R126, 2554), to retain notes of government agents (R133, 2561-2562). The Court reserved on Appellant's motion for grand jury testimony (R127-128, 2569), but later granted it to the State (R195-196, 2283-2284).

The cases came on for trial on September 6, 1983 (R566). The jury found Appellant guilty as charged on each count (R1992-1993, 2460, 2681). On September 21, the jury reconvened and recommended the death sentence (R2132, 2687).

On October 7, Appellant was sentenced to death for

first degree murder (R2152-2154), 2688-2699), and to twelve years for burglary (R2152, 2487).

Motion for new trial (R2489-2501) was denied November 3 (R2180). By notice of appeal filed that same date (R2691), Appellant seeks review of these convictions. The entire record is now before this Honorable Court for review, having been supplemented on April 24, 1984.

STATEMENT OF THE FACTS

Between 5:00 and 5:30 on the afternoon of Sunday, August 9, 1981, the body of Don Bohanon was found by his estranged girlfriend, Teresa Cast (R1078-1081). She thought she tried to talk to him and kissed his cheek trying to awaken him (R1122) (a dubious claim with the sheet up, R1176-1177). She ran out and got a neighbor to look (R939,1091-1092).

Teresa, who lived with Don for 23 months (R1052), moved out the week before after a fight (R1055-1057). She came back on the eighth to get her dog, and was bringing it back on the ninth (R1077). Though she moved in with a friend, Danny Lee (R1061-1062), she still had clothing at Bohanon's (R1095-1096). Her bloody shirt was found in the next room (R1541).

The victim spent the night of the eighth drinking beer and smoking marijuana with his brother and some friends (R948, 971-972, 1002, 1041). It broke up about 11:30 p.m., and he went on up to his room (R965, 1003). Before he did so, he had words with one David Sturgis over use of a car (R979, 1012-1013, 1038).

There was testimony that Bohanon was a racist who did not socialize with blacks, even though some, including Appellant's family, lived nearby (R936-937, 955-956, 960, 964, 1000, 1053-1054). Apparently Teresa did not share this feeling, because she and Danny Lee went riding with Appellant and bought a nickel bag of marijuana (R1062-1064).

The pathologist testified that death occurred between 12:30 a.m. and 12:30 p.m. on August 9 (R1517), caused by multiple stab wounds (R1504). The victim was almost certainly on the bed throughout and was probably nude (R1517). He received thirty-one penetrating injuries, two on the neck, twenty-two on the anterior chest, six on the arms (apparently defending himself), and one on the scrotum (R1500-1501). The assailant may also have been on the bed (R1380). The wounds were likely made by a weapon of convenience (R1520-1521). It could have been a pocket knife (R1523). There was one flashed about at Bohanon's party (R1039-1040).

Over repeated defense objections (R924-925, 939-942, 1048-1051), State's Exhibit One was utilized to identify the victim (R924, 959, 1225, 1494-1495). At least two witnesses cried at the picture (R940, 1082-1083). The sheet covering the victim had been moved before the picture was taken (R1154, 1157, 1225). Motions for mistrial (R1217, 1220-1221, 1235-1238, 1249, 1858-1860) were denied (R1250-1251, 1866).

Police suspected a burglary, since newly replaced jalousies on the south door had been removed (R967, 1150, 1185). Latents from those jalousies matched Appellant's prints (R1276, 1281-1282). The victim allegedly had several hundred dollars the night before (R1002-1003), which was never found (R1539).

The victim ordinarily slept with the door padlocked

(R1123, 1132). Teresa Cast still had her key and his was the only other (R1123). The padlock was unlocked when she found the body (R1126).

On the morning of August 13, 1981, Appellant was taken to the police station at about 6:30 a.m. (R230, 333-334). He was questioned at about 7:00 a.m., after being advised of his rights (R230-233, 335). He did not request an attorney, at least, "not at this time" (R233-235, 251-252, 345-346). The questioning went on until 9:30 and resumed at 10:00 a.m. for another ten minutes (R236, 1716-1729).

At 2:05 p.m. Appellant submitted to a polygraph (R238, 259-260, 338). By 3:50, Appellant had admitted a break-in, but denied the murder (R240, 265, 342). He gave a further statement from 3:56 until 4:20 (R241, 246). It was played to the jury (R1730-1752).

Meanwhile, Appellant's sister retained an attorney to represent him (R291-293). He called in at 2:45 p.m. and told police to stop any questioning. When told the polygraph test was almost over, he did not insist that it be stopped (R295-296, 314, 318, 340-342).

One officer testified no one told Appellant about the call (R254). Another officer claimed he did so in the presence of that officer (R343, 348). He thus contradicted his own deposition (R349, 350-351).

The attorney arrived just before 4:00 p.m. and

asked to speak to Appellant (R281, 284, 299). He was forced to leave (R279, 297), and noted the time as 3:58 (R297). By 4:18 p.m., he had a telephone court order giving him access (R301-302). The interrogation ceased at the police chief's order after the Judge called twice (R304-305). The attorney was able to see Appellant twenty to twenty-five minutes later (R247).

The West Palm Beach police have no set policy on how to handle an attorney's request to stop questioning or to allow access to the client (R288-289), but the polygraph operator would have stopped had he known counsel was outside demanding access (R272-273).

