IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY HALIBURTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee

CASE NO. 64,510

______________________/

SUPPLEMENTAL 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/Florida Bar #095137
Attorney for Appellant

TABLE OF CONTENTS

	Page
TABLE OF CASES	
STATEMENT OF CASE AND FACTS	1-2
SUMMARY OF ARGUMENT	3
POINT INVOLVED	4
ARGUMENT	5
CONCLUSION	9

TABLE OF CASES

	Page
Cash v. Culver 122 So.2d 179 (Fla, 1960)	6
Darwin v. Connecticut 391 U.S. 346, 88 S. Ct. 1488, 20 L.Ed. 2d 630(1968)	6
Davis v. State 287 So.2d 400 (Fla. 2DCA 1974)	5,7,8
Escobedo v. Illinois 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964)	5,6,7
Fare v. Michael C. 442 U.S. 707, 99 S.Ct. 2560, 61 L. Ed.2d 197 (1979)	7
Gideon v. Wainwright 372 U.S. 335 at 340-341, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)	7
Grades v. Bates 398 F.2d 409 (4th Cir. 1968)	7
Jamason v. State 455 So.2d 380 (Fla 1984)	5,8
Mincey v. Arizona 437 U.S. 385 at 398, 98 S.Ct. 2408, 57 L.Ed. 2d 290 (1978)	8
Moran v. Burbine 475 U.S.____, 106 S.Ct. 1135.89 L.Ed.2 1410 (1986)	2,5,7,8
People v. Donovan 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (N.Y. 1963)	5
People v. Houston 230 Cal Rptr. 141, 724 P. 2d 1166 (Cal. 1986)	5
State v. Alford 225 So.2d 852 (Fla. 2DCA 1969)	5,8,6
United States v. Carignan 342 U.S. 36 at 46 (1951)	7

STATEMENT OF THE CASE AND FACTS

The body of Don Bohanon was found in his bed on the afternoon of August 9, 1981. Medical evidence indicated that death, caused by multiple stab wounds, had occurred sometime after 12:30 a.m. that morning. The perpetrator had gained entry to the victim's apartment by removing glass panes from a jalousie door. Fingerprint evidence led the police to appellant, who lived nearby in downtown West Palm Beach.

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, 2246). 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[1] in the

---

[1] The officer who claimed to have told Appellant an attorney called described his response as follows:

> "Well, he didn't say yes he wanted to talk to him and he didn't say no, he didn't want to talk to him. He just sort of slunked his shoulders, like, <u>I will wait until they get here and see</u>: (R343)

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).

By order dated August 30, 1985, this Court reversed because police failure to tell Appellant his counsel was outside trying to see him vitiated his waiver of counsel (476 So.2d 192).

The United States Supreme Court vacated that order and remanded for further consideration in light of Moran v. Burbine 475 U.S.____, 106 S.Ct. 1135.89 L.Ed.2 1410 (1986).

This supplemental brief is in response to this Court's order of January 28, 1987.

SUMMARY OF ARGUMENT

Appellant submits that keeping his Counsel out and failure to tell him of the attorney is misconduct. Combined with the substantial time he was held incommunicado and the substantial time he was questioned, his statement is rendered involuntary.

Both the involuntary statement and the denial of the immediate access to counsel as established by the Florida Constitution and law make this conduct a denial of Florida due process.

POINT INVOLVED

WHETHER FAILURE OF POLICE TO ADVISE APPELLANT THAT AN ATTORNEY WAS AVAILABLE TO SPEAK TO HIM MADE ANY STATEMENT THEREAFTER INVOLUNTARY AND/OR DENIED APPELLANT DUE PROCESS?

ARGUMENT

FAILURE OF POLICE TO ADVISE APPELLANT THAT AN ATTORNEY WAS AVAILABLE TO SPEAK TO HIM MADE ANY STATEMENT THEREAFTER INVOLUNTARY AND DENIED APPELLANT DUE PROCESS.

This brief focuses only on the issues requested by this Court's Order of January 28. Appellant does not waive any of his other arguments by thus limiting this brief.

POLICE MISCONDUCT

If the question is still open, there can be no doubt that failure to tell a suspect his attorney is outside is misconduct. This Court so ruled initially in this case, and the ruling finds support in decisions such as State v. Alford, 225 So.2d 852 (Fla. 2DCA 1969), Davis v. State, 287 So.2d 400 (Fla. 2DCA 1974), Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964), People v. Houston, 230 Cal. Rptr. 141, 724 P. 2d 1166 (Cal. 1986) and People v. Donovan, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (N.Y. 1963).

The misconduct is particularly reprehensible where, as here, the police not only refuse to tell the client about the lawyer, but also chase the lawyer from the station and delay admitting him even after a direct Court order. The attitude of this police department is well reflected in its subsequent refusal to honor the Judge's order at all, as chronicled at R2318-2321 and in Jamason v. State, 455 So.2d 380 (Fla. 1984). Moran v. Burbine, supra is not to the contrary. It grants that deliberate or reckless withholding of information is objectionable as a matter of ethics, but concludes that the state of mind of the police does not affect the validity of a Defendant's Miranda waiver. That leaves open the next issue to be addressed in this brief.