Appellant maintained that he saw the body and the blood when he broke in, so he left at once (R1731-1734). The grand jury refused to indict, so he was charged only with the burglary and was able to secure his release on bond (R1827).

Seven months after the murder, Appellant allegedly raped his brother's girlfriend at knife point (R1843-1845). In the process, he allegedly said if she did not submit, he would kill her like he did Bohanon (R1846). She finally told the police four or five days later (R1852), after the brother took away her clothes (R1849-1850).

Appellant's brother also came forward after the alleged attack (R1795-1796). He described alleged admissions that Appellant killed Bohanon (R1784-1786) to see if

he had the nerve (R1789). The brother also took a shot at Appellant (R1797-1798), trying to kill him (R1801-1802).

A defense motion to limit the State from using threats against the girlfriend (R465-489) was denied (R489-490). The Judge also refused to exclude evidence that Appellant claimed to have smoked marijuana the night of the murder (R499-500) and evidence of alleged threats against other unspecified persons (R1786, 1792).

The jury began deliberating at 3:23 (R1988). At 6:02 (R1989), it returned to ask if it had to distinguish between premeditated and felony murder (R2459). Told it did not, it returned its verdicts at 6:29 (R1991).

At the sentencing hearing, the jury received evidence that Appellant had been previously convicted on pleas to armed robbery and to sexual battery (R2027-2028, 2042, Exhibits 1 and 3), although no one could say what facts he admitted to at the time of each plea (R2033-2036, 2041-2042). Appellant denied having a weapon on either occasion (R2090-2091. It also learned that he was on MCR at the time of this offense (R2059). This was described as release under supervision for gain time (R2055). A Department of Corrections officer and his parole officer each asserted he was still under sentence as a result (R2055, 2059).

Dr. Hobin told the jury Bohanon was legally intoxicated and asleep when attacked (R2064-2065), suffered no torment before death, and had no prolonged survival (R2067).

Appellant's brother described his extensive drinking that night (R2076).

After deliberating ten minutes (R2131-2132), the jury voted 10 to 2 to recommend the death sentence (R2132).

POINTS INVOLVED

I. THE COURT ERRED IN APPLYING APPELLANT'S WAIVER OF SPEEDY TRIAL ON THE BURGLARY CHARGE TO THE SUBSEQUENT HOMICIDE INDICTMENT AND DENYING APPELLANT'S MOTION FOR DISCHARGE.

II. THE COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM APPELLANT WHILE HIS ATTORNEY WAS OUTSIDE BEING DENIED ACCESS.

III. THE COURT ERRED IN REFUSING TO STRIKE THE JURY VENIRE AFTER THE PROSECUTOR CALLED ATTENTION TO APPELLATE REVIEW OF THE SENTENCE.

IV. APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED BY A REQUEST BY A STATE WITNESS THAT HE BE ASKED WHERE SHE HAD BEEN WITH HIM AND THE PROSECUTOR'S ARGUMENT THAT HE "STONEWALLED" WHEN ARRESTED.

V. THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOR CUMULATIVE IRRELEVANT AND PREJUDICIAL EVIDENCE SUGGESTING WRONGDOING.

VI. THE COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS-EXAMINATION OF A CRITICAL WITNESS WHEN HE WAS TOO TIRED TO DO SO PROPERLY.

VII. THE COURT ERRED IN ALLOWING THE STATE TO USE A POSED AND PREJUDICIALLY GORY PHOTOGRAPH FOR IDENTIFICATION.

VIII. THE COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE.

IX. THE COURT ERRED IN STRIKING PROSPECTIVE JURORS FOR CAUSE FOR SCRUPLES AGAINST THE DEATH PENALTY.

X. FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL.

XI. THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

XII. THE COURT ERRED IN SENTENCING FOR BOTH THE FELONY AND THE MURDER.

ARGUMENT POINT I

THE COURT ERRED IN APPLYING APPELLANT'S WAIVER OF SPEEDY TRIAL ON THE BURGLARY CHARGE TO THE SUBSEQUENT HOMICIDE INDICTMENT AND DENYING APPELLANT'S MOTION FOR DISCHARGE.

It is undisputed that Appellant was arrested for murder on August 13, 1981, but was charged only with burglary when the grand jury refused to indict (R2215-2217, 2267). Unless speedy trial was waived, the 180-day period allowed the State by Rule 3.191(a)(1) Fla.R.Crim.P. expired on February 9, 1982. Thus, the critical issue here is the effect of Appellant's waiver (R2251) on the burglary charge on December 17, 1981 on the subsequent indictment for murder returned March 24, 1982 (R2543).

It is one thing to say that the State may increase the degree of the crime charged, as in Gallego v. Purdy, 415 So.2d 166 (Fla. 4 DCA 1982), or vary the charge slightly, as in Clark v. State, 318 So.2d 513 (Fla. 4 DCA 1975), without losing the benefit of a prior speedy trial waiver. It is quite another to assert, as in Gallego v. Purdy, supra, 415 So.2d at 167, that the waiver applies to any charge arising from the same conduct. The only appropriate view is that of Haddock v. State, 379 So.2d 194 (Fla. 5 DCA 1980), which held a waiver as to manslaughter did not apply to a subsequently added aggravated battery charge because that was a separate crime.

First of all, a waiver must be knowing and intelligent, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). How can one knowingly waive speedy trial on unfiled charges?

Secondly, as Appellant noted below (R2653), the holding that a continuance waives the benefit of the rule for unfiled charges cannot be within contemplation of the rule. A continuance takes a pending case out of the rule, but the accused can restore it by a simple demand under Rule 3.191(c), Fla.R.Cr.P. Since such a demand is a nullity on an unfiled charge, State v. Gravlee, 276 So.2d 480 (Fla. 1973), the incongruous result is that the rule can be reinstated on the charge for which it was directly waived, but is forever tolled on the charge for which it was not directly waived. Such an absurd result must be avoided, State v. Webb, 398 So.2d 820 at 824 (Fla. 1981).

Finally, the continuance and waiver of December 17 was necessary so counsel could properly prepare for a serious and complex felony charge (R2252-2253). The right to counsel means counsel who has time to and does prepare properly, Brown v. State 426 So.2d 76 (Fla. 1 DCA 1983), Dixon v. State, 287 So.2d 698 (Fla. 1 DCA 1973). As this Court stated with regard to the statute which preceded the rule:

> "In brief, the accused found himself in a vise. His constitutional right is to a speedy trial by an impartial jury. After seeking a speedy trial, he found himself

> facing the risk of trial by a jury which had been exposed to pretrial prejudicial publicity. The presiding judge found this to be a real risk, when he granted the motion for change of venue.
>
> Respondent now argues that in seeking his constitutional right to a trial by an impartial jury, petitioner forfeited his constitutional right to a speedy trial.
>
> We do not believe such to be the case. While Sec. 915.01(2) should apply, and the continuance is sought for the mere convenience of the accused, we hold that it was not intended to apply when an accused takes such steps as are necessary to protect his fundamental rights." [State ex rel. Johnson v. Edwards, 233 So.2d 393 at 395 (Fla. 1970)]

However, that is precisely the Hobson's Choice imposed on Appellant here when he was forced to give up his right to speedy trial on the possible murder charge to give his attorney time to prepare for the burglary. Placing such a chill on the exercise of the constitutional right to counsel is itself unconstitutional, Sherbert v. Verner, 374 U.S. 398 at 403-404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

There was no waiver on the murder charge. Appellant was not even charged much less put on trial within 180 days of his arrest for that crime. Accordingly, his murder conviction must be reversed and the cause remanded with instructions to discharge him.

ARGUMENT POINT II

THE COURT ERRED IN REFUSING TO SUPPRESS STATEMENTS OBTAINED FROM APPELLANT WHILE HIS ATTORNEY WAS OUTSIDE BEING DENIED ACCESS.

The facts in this melodrama are not in dispute. In a dress rehearsal for the contempt citation this Court is reviewing in Jamason v. State, et al, Case No. 63,571, West Palm Beach police ignored the demand by the attorney retained by Appellant's sister to stop interrogating Appellant, and refused him access when he arrived at the jail until a Circuit Judge interceded on his behalf.

The conduct of the police in this case and in that of John Melody (R2318-2321) can only be characterized as unlawful. It is wrong to disregard the demand not to question, as the Second District recognized in Del Duca v. State, 422 So.2d 40 (Fla. 2 DCA 1982) and Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Though it is still possible for the suspect to waive counsel and give a voluntary statement, he cannot do so when he does not know his family has provided an attorney, and he was not told. [Though one officer said he told him, the contrary conclusion is not only compelled by the weight of the evidence but also by the rule that testimony of a State's witness who contradicted that claim (R254) is binding on the State, Weinstein v. State, 269 So.2d 70 at 72 (Fla. 2 DCA 1972)].

It was also wrong to deny attorney Burford access to his client. Appellant had been in custody for almost ten

hours. He is deemed to have been held incommunicado, in violation of Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), State v. Alford, 225 So.2d 852 (Fla. 2 DCA 1969), and Davis v. State, 287 So.2d 400 (Fla. 2 DCA 1974). It should not have been necessary to seek the help of Judge Barkett at all. When the Judge did call, the police response was not so wrong as it was on John Melody, but it took more than one call (R304) and several minutes elapsed during which interrogation continued.

As in Davis v. State, supra, Appellant

> "was deprived of effective representation by counsel at the only stage when legal aid and advice would help him." (287 So.2d at 400)

but nothing here was suppressed. All of the statements obtained after each impropriety should have been excluded. All of Appellant's admissions as to burglaries came after his attorney demanded that questioning stop. After counsel arrived at the station, Appellant gave virtually the entire final taped statement beginning at 1730 (R241). He claimed he did not like or use knives (R1751). He talked about the clothes he wore that night and where they could be found (R1739-1741). He described how the body looked (R1731). He contradicted himself as to when he smoked marijuana with the victim (R1735-1736).

From the nature of the statements which should have been suppressed, it is clear that their admission was prejudicial. Any doubt on the subject is dispelled by the

prosecutor's closing argument, which dwells at length on the contradictions in the various statements (R1941-1947). A new trial is in order, without the offensive statements.