VOLUNTARINESS

Appellant was basically held incommunicado from 6:30 a.m. on. He may not have been questioned the entire time, but the questioning, including the polygraph, exceeded five hours. He may not have been held as long as was the suspect in Darwin v. Connecticut, 391 U.S. 346, 88 S. Ct. 1488, 20 L. Ed. 2d 630 (1968), but he was taken in early in the morning, held for a substantial time and questioned for a substantial time.

To this plainly coercive conduct, we must add the repeated frustration of counsel's efforts to stop his client from being questioned and to get in to see him. Counsel was told, incorrectly, that the polygraph test was still going on when he called. His visit and the first call from the Judge were also rebuffed.

Denial of access to counsel figured prominently in the U.S. Supreme Court's findings of involuntariness in Darwin v. Connecticut, supra, as well as Escobedo, supra, and State v. Alford, supra.

Appellant submits that the combination of factors here likewise make his statement involuntary after police denied him access to counsel. Further, were it otherwise, the conduct would still violate the next aspect this Court has requested.

DUE PROCESS

Because the right to counsel and the privilege against self-incrimination are separately guaranteed, they are rarely discussed in terms of due process. However, earlier Florida cases uniformly hold that denial of counsel when counsel if required is a denial of due process under Article 1, Section 9 of the Florida Constitution of 1968 (formerly Section 12). For example, in Cash v. Culver, 122 So.2d 179 (Fla. 1960), Cash was discharged by habeas corpus from a conviction for burglary where his counsel was allowed to withdraw five days before trial and he was given no chance to get a replacement.

At the time, counsel was a mandatory aspect of due process in a capital case, such as this one. When the U.S. Supreme Court extended the right to all felonies, it did so as a matter of due process under the Fourteenth Amendment, Gideon v. Wainwright, 372 U.S. 335 at 340-341, 83 S. Ct. 792, 9 L.Ed. 2d 799 (1963).

It is now indisputable that interrogation can be a critical stage of criminal proceedings at which there is a right to have counsel. As the Supreme Court recognized in Escobedo, supra:

> "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination.'" (R2304)

That Court has also acknowledged the unique and critical role of counsel during interrogation, Fare v. Michael C. 442 U.S. 707, 99 S.Ct. 2560, 61 L. Ed.2d 197 (1979).

According to Justice Douglas,

> "What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country -- the free as well as the despotic, the modern as well as the ancient."

United States v. Carignan, 342 U.S. 36 at 46 (1951). What happened here was that Appellant, friendless and counselless, was gradually pressed into giving up more and more as police confronted him with evidence and test results. His final admission that he broke in but ran when he saw the already dead victim was tantamount to a foolish and unproductive effort to "bargain" his charge down to burglary. Such bargaining at the station is not valid precisely because there is no attorney for the suspect there, Grades v. Bates, 398 F.2d 409 (4th Cir. 1968). Just 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).

In Moran v. Burbine, supra, the United States Supreme Court found no Sixth Amendment violation in refusing to tell a suspect about a lawyer's call because of a prior ruling that

the Sixth Amendment right does not attach until formal charging. That rule does not apply here for several reasons.

For one, Florida has its own Constitutional guarantee, and its own rules. This Court has established the right to counsel under State law as arising upon any restraint of freedom. That is why counsel must be appointed for indigents "as soon as feasible after custodial restraint" [Rule 3.111 (a), Fla.R.CrimP.] and why a booking officer is required to place a defendant in custody immediately and immediately and effectively in communication with his lawyer [Rule 3.111(c)(2) and (3)].

Florida has also established its own right of access to prisoners, more in keeping with the ABA Standards for Criminal Justice 5-7.1 (2d ed. 1980). Decisions such as Davis v. State, supra, and State v. Alford, supra, require access. Section 27.59 Fla. Stat., which expressly applies only to public defenders, clearly implies the right of private counsel to access. This Court has required that telephonic Court orders of access be honored in Jamason v. State, supra.

Further, where, as in Florida, a prosecutor can file the formal charge himself, it would be incongruous to allow him to defer the right to counsel by simply delaying the information.

Finally, this case goes far beyond what was condoned in Burbine, supra. Not only did counsel call in (which either was not told to Appellant or produced only a temporary waiver), but he came to the station and was kept out despite a telephonic habeas corpus order.

Moran v. Burbine, supra, expressly authorizes contrary decisions under State law. This Court can and should find police conduct here violated Appellant's right to counsel and due process under Florida's Constitution, decisional law and Court rules.

It must also be noted that use of an involuntary confession violates due process, and that is what we have here. See Mincey v. Arizona, 437 U.S. 385 at 398, 98 S. Ct. 2408, 57 L.Ed. 2d 290 (1978).

CONCLUSION

Appellant respectfully submits that police conduct in his case violates the voluntariness of his confession and denies him due process as it relates to his Florida right of access to counsel. For those reasons, and all the reasons expressed in prior briefs, he prays a new trial will be ordered without the offending statements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 27th day of February, 1987.

Charles W. Musgrove
CHARLES W. MUSGROVE
Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, Florida 33406
305-968-8799/Florida Bar #095137