ARGUMENT POINT III

THE COURT ERRED IN REFUSING TO STRIKE THE JURY VENIRE AFTER THE PROSECUTOR CALLED ATTENTION TO APPELLATE REVIEW OF THE SENTENCE.

While attempting to determine the views of prospective jurors on capital punishment, the prosecutor engaged in the following colloquy:

> "MR. BARKIN: Do you understand, Mrs. Devries (sic), that even if you sat on the jury and you recommended that, it's still up to the Judge to make a final decision as to sentence?
>
> MS. TOBIES: Yes.
>
> MR. BARKIN: Your recommendation is advisory only?
>
> MS. TOBIES: Yes.
>
> MR. BARKIN: And even if the appellate -- you understand that the sentence is reviewed by the Court of Appeals --" (R705)

Appellant promptly objected, which produced an admonition to the prosecutor outside the presence of the prospective jurors, but the motion to strike the panel was denied and no corrective instruction was given (R705-707).

The clear meaning of the prosecutor's statement was to denigrate the importance of the jury sentencing function by suggesting that any error could be corrected on appeal. The suggestion is exactly the same as that condemned in Pait v. State, 112 So.2d 380 (Fla. 1959). There this Court reversed a death conviction in part because the prosecutor said:

> "The State of Florida also provides this defendant with the only right of appeal. The People of the State have no right to appeal. This is the last time the People of this State will try this case in this court. Because whatever you do, the People have no right of appeal. They are done. This is their day. But he may have another day; he has an appeal. So those are the rights that the State of Florida gives to him, that intangible object." (112 So.2d at 383).

This Court found the comment could not be harmless because:

> "... the jury is being told that in some measure they could disregard their own responsibility in the matter and leave it up to the Supreme Court." (112 So.2d at 384).

The prosecutor overlooked the great weight accorded to the advisory sentence. A jury recommendation of mercy is binding on the trial Judge and this Court, unless no reasonable man could disagree on the override, Tedder v. State, 322 So.2d 908 at 910 (Fla. 1975). A jury recommendation of death, if approved by the trial Judge, is likewise entitled to great weight, Stone v. State, 378 So.2d 765 at 772 (Fla. 1979).

Thus, the comment was wrong. Further, whether right or wrong, it was reversible error. Had the jury been sworn, it would have required a mistrial. In Pait v. State, supra, this Court declared it so prejudicial as to require a new trial despite the absence of a timely objection. Though this jury was not sworn, it was still prejudiced, so the only appropriate remedy was to grant Appellant's motion to strike the panel. Failure to do so requires a new trial.

ARGUMENT POINT IV

APPELLANT'S PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED BY A REQUEST BY A STATE WITNESS THAT HE BE ASKED WHERE SHE HAD BEEN WITH HIM AND THE PROSECUTOR'S ARGUMENT THAT HE "STONEWALLED" WHEN ARRESTED.

Appellant's privilege against self-incrimination was violated not just once, but twice. Either one is sufficient to require a new trial.

The first came when Appellant's attorney cross-examined the victim's girlfriend, Teresa Cast, about a trip she and the Appellant took. Asked where they let him off, she said:

> "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. <u>He could tell you where it's at.</u>" (Emphasis added) (R1112).

The second came when the prosecutor accused Appellant of "beginning to stonewall" (R1942). In each

case, Appellant's motion for mistrial (R1114, 1232-1234, 1238-1243, 1942) was denied (R1250, 1942).

Any comment which directly or indirectly calls attention to failure to testify is prohibited. A comment very much like the first one above required reversal where the prosecutor noted the absence of an allegedly pornographic film, saying:

> "Dr. Wilson maybe could shed some light on it." [Wilson v. State, 371 So.2d 126 at 127 (Fla. 1 DCA 1978)].

White v. State, 365 So.2d 199 at 200 (Fla. 2 DCA 1978) teaches that reversal is required even if the State does not create the error. From Clark v. State, 363 So.2d 331 (Fla. 1978), we know that it cannot be harmless error. A new trial is required.

The same is true for the error the prosecutor did create when he talked of "stonewalling". By definition, stonewalling means obstructing a proceeding, but Watergate has given it a new connotation as well. In the common understanding, it also signifies a cover-up or a wall of silence. Here again, because the comment is subject to that interpretation, it is reversible.

ARGUMENT POINT V

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL FOR CUMULATIVE IRRELEVANT AND PREJUDICIAL EVIDENCE SUGGESTING WRONGDOING.

Appellant's trial was infected by repeated references to irrelevant and prejudicial evidence. The problem was most prevalent during Fred Haliburton's testimony. He mentioned that Appellant had been in jail (R1778). He talked about alleged plans to kill unnamed others (R1786), including someone he had a confrontation with (R1792). He said he was afraid for his own safety (R1792). Defense motions for mistrial (R1778-1779, 1787-1788, 1793) were denied (R1866, 1870). The comments are not unlike those which required a new trial in Clarence Jackson v. State, Case No. 62,723, opinion of this Court filed May 10, 1984.

Sharon Williams also injected error when she was allowed to discuss the nature of the attack on her (R1844-1847) despite a motion in limine (R1834-1835). She too described alleged threats to Fred and her (R1848). That she was attacked with a knife was no more relevant to any fact in issue than were the robberies condemned in Franklin v. State, 229 So.2d 892 at 895 (Fla. 3 DCA 1969). Mere propensity to use a knife is an abuse of this Court's Williams v. State, 110 So.2d 654 (Fla. 1959).

Other prejudice was injected when the jury saw Appellant's tennis shoes from a distance of ten to twenty

feet (R1463). Over objection (R1463, 1465), a witness who had to catch a plane was allowed to testify that she found blood on the right shoe, but could not even tell if it was human blood (R1465). The exhibit was excluded (R1559), but it was too late to avoid the prejudice.

Armed with a set of prints taken for comparison purposes (R1288-1289), the State nonetheless used standard prints taken March 22, 1979 (R1483-1484). Defense motion for mistrial based on the implication of a prior record (R1486), was denied, apparently on grounds that no such objection was made when they were admitted without the testimonial predicate (R1485). However, they had not been admitted, and the defense did object on the same grounds at the time (R1272-1273).

Further, however desireable a second examination may be (R1487-1488), it is difficult to see why the new prints could not have been used for both comparisons, or another new standard taken. That the old standard was used, with the prejudicial implication, is just another unnecessary and prejudicial aspect.

The jury even heard over objection (R1542-1544) about the State's ill-fated search warrant. The implication was that a magistrate found probable cause. There was no legitimate reason for it.

It is not sufficient response to say that only a fair trial is required, not a perfect one. The applicable

rule here is that error which may not be prejudicial in an overwhelming case requires a new trial in a close one. This case was so close that the grand jury would not indict on the circumstantial portion, and the alleged confessions were asserted only by the brother who wanted to kill Appellant and the girlfriend who made him so mad.

Perhaps some of this might have been cured by prompt corrective action, but none was taken. As in Sherman v. State, 255 So.2d 263 (Fla. 1971), there is too much error and too little control. A new trial is in order.

ARGUMENT POINT VI

THE COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROCEED WITH CROSS-EXAMINATION OF A CRITICAL WITNESS WHEN HE WAS TOO TIRED TO DO SO PROPERLY.

The critical nature of Fred Haliburton's testimony against his brother cannot be overstated. Only he provided any direct evidence that Appellant killed the victim. Only he asserted a motive. The most important task for Appellant's counsel was to discredit his testimony.

When Fred was announced counsel noted that his cross-examination would be placed under pressure (R1754). Then he was delayed over his attire and the absence of his counsel (R1760-1762). Before he took the stand at 4:33 p.m. (R1772) defense counsel complained of exhaustion (R1770-1771) and later told the Judge he was drawing a blank (R1811). Cross-examination ended just before 5:50 p.m. (R1827-1828).

The trial Judge refused to confirm counsel's assertion of exhaustion (R2170), but defense counsel noted his failure to touch at all on the increasingly detailed account Haliburton gave with the passage of time (R2171). That is contrary to the customary human experience that memory fades as time goes by.

The witness was certainly adequately impeached as to his motive to testify, including his hatred and his immunity, but his memory quirk is a significantly different challenge to his veracity. Effective counsel would not allow it to pass without comment.

Control of the trial's progress is clearly the prerogative of the trial Judge, but his broad discretion can be abused, Diaz v. Diaz, 258 So.2d 37 (Fla. 3 DCA 1972). Appellant submits that it was here. Throughout the trial the drain on Appellant's attorney was evident. While the prosecutor had an Assistant Attorney General to help, Court appointed defense counsel worked alone (R1144). His troubles getting research done appeared first when Teresa Cast made her comment, and counsel spent his lunch hour on research (R1733). His problems continued after the incident (R1833, 1866-1868).

The State's suggestion that counsel was just making a record (R2176, 2508) is not persuasive. Counsel made the Court aware when recessing for the night after direct examination would have solved the problem. If counsel had been physically ill, the case would surely have recessed. Whey should not exhaustion be treated similarly, especially in a case of this magnitude.

Somewhere along the way, this search for truth degenerated into an unseemly effort to finish by Saturday (R1669-1670, 1753-1754). That haste interfered with Appellant's right to a fair trial, and for no good or sufficient reason. A new trial is in order, where counsel is not pushed past the breaking point.

ARGUMENT POINT VII

THE COURT ERRED IN ALLOWING THE STATE TO USE A POSED AND PREJUDICIALLY GORY PHOTOGRAPH FOR IDENTIFICATION.

The first officer (R1148) could not see the victim's eyes because the sheets were up so high (R1176). Rather than photograph the scene as he found it, the crime scene man pulled the sheets down, thus making Exhibit One a posed photograph rather than an accurate description of the crime scene.

In a case where victim identity was not in dispute (R919, 1235), this gory photograph was used repeatedly for identification, and that despite the trial Judge's admonition against doing so (R1049). This Court may examine the photograph and judge its effect. That it provoked emotional reactions in two separate witnesses demonstrates that it was prejudicial to the defense. The State wanted the jury to see Teresa Cast's reaction to the picture (R1048). It presented a blatant appeal to sympathy for the victim. No matter how the jurors promised to disregard the reaction (R1090-1091), the Judge's comments suggest that they could not do so:

> "THE COURT: Well, State's Exhibit 1 was shown to the witness. She was asked if she could identify the person in the exhibit. The witness then moaned loudly, turned her back to the jury and towards the Court. I believe she buried her head in her hands. I could not see her hands at that particular point. However, it was obvious that she had

> a very emotional reaction to the exhibit, at which point the Court excused the jury to go to the jury room." (R1082-1083).

The Court did not think the witness could look at it long enough to testify without prejudicing the jury (R1087).

The State presented no pertinent justification. It may have had more gory photographs to show the wounds, but it made no showing that there were no less gory photographs for use in identification, just as the Judge noted (R1085). Its claim that the photograph showed the wounds and had to come in anyway is very dubious. Even though the crime scene man tried to use the picture to talk about the wounds (R1225-1226), he was stopped, and the pathologist hardly even tried, despite the urging of the prosecutor to "point out one wound" (R1496-1497). The pathologist had his own diagram (R1498). Thus, State's Exhibit One does not meet the relevancy test of Welty v. State, 402 So.2d 1159 at 1163 (Fla. 1981).

Appellant submits that the picture should not have been admitted at all. The prejudice far outweighed the marginal value in this use, just as in Young v. State, 234 So.2d 341 at 347-348 (Fla. 1970). Further, there can be no excuse for using such a gory picture for identification. For the predictable emotional outbursts which followed, a new trial is required.

ARGUMENT POINT VIII

THE COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT ON CIRCUMSTANTIAL EVIDENCE.

Appellant requested a jury instruction on circumstantial evidence early (R772-776) and often (R1892-1893). The request was refused (R1893-1894), and Appellant submits that was reversible error.

This Court deleted the old standard instruction on circumstantial evidence, suggesting that standard instructions on reasonable doubt will ordinarily suffice. The Court expressly recognized that the trial Judge could give the old instruction if necessary, In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 at 595 (Fla. 1981). Because of the critical importance of the circumstantial evidence in this cause, Appellant submits that due process required it, just as in Marsh v. State, 112 So.2d 60 (Fla. 1 DCA 1959).

Before this Court's amendment, the instruction was required whenever the State relied entirely or substantially on circumstantial evidence, Perez v. State, 371 So.2d 714 at 717 (Fla. 2 DCA 1979). It is no longer mandatory, Williams v. State, 437 So.2d 133 at 135-136 (Fla. 1983). However, here the only evidence other than circumstantial is impeached by the ill will which lead Appellant's brother to shoot him with intent to kill (R1801-1802). If ever there was a jury which needed guidance in the weighing of circumstantial evidence, this was the one.

Recent decisions have substantially reduced the right of a trial Judge to apply the law of circumstantial evidence in directing a verdict. The question is no longer whether the Judge feels all reasonable hypotheses are excluded, but whether the jury could find that they were, Tillman v. State, 353 So.2d 948 (Fla. 1 DCA 1978).

How can the jury properly apply the law if it is not instructed on the law? Appellant submits that the standard jury instruction is not adequate in a case such as this, to the point of being an abuse of discretion. A new trial is required for failure to fully instruct the jury on the law of the case.

ARGUMENT POINT IX

THE COURT ERRED IN STRIKING PROSPECTIVE JURORS FOR CAUSE FOR SCRUPLES AGAINST THE DEATH PENALTY.

Over Appellant's objection that Witherspoon does does not or should not apply in Florida (R804-805), the Court struck five prospective jurors for cause (R806-808). Two indicated that their scruples would not prevent them from determining guilt or innocence, Wood (R710) and Cox (R792-793), and one, Bess (R714) was uncertain.

Appellant is aware that this Court has upheld the striking of prospective jurors who say they could never consider imposing the death penalty in reliance on Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed.2d 776 (1968). However, the Witherspoon decision is based on the absence of evidence before the Court that exclusion of jurors with scruples against the death penalty denied a fair cross section on guilt or innocence. The evidence which the Supreme Court did not have at the time is now a matter of record in Grigsby v. Mabry, 569 F.Supp. 1273 at 1291-1308 (E.D. Ark. 1983). The so-called "death qualified" jury is significantly more likely to convict.

This could have been avoided by granting Appellant's request for separate juries (R2567) or by recognizing that Witherspoon does not require excluding conscientious jurors in a state where a majority suffices on penalty. Davis v. Georgia, 429 U.S. 122 at 123, 97 S.Ct. 399, 50 L.Ed.2d 339

(1976) teaches that a single erroneous strike for cause for inability to consider the penalty will invalidate the penalty. Since prospective jurors were wrongly excluded from the guilt determination here, Davis v. Georgia requires a new trial on guilt or innocence.

ARGUMENT POINT X

FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL.

Appellant challenges Florida's death penalty scheme on grounds enumerated below as follows:

1. The aggravating circumstances relied upon are not specified in the indictment (R2555).

2. The statutes are vague, and also fail to properly distinguish between murder in the first degree and murder in the second degree (R2555-2556).

3. The statutes constitute arbitrary infliction of punishment (R2556).

4. The aggravating circumstances are vague and, at least as to subparagraph (d), which makes all felony murders start out with one automatic aggravating circumstance, unconstitutionally shift the burden (R2556).

5. The sections are so vague as to make it impossible to prepare a defense (R2557).

6. Section 921.141 Fla. Stat. unconstitutionally requires the defense to prove mitigating circumstances (R2557).

7. The instruction to recommend death unless mitigating circumstances outweigh aggravating violates the accused's right to the benefit of a reasonable doubt (R2557).

8. Either life in prison without parole for twenty-five years or the death penalty violates the Eighth Amendment (R2557).

9. Statutory mitigating circumstances are too vague, and fail to give proper emphasis to unenumerated mitigating circumstances (R2558).

10. Section 921.141 Fla. Stat. does not require the State to prove a compelling State interest requiring imposition of the death penalty for an individual case (R2558).

11. Section 921.141 Fla. Stat. is invalid because it deals with procedural matters (R2558).

12. Applying the death penalty to a felony murder without a finding of an intent to kill is invalid because it is grossly out of proportion to the crime and has no deterrent effect (R2558).

13. The penalty is applied excessively to the poor, blacks, and males (R2558-2559).

14. The penalty is applied irregularly because this Court's rulings lack uniformity (R2559).

15. The statute is invalid because this Court does not review the life cases for comparison (R2559).

16. The statutes do not give notice of whether felony murder is being relied upon (R2559, 2570).

The grounds are set forth in detail in the motions and are self-explanatory. Appellant is aware that this Court has repeatedly affirmed validity of Florida's law, and will rely on the arguments below without further comment except as to those relating to failure to distinguish between felony murder and premeditated.

It is wrong to let the State proceed on either theory without notice as to which it will rely on, because it is impossible to prepare a defense. It is worse to allow the jury to return a verdict without specifying which it found the accused guilty of. This case is a classic example. When the jury returned after almost three hours of deliberation (R1988, 1989) to ask whether it had to distinguish between premeditated murder and felony murder (R2459) and was told it did not (R1990), the jury returned its verdict only twenty-three minutes later (R1991). Thus, it is clear that one or more jurors based the guilty verdict on each.

Because it is not just possible, but probable that the jurors here did not unanimously agree on either felony murder or premeditated murder, Appellant has been severely injured by the unconstitutional commingling of offenses. His conviction for first degree murder must be reversed.

ARGUMENT POINT XI

THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Appellant submits that the Court committed both substantive and procedural errors in imposing the death sentence in this cause. The Judge found five aggravating circumstances, but they do not withstand close scrutiny (R2152-2153), as follows:

Crime committed while under sentence of imprisonment.

It is clear that Appellant was on mandatory conditional release due to gain time when this crime occurred. It is also true, as the prosecutor argued, that release on MCR was on the same conditions as release on parole until October 31, 1981, Section 944.291, Fla. Stat. (R2009). Nonetheless, this Court's ruling that a person on parole is still under sentence within the meaning of §921.141(5)(a), Fla. State., should not apply.

Parole is not quite the same as MCR, because the parolee has not completed his sentence. Rather, he is released from prison early because he agrees voluntarily to certain restrictions on his freedom. There is nothing voluntary about MCR, and it comes only when the sentence is terminated by operation of law.

Section 944.275(1)(a)-(b), Fla. Stat., like its predecessor, Section 944.27(1)(a)-(c), Fla. Stat., says very emphatically that it awards time off the sentence. If

the statute means what it says, Appellant's sentence was shortened by his gain time, and he was simply not under sentence any longer. Since the cardinal rule of statutory construction is to read penal statutes most favorably to the accused, this statute must be deemed to mean what it says, Section 775.021(1), Fla. Stat., Reino v. State, 352 So.2d 853 (Fla. 1977). This aggravating circumstance cannot stand.

Prior record of convictions for violent crimes.

Over defense objection (R2030-2031, 2041-2042), the prosecutor proved that Appellant was charged with two prior crimes, a robbery and attempted sexual battery (Exhibits 1 and 3, 9-21-83). He also proved that Appellant plead no contest to the robbery, but not what facts he admitted to (R2033-2036). Appellant denied that he had a firearm during the robbery or a weapon in the other case (R2090, 2091).

In the classic case, this Court was correct in Simmons v. State, 419 So.2d 316 (Fla. 1982), that a robbery necessarily qualifies as a violent conviction. But, when robbery can be committed by a pursesnatcher, and the slightest touch can be a battery, some proof of underlying facts must be required, sufficient to make such a life and death distinction.

Killing occurred in the course of a burglary.

There is some evidence to support this finding, but it is doubtful that the jury so found beyond a reasonable

doubt. It had no time to do so during the 23 minutes after it asked whether it had to distinguish between felony murder and premeditated murder (R1989-1991).

It can hardly be anything but double punishment to elevate the crime to first degree murder because of the felony and then count the felony as an aggravating circumstance as well. This Court recognized the principle in refusing to allow sentencing on the underlying felony (see Point XII), and should do likewise where, as here, there could be no unanimous guilty verdict without the underlying felony.

Killing especially wicked and evil.

This is apparently an effort to fall within Section 921.141(5)(h), although it hardly achieves the "unmistakable clarity" required by Mann v. State, 420 So.2d 578 at 581 (Fla. 1982). Since it does not fall clearly within that section, it must be rejected.

The finding must also be rejected because it is based on the fact that Bohanon was asleep, intoxicated and defenseless (R2689). Sleeping victims, being unaware of the impending attacks, do not qualify for the "heinous, atrocious and cruel" aggravation, Middleton v. State, 426 So.2d 548 at 552 (Fla. 1982), Simmons v. State, 419 So.2d 316 at 319 (Fla. 1982), Maggard v. State, 399 So.2d 973 at 977 (Fla. 1981). Likewise, it does not apply to a victim who is semiconscious from drugs, Herzog v. State, 439 So.2d

1372 (Fla. 1983). The same rule should apply to a drunken stupor.

Not all stabbing deaths are heinous, atrocious and cruel. Demps v. State, 395 So.2d 501 (Fla. 1981). There is nothing about this one that distinguishes it from the norm as required by Tedder v. State, 322 So.2d 908 at 910 (Fla. 1975). Since this surprise attack produced a fairly quick death, without much suffering, this circumstance does not apply, Simmons v. State, 419 So.2d 316 at 318-319 (Fla. 1982). Killing was cold, calculated and premeditated.

As in the argument on the felony aggravation above, it is likewise clear that the jury was not even unanimous as to whether this was a premeditated murder, much less so cold and calculated as to trigger this aggravating factor. It is also clear that not every premeditated murder qualifies. Rather, it is the execution style or contract killing, Cannady v. State, 427 So.2d 723 at 730 (Fla. 1983).

Whether this was a spur of the moment killing of opportunity, as Appellant allegedly told his brother, or a crime of frenzy, as Dr. Hobin testified (R1508), it was not an execution style killing, so this one also falls.

Appellant concludes that none of the aggravating circumstances can stand, which requires reversal of the death sentence. If this Court feels however that one or more is established, the cause should be reversed so the trial Judge can determine whether the sentence is appropri-

ate in view of the reduced number of aggravating circumstances.

The trial Judge should be told to give appropriate consideration to the mitigating circumstance which is established. The record indicates that the killing was frenzied or enraged. If Appellant were the killer, he had been drinking and had smoked marijuana with the victim. (The Court had to believe this to find as it did that Appellant knew the victim was intoxicated and helpless. He could only have learned it while they smoked.) All of this adds up to a disturbed mental state with diminished capacity. See Kampf v. State, 371 So.2d 1007 at 1010 (Fla. 1979).

Finally, in the proportionality review required by Brown v. Wainwright, 392 So.2d 1327 at 1331 (Fla. 1981), this Court is urged to compare this case to Burch v. State, 343 So.2d 831 (Fla. 1977), which is similar in repeated attacks with a small knife during a felony, and the frenzy suggesting mental disturbance. Appellant has the additional mitigating factor of use of intoxicants. This Court should reduce the sentence accordingly.

ARGUMENT POINT XII

THE COURT ERRED IN SENTENCING FOR BOTH THE FELONY AND THE MURDER.

A defendant may be convicted of both the felony murder and the underlying felony, but may not be sentenced for the felony, State v. Hegstrom 401 So.2d 1343 (Fla. 1981). Appellant submits that the rule applies to him since the State clearly pursued a felony murder theory here (R1937-1938).

This Court held that rule inapplicable where there is evidence of premeditation, even though the verdict does not specify its basis, McCampbell v. State, 421 So.2d 1072 (Fla. 1982). However, it is impossible here to indulge the presumption that Appellant may have been convicted solely on premeditation.

First of all, there is no more evidence of premeditation here than there was in Hegstrom (388 So.2d 1308 at 1309, Fla. 3 DCA 1980)--conflicting out-of-court statements and the worst of those from people who wanted to kill Appellant (R1797, 1801-1802). We may not know here what provoked this killing, but the fact that the pathologist called this a frenzied or enraged killing (R1508-1509) is more consistent with second degree murder than premeditated murder, Smith v. State, 314 So.2d 226 at 232-233 (Fla. 4 DCA 1975), cert. disch. 343 So.2d 598.

Secondly, Appellant's jury returned after almost three hours of deliberation (R1988, 1989) to ask whether it

had to distinguish between premeditated murder and felony murder (R2459). Told it did not (R1990), the jury returned its verdict only twenty-three minutes later (R1991). Thus, it is clear that one or more jurors based the guilty verdict on felony murder.

Appellant's sentence for burglary is a fundamental error under Section 775.021, Fla. Stat., Marsden v. State, 400 So.2d 194 (Fla. 2 DCA 1981). It must be reversed despite his failure to object.

CONCLUSION

Appellant respectfully submits that his judgments and sentences must be reversed. He should be discharged on the murder count for want of a speedy trial. A new trial is also required, with evidence obtained in violation of Appellant's right to counsel excluded, and without the many errors which combined to deny Appellant a fair trial in this close case. In any event, the death sentence must be reversed because the aggravating circumstances are not sustained.

Charles W. Musgrove

CHARLES W. MUSGROVE
Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
305-968-8799
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Assistant Attorney General, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 29th day of May, 1984.

Charles W. Musgrove

CHARLES W. MUSGROVE